Railroads and Rights of Way
~ Missouri ~

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Biography of Gary R. Kent

Gary Kent is a part-time Professional Surveyor with Schneider Geomatics, a land surveying and consulting engineering firm based in Indianapolis. He is in his 37th year with the firm and upon his shift to part-time status, he has formed Meridian Land Consulting, LLC in order to provide professional land consulting and expert witness services.

Gary is a graduate of Purdue University with a degree in Land Surveying; he is registered to practice as a professional surveyor in Indiana and Michigan. He has been chair of the committee on ALTA/NSPS Standards for NSPS since 1995 and is the liaison to NSPS for the American Land Title Association and chair of the joint ALTA/NSPS Standards committee. He is also past-president of the American Congress on Surveying and Mapping and twice past-president the Indiana Society of Professional Land Surveyors.

A member of the adjunct faculty for Purdue University from 1999-2006, Gary taught Boundary Law, Legal Descriptions, Property Surveying and Land Survey Systems and was awarded "Outstanding Associate Faculty" and "Excellence in Teaching" awards for his efforts. Gary is on the faculty of GeoLearn (www.geo-learn.com), an online provider of continuing education and training for surveyors and other geospatial professionals. He is also an instructor for the International Right of Way Association.

Gary has served on the Indiana State Board of Registration for Professional Surveyors since 2004 and is currently chairman. He is frequently sought as an expert witness in cases involving boundaries, easements, riparian rights, survey standards and land surveying practice. Gary regularly presents programs across the country on surveying and title topics, and he also writes a column for The American Surveyor magazine.

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Railroads and Rights of Way

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Easement

An easement is perhaps most simply defined as "*a limited non-possessory interest in the land of another.*"

> An easement is a non-possessory interest in the real estate of another. The interest is not an interest in title, but confers a right of one person to use the real estate of another for a general or specific purpose. *Burg v. Dampier*, 346 SW 3d 343 - Mo: Court of Appeals, Western Dist. 2011.

In Anglo-American property law, an easement is a right granted by one property owner to another to use a part of [the grantor's] land for a specific purpose.

Easement: "A right of use over the property of another. Traditionally the permitted kinds of uses were limited, the most important being rights of way and rights concerning flowing waters. The easement was normally for the benefit of adjoining lands, no matter who the owner was (an easement appurtenant), rather than for the benefit of a specific individual (easement in gross). The land having the right of use as an appurtenance is known as the dominant tenement and the land which is subject to the easement is known as the servient tenement." © 1994-2001 Encyclopedia Britannica, Inc.

An easement may be created expressly by a written deed of grant conveying to another the right to use for a specific purpose a certain parcel of land. An easement may also be created when one sells his land to another but reserves for himself the right to future use of a portion of that land. An easement may also be created by implication, when, for example, a term descriptive of an easement is incidentally included in a deed (such as "passageway"–a section of land to be used for passage). An easement by implication also arises when the owner of two or more adjacent parcels of land sells one lot; the buyer acquires an easement to that visible property of the seller necessary to the buyer's use and enjoyment of his lot, such as a roadway or drainage duct. When created in this manner the easement also arises as an easement of necessity.

In most of the United States and England, statutes permit the creation of an easement by prescription, which arises by virtue of a long, continuous usage of the property of another by a landowner, his ancestors, or prior owners. The length of time necessary for such continued use to ripen into an easement by prescription is specified by the applicable state statute.

When use of the easement is restricted to either one or a few individuals, it is a private easement. Use of a public easement, such as public highways or a portion of private land dedicated by a present or past owner as a public park (also known as a dedication) is not restricted.

An owner of an easement is referred to as the owner of the dominant tenement [or estate]. The owner on whose land the easement exists is the owner of the servient tenement [or estate].

A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner.

The ownership of real property often has been described as a "bundle of sticks", with each stick being a right or privilege to enjoy the ownership thereof and dominion over all that the master of that property surveys (meaning "views", not performs a land survey upon). The entire bundle of sticks would constitute fee simple absolute ownership of the realty. Ownership in fee of real estate generally carries with it all rights to do everything to and upon the land which is not proscribed by law, such as to operate a "common nuisance", a hazardous waste landfill, or other limitation imposed by zoning, restrictive covenants, or development use standards.

An easement would transfer from the owner a general or a specific right to use the land without alienating, or selling, the land to the grantee. If general, the right would be granted to the general public and might be limited to ingress and egress. If specific, the easement would be granted to one or more specific individuals or entities, which may or may not be able to transfer or assign the easement to others depending upon the terms of the original grant. An easement also can "run with the land", or be permanent or for a term certain, and will continue to burden the servient estate (tenement) despite the transfer of the benefited property or change in the individual(s) and/or entity or entities grantee(s). An easement is not an estate, *per se*, but is an interest in land.

Easements can arise by grant, by reservation, by will, by implication, by condemnation, by prescription, or by way of necessity. By grant–probably the most common manner in which an easement is created–the owner of the burdened land will expressly grant the easement. Ordinarily, third parties are not bound by the agreement unless it is recorded and "of record", or "perfected", thereby giving the world at large constructive notice of the easement agreement and its terms and conditions, its breadth and its limitations.

An easement by implication arises when an owner subdivides his land in such a way that the one(s) to which the land is conveyed has no convenient access other than across land retained by the conveyor. It then will be presumed that the conveyor also conveyed the right to reasonable access, a right-of- way, to and from the conveyed lands across the retained lands.

Conversely, when the conveying owner effectively creates a land-locked retained parcel, the owner will be presumed to have also retained the right to reasonable access to the retained parcel across the conveyed lands. The resultant easement is an easement by necessity. Some jurisdictions have codified (passed statutes legalizing) easements by necessity. Implication also arises where pipes or paths existed on the undivided parcel that suggested the parties involved in dividing the parcel intended to subject one parcel to an easement in favor of another.

Common law also provides for prescriptive easements – easements essentially established by long use.

Black's Law Dictionary defines access easement, affirmative easement, appendent (or appurtenant) easement, discontinuing easement, easement by estoppel, easement by prescription, easement in gross, easement of access, easement of convenience, easement of natural support, easement of necessity, equitable easements, implied easement, intermittent easement, negative easement, private or public easements, quasi easement, reciprocal negative easement, and secondary easement. The above terms are not mutually exclusive; one can have a private discontinuing reciprocal negative appurtenant access easement, for example.

In English property law, the right of a building or house owner to the light received from and through his windows was the "law of ancient lights". "Windows used for light by an owner for twenty years or more could not be obstructed by the erection of an edifice or by any other act by an adjacent landowner. This rule of law originated in England in 1663, based on the theory that a landowner acquired an easement to the light by virtue of his use of the windows for that purpose for the statutory length of time."[EBI] The doctrine has not gained wide acceptance by courts in the United States.

The converse of "easement" in English common law is "servitude," derived from Roman law and similar to easement except that while easement considered the benefit derived from the servitude, servitude related to the burden owed and the land "served" by the servitude constituted the dominant estate or tenement. Hence, the "servient tenement" or servient estate concept and terminology. The dominant tenement dominates or burdens the servitude.

Land servitudes are personal or real; personal servitudes being owed to a particular person and, when that person dies, the personal servitude is extinguished. Real servitudes are obligations or duties owed to the lands of another, having been created for the benefit of those lands. The servitude is a property right–one stick in the bundle of sticks–attached to the dominant tenement and generally passing with the land when it is conveyed or devised.

European civil law separates servitudes into rural and urban servitudes, with the nature of the obligation determining the type of servitude rather than its geographic location. Rural servitudes include rights-of-way of various types and purposes; urban servitudes include building rights such as rights of support, rights of view, and rights of drainage, sewers and sewerage, and utilities. Servitudes may be positive or negative.

A positive servitude obligates a landowner to permit or allow certain use of his property by another. A negative servitude obligates a landowner to refrain from making certain use(s) of his property, which will serve or offer some benefit to the owner of the dominant estate.

There is a wide variety of the types of easements recognized under the law. For example, South Dakota statutes recognize:

(1) The right of pasturage;
(2) The right of fishing;
(3) The right of taking game;
(4) The right of way;
(5) The right of taking water, wood, minerals, and other things;
(6) The right of transacting business upon land;
(7) The right of conducting lawful sports upon land;
(8) The right of receiving air, light, or heat from or over, or discharging the same upon or over land;
(9) The right of receiving water from or discharging the same upon land;
(10) The right of flooding land
(11) The right of having water flow without diminution or disturbance of any kind;
(12) The right of using a wall as a party wall;
(13) The right of receiving more than natural support from adjacent land or things affixed thereto;
(14) The right of having the whole of a division fence maintained by a coterminous owner;
(15) The right of having public conveyances stopped, or of stopping the same on land;
(16) The right of burial;
(17) The right of preserving land areas for public recreation, education, or scenic enjoyment;
(18) The right of preserving historically important land area or structures;
(19) The right of preserving natural environmental systems.[1]

[1] South Dakota Codified Laws 43-13-2.

In some cases, a "**secondary easement**" exists in support of the primary express, implied or prescriptive easement.

> "Every easement carries with it by implication the right, sometimes called a secondary easement, of doing what is reasonably necessary for the full enjoyment of the easement itself ... [but] the right is limited and must be exercised in such reasonable manner as not injuriously to increase the burden upon the servient tenement ..." *Hall v. City of Orlando*, 555 So. 2d 963 - Fla: Dist. Court of Appeals, 5th Dist. 1990 [internal citation omitted].
>
> The right to enter the servient property to maintain and repair facilities located within an easement is sometimes called a "`secondary easement.'" 25 Am.Jur.2d Easements and Licenses § 86 (1966). *Cunningham v. Otero County Elec. Co-op.*, 845 P. 2d 833 - NM: Court of Appeals 1992.
>
> The right to enter upon the servient tenement for the purpose of repairing or renewing an artificial structure, constituting an easement, is called a secondary easement, a mere incident of the easement that passes by express or implied grant, or is acquired by prescription. . . This secondary easement can be exercised only when necessary, and in such a reasonable manner as not to needlessly increase the burden upon the servient tenement. 2 Thompson, *Real Property,* (Perm. Ed.), § 676, p. 343.
>
> By definition a secondary easement goes with an existing easement and consequently would not have to be separately acquired. It either exists or it does not exist as an incident to an easement.
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> A secondary easement, then, is simply a legal device that permits the owner of an easement to fully enjoy all of the rights and benefits of that easement. Conversely, it is a legal device that prohibits an owner of a servient tenement from interfering with an easement owner's enjoyment of the full benefits and rights of an easement.
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> However, a secondary easement does not necessarily exist in every case. For example, a highway department or railroad company would not have a right of ingress or egress over all adjacent land to its rights-of-way. It is not needed because access is inherent in such easements or rights-of-way. Nor would one exist where access to a right-of-way, such as that taken in this case, already exists.
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> *Loyd v. Southwest Ark. Utilities Corp.*, 580 S.W. 2d 935 (1979)

As society in general (other than the Supreme Court, apparently) has become more sensitive to private property rights, states like Indiana have started adopting statutes regulating the free use of secondary easements especially by utility companies.

License

Licenses frequently come into play as related to railroad rights of way because utility companies often need to cross or even run along and inside railroad rights of way. A license

is different from an easement in that a license permits a specific use or permits certain specific acts to be done by the licensee on the licensor's lands, but it does not represent an interest in the property.

A license confers a personal privilege, unassignable and terminable at will, to do something on another's land and which contains no [estate] interest in that land, and which is not required to be created by a conveyance. It does not pass to the heirs of the licensee, and does not give third parties a right to sue for interference with its use. An example is where an owner gives someone a right to park in the owner's front lawn to view a parade, or the Speedway City homeowner permits parking for the Indianapolis 500.

> "A license is a privilege to enter certain premises for a stated purpose and does not vest any title, interest or estate in the licensee." "No formal language is necessary to create a license as long as the proper intent appears...." 53 C.J.S. *Licenses* § 89. As a general rule it "can be revoked at the will of the licensor." (to avoid a harsh result equitable estoppel may be applied to secure enjoyment of a license where licensee made material expenditures of money or labor). *Blackburn v. Habitat Development Co.,* 57 SW 3d 378 - Mo: Court of Appeals, Southern Dist., 1st Div. 2001.
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> It is a proposition hoary with age that a license is not an interest in land, but only a revocable privilege to go upon the land for a specified purpose. *Keck v. Scharf*, 400 NE 2d 503 - Ill: Appellate Court, 5th Dist. 1980.
>
> "[a] license is merely a permit or privilege to do what otherwise would be unlawful." *Lee v. North Dakota Park Service*, 262 N.W.2d 467, 470 (N.D. 1977).
>
> "A personal, revocable, and nonassignable privilege, conferred either by writing or parol, to do one or more acts upon land without possessing any interests in the land." *DePugh v. Mead Corp.* (1992), 79 Ohio App.3d 503,511.
>
> One who possesses a license thus has the authority to enter the land in another's possession without being a trespasser." *Mosher v. Cook United, Inc.* (1980), 62 Ohio St.2d 316,317.

There are, however, some exceptions or qualifications to the ability of a license to be revoked.

> There is a split among the jurisdictions as to whether a license may ever become irrevocable. Florida has sided with those jurisdictions which have allowed a license to become irrevocable to escape an inequitable situation which might be created by the requirements of the statute of frauds, or where money has been spent in reliance on a license. *Tatum v. Dance*, 605 So. 2d 110 - Fla: Dist. Court of Appeals, 5th Dist. 1992. [internal citations intentionally omitted]

> [W]hen a privilege having the characteristics of a license (or deficient in some manner to qualify as an easement) has been executed by the licensee through the expenditure of money or labor in reliance upon the license being perpetual, or when a license has been given for a valuable consideration paid, it cannot be revoked by the licensor unless he remunerates the licensee or restores him to *status quo. Hay v. Baumgartner*, 870 NE 2d 568 - Ind: Court of Appeals 2007
> A potential distinction (which may be illusory) might exist in the determination that a license given for consideration may be revoked upon the licensee being restored to status quo or adequately compensated[.] See, e.g., *Sheeks v. Erwin* (1891), 130 Ind. 31, 29 N.E. 11.

The Difference Between a License and an Easement or Lease

Although there are similarities and, in some cases, one can have the characteristics of the other, the courts in the various states have outlined distinct differences between easements and licenses.

> "Both a license and easement give the grantee the right to go onto the grantor's property for a limited use." "An easement entitles its owner to a limited use or enjoyment of the land of another." *Blackburn v. Habitat Development Co.,* 57 SW 3d 378 - Mo: Court of Appeals, Southern Dist., 1st Div. 2001.

Yet, certain conditions associated with a license can change its nature from license to easement or vice versa in some states...

> An irrevocable license is said to be an easement rather than a license. *Cambridge Vil. Condo. Assn. v. Cambridge Condominium Assn.*, 139 Ohio App. 3d 328 - Ohio: Court of Appeals, 11th Appellate Dist. 2000 [internal citations intentionally omitted]
>
> [A]n executed license which becomes irrevocable is treated as an easement. *Industrial Disposal Corp of America v. City of East Chicago, Dept. of Water Works,* 407 N.E.2d 1203, 1205 (Ind. Ct. App. 1980).
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> [I]n at least two cases our courts have used the terms `irrevocable license' and `easement' interchangeably." *Industrial Disposal Corp of America v. City of East Chicago, Dept. of Water Works,* 407 N.E.2d 1203, 1205 (Ind. Ct. App. 1980).
>
> "To distinguish the legal relationship `license' from the more substantial relationship `easement,' license should be limited to a revocable relationship. Under such a classification, an irrevocable relationship would constitute an easement . . ., no matter how created, because an irrevocable license in legal effect is no different than an easement." C. Smith & R. Boyer, Survey of the Law of Property 418 (2d Ed.

1971). *Industrial Disposal Corp of America v. City of East Chicago, Dept. of Water Works,* 407 N.E.2d 1203, 1205 (Ind. Ct. App. 1980).

An irrevocable license is said to be an easement rather than a license. See *Kamenar RR. Salvage, Inc. v. Ohio Edison Co.* (1992), 79 Ohio App.3d 685, 691, 607 N.E.2d 1108, 1111-1112.; *American Law of Property, A Treatise on the Law of Property in the United States* (2 Ed.1974), Section 8.112.

Recordation of the document that creates an easement is just as important as recordation of any other conveyance of an interest in real property because parties who take title to the servient estate without notice – either constructive or actual – take title free of the easement. [See subsequent section in this handout on Recordation and Filing]

The city's easement was recorded in 1951. The owner, as a subsequent grantee of the servient tenement, was charged with constructive notice of the recorded easement, and this is true whether or not the easement was mentioned in the deed by which the owner acquired title. The contractor, on the other hand, was not charged with notice of the easement. A recorded instrument is constructive notice only to those who are bound to search for it. *Statler Mfg., Inc. v. Brown*, 691 SW 2d 445 - Mo: Court of Appeals, Southern Dist., 3rd Div. 1985.

[T]the plaintiff should be imputed with constructive knowledge of the unrecorded easement because he knew gas lines ran though his property, and he had visually observed other gas-related objects as well as marker lines on his property); (an unrecorded easement to place poles on the plaintiffs' property was valid as against the plaintiffs where the plaintiffs had, at least, constructive notice, based on the open and visible use of the property by the defendant). *Duresa v. Commonwealth Edison Co.*, 807 NE 2d 1054 - Ill: Appellate Court, 1st Dist., 2nd Div. 2004. [internal citations intentionally omitted]

An unrecorded easement is a license and does not run with the land or bind subsequent purchasers without notice. *Continental Tele. Co. of the West v. Blazzard* 149 Ariz. 1, 5-6, 716 P.2d 62, 66-67 (App. 1986).

Rights of Way

Originally the term “right of way” referred to a right of easement, i.e. an easement, specifically for passage purposes such as for a railroad, pipelines, pedestrians, vehicles, aqueducts, etc.

Since then, the term has come to have another meaning which is the *land burdened by the easement* even if the land has been dedicated in fee. Hence, in the common use of the term a “right of way” may be owned in fee, or something less.

"Right of way" has been accorded two meanings in railroad parlance—the strip of land upon which the tract is laid— and the legal right to use such strip. *Schuermann*

Enterprises, Inc. v. St. Louis County, 436 SW 2d 666 - Mo: Supreme Court, 1st Div. 1969.

The fact that the term has two meanings is problematic particularly as related to railroad rights of way because the simple use of the term implies an easement even though the party using the term may intend its use to merely identify the strip of land.

> A right-of-way is an easement and is usually the term used to describe the easement itself or the strip of land which is occupied for the easement. 25 Am. Jur. 2d Easements & Licenses, §§ 1 and 8. [emphasis added]
>
> There appears to be considerable conflict in the cases as to the construction of deeds purporting to convey land, where there is also a reference to a right of way. Some of the conflict may arise by virtue of the twofold meaning of the term "right of way," as referring both to land and to a right of passage. In some cases, particularly where the reference to right of way is in the granting clause, or where there are other relevant factors, the courts have held that an easement only was intended. In other cases, the deed is held to convey a fee simple estate in the land, the courts generally basing their holdings on the ground that the granting clause governs other clauses in the deed, that the reference to right of way did not make the deed ambiguous (therefore barring extrinsic evidence from consideration), or that the reference to right of way was to land and did not relate to the quality of the estate conveyed.
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> Other cases purporting to grant land contain language relating to the purpose for which the land conveyed is to be used. Some cases hold that such language is merely descriptive of the use to which the land is to be put and has no effect to limit or restrict the estate conveyed; in others, the position is taken that such language indicates an intention to convey an easement only and not a fee. Many cases appear to turn upon the nature of the reference to purpose, the location of the reference in the deed, and the presence of other factors and provisions bearing on the question of intent. *Maberry v. Gueths*, 777 P. 2d 1285 - Mont: Supreme Court 1989. [emphasis added]
>
> In one context, the term [‘right of way”] means "[t]he right of a vehicle, streetcar, trackless trolley, or pedestrian to proceed uninterruptedly in a lawful manner in the direction in which it or the individual is moving in preference to another vehicle, streetcar, trackless trolley, or pedestrian approaching from a different direction into its or the individual's path". Alternatively, "right-of-way" is "a general term denoting land, property, or the interest therein, usually in the configuration of a strip, acquired for or devoted to for transportation purposes. When used in this context, right-of-way includes the roadway, shoulders, or berm, ditch, and slopes extending to the right-of-way limits under the control of state or local authority." *Akers v. Saulsbury*, 2010 Ohio 4965 - Ohio: Court of Appeals, 5th Appellate Dist. 2010. [emphasis added]

On cursory inspection, it is apparent that the [Colorado] General Assembly has used the term "right-of-way" in a number of different ways. Most commonly, it is used to indicate precedence in traffic rather than as a reference to property interests at all. See, e.g., § 24-10-106(1)(d)(II), C.R.S. (2010) (waiving governmental immunity for dangerous conditions caused by the failure to realign a stop sign or yield sign that was turned "in a manner which reassigned the right-of-way upon intersecting public highways, roads, or streets"). See generally Black's Law Dictionary 1440 (9th ed. 2009). Even when the term is used in reference to property interests, however, its various nuances of meaning have long been recognized. See *Hutson v. Agric. Ditch & Reservoir Co.*, 723 P.2d 736, 739 (Colo.1986) (discussing *McCotter v. Barnes,* 247 N.C. 480, 101 S.E.2d 330, 334 (1958)); see also *Bouche v. Wagner,* 206 Or. 621, 293 P.2d 203, 209 (1956) (citing *Terr. of New Mexico. v. United States Trust Co. of New York*, 172 U.S. 171, 183, 19 S.Ct. 128, 43 L.Ed. 407 (1898)).

In the context of real property generally, the term "right-of-way" is perhaps most commonly used to describe a limited property right. See *Terr. of N.M.*, 172 U.S. at 182, 19 S.Ct. 128 ("It is sometimes used to describe a right belonging to a party, a right of passage over any tract" (quoting *Joy v. City of St. Louis*, 138 U.S. 1, 44, 11 S.Ct. 243, 34 L.Ed. 843 (1891))). See generally Black's Law Dictionary 1440 (9th ed. 2009). This limited property right may be a type of easement, see *Hutson*, 723 P. 2d at 739 ("In the absence of additional descriptive language, `right-of-way,' when used to describe an ownership interest in real property, is traditionally construed to be an easement."), but at times it has also been characterized as a limited fee interest, see e.g., *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 118, 77 S.Ct. 685, 1 L.Ed.2d 693 (1957) (discussing "a line of decisions by the United States Supreme Court describing the rights-of-way under early railroad land grants as limited fees").

Especially in the context of railroads and highways, however, the term is also commonly used more broadly in reference to the strip of land on which the highway or railroad tracks will be constructed. See *Terr. of N.M.,* 172 U.S. at 182, 19 S.Ct. 128 ("`[I]t is also used to describe that strip of land which railroad companies take upon which to construct their roadbed.' That is, the land itself, not a right of passage over it." (quoting *Joy*, 138 U.S. at 44, 11 S.Ct. 243)). See generally Black's Law Dictionary 1440 (9th ed. 2009) ("The right to build and operate a railway line or a highway on land belonging to another, or the land so used .... The strip of land subject to a nonowner's right to pass through." (emphasis added)). In this sense, the term is merely descriptive of the purpose to which the land is being put, without reference to the quality of the estate or interest the railroad company or highway authority may have in the land. See *Hutson*, 723 P.2d at 739; *McCotter*, 101 S.E.2d at 334-35 ("It is a matter of common knowledge that the strip of land over which railroad tracks run is often referred to as the `right of way'....").

Dept. of Transp. v. Gypsum Ranch Co., LLC, 244 P. 3d 127 - Colo: Supreme Court 2010 [Emphases added]

> While both deeds contain recitations or clauses seeming to convey title to a strip of land, they also reference the land as the railroad company's "right of way." Such language evidences both conveyance in fee and creation of a right-of-way easement. When this situation is presented, we think the law requires an interpretation in favor of the latter. In *Sherman v. Petroleum Exploration*, 280 Ky. 105, 132 S.W.2d 768, 771 (1939), the Court, construing a railroad deed containing similar inconsistencies, stated:
>
> We think it may be well said that an indefinite or ambiguous conveyance of land specifically for a railroad right of way is in its interpretation subject to the influence of a general knowledge that much railroad right of way is expressly or by operation of law limited to an easement, which has been usually found sufficient for the purposes desired.
> *Illinois Cent. R. Co. v. Roberts*, 928 SW 2d 822 - Ky: Court of Appeals 1996.

Rights of way can be created in a number of ways and in fee or lesser interests, including by the exercise of eminent domain, which is sometimes limited statutorily to acquisition of an easement interest only. In some western states, statues have established road rights of way along all section lines.

Whether a conveyance of a right of way conveys a fee or an easement is dependent on the words of the grant and the laws of the state.

> Railroads may hold, purchase, or convey the fee in land when the acquisition is by general warranty deed without any restriction on the quantum of title conveyed and for a valuable consideration; but where the acquisition is for right of way only, whether by condemnation, voluntary grant or conveyance in fee upon a valuable consideration, the railroad takes only an easement over the land and not the fee. *Schuermann Enterprises, Inc. v. St. Louis County,* 436 SW 2d 666 - Mo: Supreme Court, 1st Div. 1969.
>
> Where a deed uses terminology which in the law of real property has come to have a definite legal meaning, that terminology will be given its legal effect. A deed conveying a definite "parcel" or "strip of land" without language limiting the estate granted shall be deemed to have granted a fee simple estate. Similarly, the use of the words "convey and warrant" are suggestive of an intention to convey a fee simple estate. However, where a deed purports to grant only a "right" in a parcel of land, the estate conveyed is limited to an easement. *Urbaitis v. Commonwealth Edison*, 575 NE 2d 548 - Ill: Supreme Court 1991. [internal citations intentionally omitted]

Quoting from 16 Am.Jur. Deeds § 245, the Court went on to say:

> "If, in a deed to a railroad, the land conveyed is described as a right of way, the deed may be construed as giving an easement right only, and not the full fee, notwithstanding there are other words in the deed referring to the fee simple, for such a conveyance does but imply a grant of the easement forever."

Illinois Cent. R. Co. v. Roberts, 928 SW 2d 822 - Ky: Court of Appeals 1996.

> [When in the conveyance] the word "right of way" is used to establish the purpose of the grant [it] . . .presumptively conveys an easement interest. *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Assoc.,* 126 P. 3d 16 - Wash: Supreme Court (2006).

In the traditional sense, a railroad 'right-of-way' is the entire expanse of land taken out of unrestricted private ownership – usually a set width with ample room for maintenance, side ditches, side slopes, embankments and various other ancillary features such as traffic control devices and telegraph lines.

> Though the owner of a fee in an easement existing for public road purposes may technically have title to the surface of the way not useful or necessary in the construction or maintenance of the road, he can not utilize it in any manner that will interfere with the use by the public or with the control of the way by the State. 39 C.J.S., Highways, § 138; 25 Am.Jur., Highways, Section 135.[2]

A right-of-way, granted or created in the absence of an express grant, establishes a privilege or license to pass over another's land (or under in the case of a tunnel and over aerially in the case of a bridge overpass or skywalk). The benefit may extend to an individual, to a group or class of people, or generally to the public. However, there are specific rules that guide the establishment of public roads across private property when there is no express grant.

Issues frequently arise as to whether or not a conveyance of real property abutting a road or railroad that exists by easement (i.e., the abutting owner holds the underlying fee title in all or part of the road) also conveys the underlying fee interest in that road. The weight of authority on this issue differs by state.

The following discussion on the rights of utilities to locate facilities in public rights of way is relevant to railroad rights of way also.

The rights of utilities to locate facilities on public property and in public rights of way are governed by state and/or common law.

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[2] This premise applies likewise to a railroad right of way established by grant of easement. The author knows of one railroad in Indianapolis that was created by grant of easement. When the underlying fee interest was sold, the conveyance was subject to a 999 year easement in favor of the railroad.

The rights of utilities to locate in railroad rights of way are controlled by the railroads to the extent that they have the right to grant licenses or easements. Utilities are generally allowed to *cross* railroad rights of way, although normally only a license will be granted for that purpose. This author recalls seeing only one case in which a railroad actually granted an easement to a private party (in that case for access).[3]

Appurtenant Easements and Easements in Gross

All easements are either appurtenant or in gross.

> Easements are either "appurtenant" or "in gross." *Burg v. Dampier*, 346 SW 3d 343 - Mo: Court of Appeals, Western Dist. 2011
>
> There are two types of easements. "[A]n easement is appurtenant if it passes (by conveyance or inheritance) with the dominant tenement[.]" "[A]n easement is in gross if it is personal to the owner of the dominant tenement." *Collins v. Metro Real Estate Services LLC*, 72 NE 3d 1007 - Ind: Court of Appeals 2017. [internal citations intentionally omitted]

Appurtenant easements attach to a particular property for the benefit of an adjacent property. The burdened property is called the servient estate (or tenement) and the property that the easement benefits is the dominant estate (or tenement.) Appurtenant easements create both a dominant estate and a servient estate.

> An easement appurtenant creates a dominant tenement (the land which benefits from the easement) and a servient tenement (the land which is burdened by the easement). *Burg v. Dampier*, 346 SW 3d 343 - Mo: Court of Appeals, Western Dist. 2011
>
> An easement appurtenant involves two different estates or tenements in land (a) the dominant estate, that to which the easement or right attaches or belongs; and, (b) the servient estate, that which is subject to the easement. 25 Am.Jur.2d Easements and Licenses 11 (1966).
>
> An easement appurtenant is attached to the land that it benefits even if that land is not physically adjacent to the land subject to the easement; however, there must be two estates or distinct tenements: the dominant estate, to which the right belongs, and the servient estate, upon which the obligation rests. *Schumacher v. Apple*, 2010 Ohio 5372 - Ohio: Court of Appeals, 8th Appellate Dist. 2010. [internal citations intentionally omitted]

[3] See Exhibit 1

While an easement for a railroad spur or siding created specifically to provide rail access for a particular property could well be an easement appurtenant, typically easements for railroads are **Easements in Gross** which burden the servient estate and attach to the easement owner, but are not created for the benefit of any land owned by the owner of the easement (dominant estate). Thus while all easements create a servient estate, with easements in gross, there is no associated dominant estate.

> An easement in gross conveys a personal interest in or right to use the land of another independent of ownership or possession of land and thus lacks a dominant tenement. *Burg v. Dampier*, 346 SW 3d 343 - Mo: Court of Appeals, Western Dist. 2011.
>
> [An easement in gross is] [a]n irrevocable personal interest in the land of another. Jon W. Bruce and James W. Ely, Jr., The Law of Easements and Licenses in Land Sec.2.01(2) (1988).
>
> Easement in gross is not appurtenant to any estate in land (or not belonging to any person by virtue of his ownership of an estate in land) but a mere personal interest in, or right to use, the land of another. Black's Law Dictionary, Fourth Edition, page 600.

Oftentimes there is a question as to whether a grant constituted an easement in gross or an easement appurtenant. This is important when the servient owner hopes to see an easement extinguished, which can happen with an easement in gross when the dominant estate owner dies, when he or she sells land that may be peripherally associated with the easement in gross or when the purpose for the easement otherwise ceases.

> The character of an easement depends on the intent of the parties, as drawn from the language of the deed, the circumstances existing at the time of execution, and the object and purpose to be accomplished by the easement. *Barrett v. Kunz,* 604 A. 2d 1278 - Vt: Supreme Court 1992. [internal citations intentionally omitted]
>
> It has been widely held that the omission of such words as "heirs and assigns" ordinarily does not tend to show that a grant is personal rather than appurtenant. *Mays v. Hogue*, 260 SE 2d 291 - W Va: Supreme Court of Appeals 1979. [internal citations intentionally omitted]
>
> In *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997), our Supreme Court explained the differences between easements in gross and appurtenant easements: The character of an express easement is determined by the nature of the right and the intention of the parties creating it. An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer. In contrast, an appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. It also passes with the dominant estate upon conveyance. Unless

> an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross. Id. at 325-26, 487 S.E.2d at 191 (citations omitted) (emphasis added).

In some states, an easement in gross can become an easement appurtenant under certain circumstances.

> Restatement of Property § 487, Comment b provides:
>
> > Terms of transfer of dominant tenement. There is nothing to prevent a transferor from effectively providing that the benefit of an easement appurtenant shall not pass to the transferree of the dominant tenement. Such a provision contravenes no rule of law. If its purpose is to extinguish the easement it will have this effect. If the purpose of the provision is to change the easement appurtenant into an easement in gross, it will have this effect if, and only if, the manner or the terms of the creation of the easement permits such a change to be made. If they do not permit this to be done, the result will be either that the provision against transfer is ineffective or that the easement is extinguished. Which of these results will occur depends upon whether the provision against transfer is construed to be conditioned upon the effective accomplishment of the purpose to change the easement into one in gross.
>
> FN 2, *Behm v. Saeli*, 560 So. 2d 431 - Fla: Dist. Court of Appeals, 5th Dist. 1990
>
> Easements in gross can become appurtenant easements where that result is consistent with the intent of the parties. The rule is … as follows:
>
> > When an instrument purports to create an easement in favor of a grantee to facilitate some other parcel of land which the grantee does not presently own but subsequently acquires, the easement is an easement in gross until the land is acquired, at which time it becomes an easement appurtenant. 3 H. Tiffany, Real Property § 759 (3d ed. 1939 & Supp. 1980).
>
> *Beebe v. Swerda,* 793 P. 2d 442 - Wash: Court of Appeals, 1st Div. 1990. [internal citations intentionally omitted]

Pipeline or transmission line easements and railroad mainlines are good examples of easements in gross, whereas an easement for ingress and egress over one property to reach another is an example of an appurtenant easement. (See http://www.buyersresource.com/glossary/Easement_in_Gross.html)

The law generally favors easements appurtenant over easements in gross. In most states, if the easement created by a document is not expressly either appurtenant or in gross, it will generally be deemed appurtenant assuming it has the necessary elements.

Personal easements in gross are generally not assignable and *commercial* easements in gross are assignable. Given this fact, the definition of a commercial easement in gross becomes critical.

> Easements of a commercial nature similar to the right-of-way here [an easement for the installation of electric transmission lines] have long been considered an exception to the general rule that easements in gross are not transferable, and a long history of allowing the transfers of such servitudes exists. See 3 Powell on Real Property § 34.16, pp. 34-220-222 (1996); Restatement of Property § 489 (1944).

Creating Railroad Easements

Easements are created in numerable ways. Written easements can be created by express grant, reservation, dedication, in probate documents or by agreement. In some cases, easements can be obtained by eminent domain. But, ultimately, they can only be created by the owner of the servient estate.

> Although the 1901 deed was titled "Deed of Right of Ways," "[l]abeling a person's interest as a `railroad right-of-way' does not mean the holder has but a mere easement." The term "`[r]ight of way' has been accorded two meanings in railroad parlance—the strip of land upon which the tract is laid— and the legal right to use such strip[.]" "[A] number of different types of interests may result from a grant or conveyance of a railroad right-of-way." "[F]ee simple absolute [is] one interest possibly resulting from a grant or conveyance of a railroad right-of-way."*Kansas City Area Transportation Authority v. Donovan*, Mo: Court of Appeals, Western Dist. 2020.

> A railroad may hold, purchase, or convey the fee in land when acquired by general warranty deed without restriction on the quantum of title conveyed and for valuable consideration. Where the acquisition is for right-of-way only, however, whether by condemnation, voluntary grant, or conveyance in fee upon valuable consideration, the railroad takes only an easement over the land and not the fee. Such limitation on the right of a railroad to acquire land by condemnation is incorporated in Article I, section 26, of the Missouri Constitution. Section 26 states in pertinent part:
>
> > The fee of land taken for railroad purposes without consent of the owner thereof shall remain in such owner subject to the use for which it is taken.
>
> *Boyles v. MO. FRIENDS OF WABASH TRACE,* 981 SW 2d 644 - Mo: Court of Appeals, Western Dist. 1998

> Railroad easements … are "essentially different from any other [easement]." As one commentator recently noted, "a railroad right-of-way easement granted by a landowner cannot be used by the landowner for any reason, even if the use does not interfere with the use by the easement holder.

> For this reason, grantors of railroad rights-of-way have included language in deeds to delineate their continuing use rights in the portion of their fee estate burdened by a railroad easement
>
> *DNR v. Carmody-Lahti Real Estate, Inc.,* 699 NW 2d 272 - Mich: Supreme Court 2005.

> An easement may be created by (1) an express grant, (2) an express reservation, (3) an implied grant, (4) an implied reservation, (5) necessity, (6) prescription, (7) a recorded covenant, (8) dedication, (9) condemnation, (10) estoppel, or (11) a court decision … (6 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 15:13, p. 15-61.)
>
> An easement is created if the owner of the servient estate enters into a contract or makes a conveyance, which complies with the Statute of Frauds or an exception to the Statute of Frauds, with the intent to create a servitude. Restatement (Third) of Prop.: Servitudes § 2.1 (2000).

Unwritten easements are created by implication, necessity, prescription, common law dedication and even by estoppel. In states where title in real property may be registered, such real estate is generally not subject to easements by prescription.

Implied easements are an exception to, and need not comply with, the Statute of Frauds.

Creating Written Easements

Written easements can be created in a number of ways, but in any case these "express grants" are created by virtue of some instrument of conveyance or a mortgage. The conveyance may involve an actual deed or grant of easement, or the easement may be created by reservation. Express easements may also be created by agreement, dedication, condemnation, or even in probate documents such as a partition.

> An easement may be created by express or implied grant, or by prescription, but it may not be created by parol because it is real property. See 25 Am.Jur.2d Easements and Licenses §17 (1966).

Express Grant

To create an easement by express grant, the owner of the servient estate grants an easement in that estate to another.

> To create an express grant or reservation of an easement, there must be language in the instrument of conveyance manifesting a clear intent to create the easement.
>
> It is not necessary that the party reserving the easement right use any particular words as long as the intent to claim an easement is apparent and it is described sufficiently so that the easement and the parcel of land to which the right is attached can be determined, using parol evidence if necessary.
>
> *Ormsbee v. Ormsbee*, Mich: Court of Appeals 2012.

> A written grant consistent with the formalities of a deed is necessary to create an express easement. *Loid v. Kell*, 844 SW 2d 428 - Ky: Court of Appeals 1992.

> To create an easement by express grant there must be a writing containing plain and direct language evincing the grantor's intent to create a right in the nature of an easement rather than a revocable license. (see *Willow Tex, v. Dimacopoulos*, 68 NY2d 963 [1986])

If the conveyancing document is ambiguous, the courts have set out criteria for determining the intent, e.g.,

> The cardinal rule regarding an interpretation of a deed is to ascertain the intention of the parties and to give that intention effect. When interpreting easements, the intention of the grantor must be ascertained from the instrument itself. Only when the language is "unclear and ambiguous may we resort to rules of construction and consider extrinsic evidence." The language of a deed is ambiguous when the terms are susceptible of more than one meaning "so that reasonable persons may fairly and honestly differ in their construction of the terms." However, the language of a deed is not ambiguous simply because the parties disagree about its meaning. *Hinshaw v. MCM PROPERTIES, LLC*, Mo: Court of Appeals, Western Dist. 2014.

> An inquiry into the scope of the interest conferred by a deed such as that at issue here necessarily focuses on the deed's plain language, and is guided by the following principles:
>
> (1) In construing a deed of conveyance[,] the first and fundamental inquiry must be the intent of the parties as expressed in the language thereof;
>
> (2) in arriving at the intent of parties as expressed in the instrument, consideration must be given to the whole [of the deed] and to each and every part of it;
>
> (3) no language in the instrument may be needlessly rejected as meaningless, but, if possible, all the language of a deed must be harmonized and construed so as to make all of it meaningful;
>
> (4) the only purpose of rules of construction of conveyances is to enable the court to reach the probable intent of the parties when it is not otherwise ascertainable

The instrument's granting clauses are a natural starting point for discerning the parties' intent.

The deed purports to convey a "right of way" that "consist[s]" of a "strip of land ... across [the parcels described in the deed]."

As we recognized over seventy years ago in Quinn, a deed granting a right-of-way typically conveys an easement, whereas a deed granting land itself is more appropriately characterized as conveying a fee or some other estate:

Where the grant is not of the land but is merely of the use or of the right of way, or, in some cases, of the land specifically for a right of way, it is held to convey an easement only.

Where the land itself is conveyed, although for railroad purposes only, without specific designation of a right of way, the conveyance is in fee and not of an easement.

DNR v. Carmody-Lahti Real Estate, Inc., 699 NW 2d 272 - Mich: Supreme Court 2005.

Condemnation

Easements may be acquired through the statutory eminent domain process and the process obviously result in a written easement. In some states, right of way taken through condemnation can only be acquired as easement, not in fee. Eminent domain can generally be exercised only by qualified public utilities, railroads and governmental entities.

Article I, section 26, of the Missouri Constitution. Section 26 states in pertinent part:

> The fee of land taken for railroad purposes without consent of the owner thereof shall remain in such owner subject to the use for which it is taken.

Recording and Filing Requirements

Easements are interests in real property and, as noted above, must be conveyed in writing in accordance with the State of Frauds.

Recordation, while not a legal necessity, is certainly highly recommended. An executed, but unrecorded easement subjects *only* the grantor and the grantee to the terms of the document. An unrecorded easement does not give notice therefore cannot affect third parties (e.g. subsequent buyers). An unrecorded easement is essentially the same as a license agreement between the two parties to the agreement.

There are cases in which a jurisdiction purchased an easement, but did not record it and did not actively use it (perhaps it was purchased in anticipation of some future use). When the servient estate was later conveyed, the grantee bought it unburdened by the easement since there was no actual notice (by use) nor was there constructive notice (virtue of recordation). When the jurisdiction finally decided to actually put the easement to use, they found it had to be purchased again from the new owner.

> A purchaser of land who has no notice either actual or constructive, of an easement in such land in favor of third persons is free from the burden of such easement. See 28 C.J.S., *Easements*, §§ 49, 50.

The exact effect of recordation depends on the individual state's recordation statute – whether race, notice, or race notice.

A properly executed and recorded easement burdens the servient estate regardless of whether or not a subsequent conveyance mentions its existence.

Unwritten Easements

There are a number of ways that easements can arise by unwritten means.

> There seems to have been nine methods recognized under the [South Carolina] common law for the creation of an easement, namely, by grant, estoppel, way of a necessity, implication, dedication, prescription, ancient window doctrine, reservation, or condemnation.") (citing *Davis v. Robinson*, 127 S.E. 697 (1925)).
>
> Easements may be created by (1) express grant, (2) implied grant, (3) prescription, or (4) estoppel. *McCumbers v. Puckett*, 183 Ohio App.3d 762, 2009-Ohio-4465, 918 N.E.2d 1046, ¶ 14 (12th Dist.). *Sunshine Diversified Invests, III, LLC v. Chuck*, 2012 Ohio 492 - Ohio: Court of Appeals, 8th District 2012.

When claiming an unwritten easement, the claimant has the burden of proof.

Prescriptive Easements and Adverse Possession

Railroads claiming a right of way by unwritten means would typically base that claim on prescription. Prescription is the easement equivalent of adverse possession – the perfecting of an unwritten interest in real estate by a use adverse to the record owner of the fee.

In some cases, however, a railroad could claim title to the right of way by adverse possession.

Prescriptive easements – in the same manner as adverse possession – cannot be gained when the servient estate is a governmental entity absent the rare statute that provides otherwise.

Public streets and roads may also be established by prescription.

> "To establish a prescriptive easement over another's property, a party must show that its use of the property has been continuous, uninterrupted, visible and adverse for a period of ten years." "The law does not favor the creation of prescriptive easements." "Therefore, the party seeking to acquire the prescriptive easement must establish each of these elements by clear and convincing evidence." *SOUTHSIDE VENTURES v. La Crosse Lumber Co.,* 574 SW 3d 771 - Mo: Court of Appeals, Western Dist. 2019.

Prescriptive Easements versus Adverse Possession

While Adverse Possession matures into an *ownership* right, a prescriptive easement will result in the acquisition of a limited, non-possessory interest - not ownership - in the servient estate.

In some states the courts have essentially stated that the only difference between adverse possession and a prescriptive easement is the element of exclusivity.

In other states, like Indiana, Arizona and New York, courts have taken the position, either implicitly or explicitly, that the same elements apply to prescriptive easements as to adverse possession except for the differences required by the differences between fee interests and easements.

The Scope of an Easement

The document creating the easement needs to define the scope of the easement. An easement generally can be used only for the purpose expressly stated in the document that created it, thus the exact wording of the conveyance is critical.

This is particularly relevant with respect to railroads which have often taken upon themselves to grant rights to third parties to, for example, co-locate a fiber optic line within their right of way. However, if they only secured their rights by grant of easement, they an overburdened the easement by allowing a use not allowed under the terms of the grant (See section on Overburdening and Easement below.

> *Black's Law Dictionary* 585-86 (9th ed. 2009). The "scope" of an easement refers to the extent or boundaries of that "specific limited purpose" which benefits the dominant estate and burdens the servient estate. FN 2 *Howard v. US*, 964 NE 2d 779 - Ind: Supreme Court 2012.
>
> This case raises the issue of what uses a dominant owner can make of the land subject to an easement when the deed does not specify either the purpose of or the uses for the easement, and it requires application of the doctrine of "unlimited reasonable use." When an easement is granted in general terms without restrictions on use, the easement is one of unlimited reasonable use. "Under the doctrine of unlimited reasonable use, the scope of an easement unspecified in a grant is regarded as unlimited insofar as it is reasonable in relation to the object of the easement." 28A C.J.S. Easements Section 160 (1996). *Maasen v. Shaw*, 133 SW 3d 514 - Mo: Court of Appeals, Eastern Dist., 2nd Div. 2004.
>
> Whether an additional use can be made of an easement depends on whether the additional use represents only a change in the degree of use, or whether it represents a change in the quality of the use. If the change is in the quality of use, it is not permissible, because it would create a substantial new burden on the servient estate. Id. Any doubt concerning an easement's scope should be resolved in favor of the

servient owner's free and untrammeled use of the land. *Maasen v. Shaw*, 133 SW 3d 514 - Mo: Court of Appeals, Eastern Dist., 2nd Div. 2004.

An inquiry into the scope of the interest conferred by a deed such as that at issue here necessarily focuses on the deed's plain language, and is guided by the following principles:

(1) In construing a deed of conveyance[,] the first and fundamental inquiry must be the intent of the parties as expressed in the language thereof;

(2) in arriving at the intent of parties as expressed in the instrument, consideration must be given to the whole [of the deed] and to each and every part of it;

(3) no language in the instrument may be needlessly rejected as meaningless, but, if possible, all the language of a deed must be harmonized and construed so as to make all of it meaningful;

(4) the only purpose of rules of construction of conveyances is to enable the court to reach the probable intent of the parties when it is not otherwise ascertainable.

DNR v. Carmody-Lahti Real Estate, Inc., 699 NW 2d 272 - Mich: Supreme Court 2005.

Usually, easements arise to fill some need or serve some purpose. That purpose, whether expressed in the grant, implied, or acquired through prescription, is the focal point in the relationship which exists between the titleholders of the dominant and servient estates. The servient estate is burdened to the extent necessary to accomplish the end for which the dominant estate was created. The titleholder of the dominant estate cannot subject the servient estate to extra burdens any more than the holder of the servient estate can materially impair or unreasonably interfere with the use of the easement.
Howard v. US, 964 NE 2d 779 - Ind: Supreme Court 2012 [internal citations and footnote intentionally omitted]

The Scope of a Prescriptive Easement

The scope of an unwritten easement is strictly defined by the need (as in easements by implication or necessity) or by the specific nature of the use (as in a prescriptive easement) that gave rise to the claim in the first place.

A prescriptive easement is defined solely by its use during the prescriptive period. *Umphres v. JR Mayer Enterprises, Inc.*, 889 SW 2d 86 - Mo: Court of Appeals, Eastern Dist., 2nd Div. 1994.

We agree with the proposition that the character and extent of a prescriptive easement is determined by the user during the prescriptive period and that no

different or greater use can be obtained under the prescriptive easement without another prescriptive period running. Lacy v. Schmitz, 639 S.W.2d 96, 100 (Mo.App. 1982). We must note, however, that since no use can be duplicated exactly, once a prescriptive easement is obtained the problem is to clarify the limits of permissible variation of use.The scope of a prescriptive easement is generally limited by the manner in which the easement was acquired and the previous enjoyment. *Fenster v. Hyken*, 759 SW 2d 869 - Mo: Court of Appeals, Eastern Dist., 3rd Div. 1988.

"One who holds a prescriptive easement is allowed to do such acts as are necessary to make effective the enjoyment of the easement unless the burden on the servient estate is unreasonably increased; the scope of the privilege is determined largely by what is reasonable under the circumstances." *WILLIAM P. FROLING REVOCABLE LIVING TRUST v. PELICAN PROPERTY, LLC*, Mich: Court of Appeals 2016.

Overburdening an Easement

Expanding the *use* or the *nature of the use* of an easement beyond that expressed in the record document that created it is considered "overburdening" the easement.

An easement specifically created for purposes of ingress and egress cannot be legally expanded to include a different use, like installing a pipeline, for example, or – for that matter - parking.

Likewise, an easement for ingress-egress to a 40 acre farm field may be overburdened if the 40 acres is subdivided into 100 residential lots; the use remains the same, but the nature has drastically changed.

The easement holder must negotiate with the owner of the servient estate to purchase additional rights if the geographic scope or nature of the use of an easement is to be expanded. Such changes generally cannot be made unilaterally by either party, although common law rules provide for some limited exception changes in location.

An expanded use of an easement may constitute an additional taking for which compensation must be paid. An easement holder is entitled to make improvements necessary to enjoy an easement, but the holder must not unreasonably increase the burden on the servient tenement.

What constitutes an over-burden depends on the circumstances of the parties, and the situation involved, and generalizations are difficult from reported cases. For example, the paving of a road has been held to be a material change; the use of an easement by cars and wagons has been held insufficient to permit use by heavy machinery and trucks; and the increase in pipeline size and pressure was deemed an improper over-burden.[6] *Hayes v. City of Loveland*, 651 P.2d 466 (Colo.App.Ct. 1982), cited in the majority opinion, found no additional taking concerning a power easement when H frames were replaced by towers, but the court relied on the fact that the owners failed to establish that the burden on their servient lands had

increased, and on the rule in Colorado that damages based on a modification of a public improvement are not compensable if the damages are not different in kind, rather than degree, from the damages sustained by the general public. Neither apply to this case.

From the dissent in *Florida Power v. SILVER LAKE HOMEOWNERS*, 727 So. 2d 1149 - Fla: Dist. Court of Appeals, 5th Dist. 1999 [internal citations intentionally omitted]

Where [an] easement comes into being by way of an agreement, . . . the "universally accepted principle" is that "the landowner may not, without the consent of the easement holder, unreasonably interfere with the latter's rights or change the character of the easement so as to make the use thereof significantly more difficult or burdensome."

[I]t is the exclusive right of the owner of the dominant tenement to say whether or not the servient owner shall be permitted to change the character and place of the servitude suffering the burden of an easement . . . . regardless of any consideration of convenience of the owner of the servient tenement.

This "unequivocal language" was tempered by our decision in *Kline*, in which we held that "relocation of an easement without the mutual consent of the parties is an extraordinary remedy and should be grounded in a strong showing of necessity." *Kline,* supra, 267 N.J. Super. at 479-80. We further held that "a court may compel relocation of an easement to advance the interests of justice where the modification is minor and the parties' essential rights are fully preserved." *MAUTONE v. CAPPELLUTI*, NJ: Appellate Div. 2014. [some internal citations intentionally omitted]

The holder of an easement is entitled to a use that is reasonably necessary and consistent with the purposes for which the easement was granted, and must impose the least possible burden upon the property. The holder of the fee may do anything not inconsistent with the enjoyment of the easement. The holder of an easement may use it for any normal use which is not forbidden by law or unreasonably interfering with the rights of the landowner. As the easement at issue was for ingress and egress only, Appellees landscaping of property owned by Appellants was not a use reasonably necessary nor consistent with the purpose of the easement. *Archer v. Engstrom*, 2009 Ohio 2479 - Ohio: Court of Appeals, 5th Appellate Dist. 2009. [internal citations intentionally omitted]

There is not a universal position amongst the states as to the extent of changes to an easement that are allowable.

[T]he easement may not substantially be altered physically without the consent of the owner of the fee. This does not mean, however, that all changes are prohibited.

> "So long as the use of an easement is confined to the purposes under which it was acquired and created without increasing the burden on the servient estate, the owner of the easement * * * may make changes that do not impair or affect its substance." *Hyland v. Fonda*, 129 A. 2d 899 - NJ: Appellate Div. 1957. [internal citations intentionally omitted]

Terminating or Extinguishing Easements

Easements can be terminated or extinguished by many means such as merger of title, release, abandonment, vacation, by the terms of the document, termination of the need, condemnation, mortgage foreclosure, tax sale, and by unwritten means such as non-user/ abandonment and adverse possession.

> An easement can terminate either by expiring in accordance with the intent of the parties manifested in the creating transaction, or by being extinguished by the course of events subsequent to its creation. Termination by extinguishment includes a wide variety of methods, some resting primarily upon conduct of the dominant owner, as for example, release and abandonment; some resting primarily upon conduct of the servient owner, as for example, prescription and conveyance to a third person having no actual or constructive notice of the easement's existence; some resting upon conduct in which both parties must participate, *as* for example, merger and estoppel; and some resting upon the conduct of outside entities, as for example, mortgage foreclosures, eminent domain and tax sales. Under any of these methods, the easement can be terminated in whole permanently, in whole for a time, in part permanently, or in part for a time. *Sluyter v. Hale Fireworks P'Ship*, 370 Ark. 511 (2007). [internal citations intentionally omitted]

Termination by Vacation/Abandonment

Easements may terminate by abandonment. This is most often the case when a public use is involved and, particularly, when the easement was initially acquired by condemnation.

A governmental agency or jurisdiction may officially vacate or abandon a dedicated public right of way, although if there are other parties with interests in the right of way, such an action will not, in and of itself, extinguish those interests.

Generally a vacation is the action taken to terminate an easement or right of way when the easement was originally created by dedication. When a jurisdiction vacates an easement, it is releasing the public's interest in the easement. Although we often mention that the fee reverts to the appropriate owner, this is incorrect terminology. The platted street existed merely as an easement, so the underlying fee never "went" anywhere and it is actually the *easement* right that is reverting - to the owner of the underlying fee. See more discussion on this topic under the Reversionary Rights section of this handout.

There is, however, a difference between a vacation or abandonment and mere discontinuance of maintenance.

> When purporting to discontinue or reclassify a highway, a town must substantially comply with the statutory method for discontinuance or the resultant change will be void. In *re Town Hwy. No. 20 of Town of Georgia*, 834 A. 2d 17 - Vt: Supreme Court 2003. [internal citation intentionally omitted]
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> A highway may be extinguished by direct action through governmental agencies, in which case it is said to be discontinued; or by nonuser by the public for a long period of time with the intention to abandon, in which case it is said to be abandoned." (citation omitted)); *Ord v. Fugate*, 152 S.E.2d 54, 59 (Va. 1967) (noting that discontinuance of public road should not carry the same effect as abandonment and stating "under the present statutes the discontinuance of a secondary road means merely that it is removed from the state secondary road system.
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> Discontinuance of a road is a determination only that it no longer serves public convenience warranting its maintenance at public expense. The effect of discontinuance upon a road is not to eliminate it as a public road or to render it unavailable for public use"); see also *Wilson v. Greenville County*, 110 S.C. 321, 325, 96 S.E. 301, 302 (1918) (recognizing that discontinuance of a public highway and abandonment are two acts which are "separate and distinct in fact and in law")

Extinguishment by Unwritten Means

As easements can be acquired by unwritten means, they can also be extinguished by unwritten means such as adverse possession, estoppel and prescription. Normally, this involves, in essence, the inverse of the acquisition. For example, with prescription, the use of the easement is *interfered* with for the statutory period of time and (upon meeting all of the other requirements for prescription) the servient estate holder may thereby re-acquire the easement interest.

Extinguishment of an easement - being an interest in real estate – particularly by unwritten means, is not looked upon favorably by the courts.

> Extinguishment of an easement is an extreme and powerful remedy which is utilized only when use of the easement has been rendered essentially impossible." *Reichardt et al., v. Hoffman* (1997) 52 Cal. App. 4th 754.
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> Having once been granted to him, he cannot lose it by mere non-user... He may lose it by adverse possession… or by abandonment, not by mere non-user, but by proofs of an intention to abandon; or, of course, by deed or other instrument in writing." *Moyer v. Martin*, 101 W. Va. 19, 24, 131 S.E. 859, 861 (1926).
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> Ohio cases recognize that termination of an easement may be an appropriate remedy when the owner of the easement abuses or misuses easement rights. *Walbridge v. Carroll*, 184 Ohio App. 3d 355 - Ohio: Court of Appeals, 6th Appellate Dist. 2009.

Cessation of Purpose or Need

An easement created for a specific purpose will expire when the purpose no longer exists. This could be the case when a railroad company originally purchased the right to operate a railroad. Upon abandonment, the easement may well cease to exist since the purpose is no longer being served.

> An easement limited to a particular purpose terminates when the "purpose ceases to exist, is abandoned, or is rendered impossible of accomplishment." Carmody-Lahti Real Estate, 472 Mich at 381-382. *Hunter v. Baldwin*, Mich: Court of Appeals 2014. [emphasis added]
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> When use of an easement for railroad purposes ceases, in the absence of contrary evidence, title to the fee is presumed to be in the abutting land owners to the center of the way. Therefore, when a railroad ceases to use the property for railroad purposes, the original owners or their grantees hold the property free from the burden of the easement. *Jordan v. Stallings*, 911 SW 2d 653 - Mo: Court of Appeals, Southern Dist., 1st Div. 1995.
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> [A]s noted in 28A C.J.S. Easements § 160 (2009),
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> While an express easement generally does not terminate even when the … purpose of the easement ceases, an easement granted for a particular purpose may terminate as soon as such purpose ceases to exist, is abandoned, or is rendered impossible of accomplishment. An interest in the nature of an easement is not terminated where the purpose for which it is created is neither totally nor permanently impossible of enjoyment. The first step in analyzing the impossibility of a purpose, as grounds for modifying or terminating an easement, is to determine the purpose of the easement. *Poe v. Gaunce*, 371 SW 3d 769 - Ky: Court of Appeals 2011.
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> Easements are not terminated by mere non-use but they can be terminated by the acts of the parties or "by the completion of the purpose or necessity for which the easement was created, or a change in the character or use of the property." *Siferd v. Stambor* (1966), 5 Ohio App.2d 79, 87.
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> When the purpose, reason, and necessity for an easement cease, within the intent for which it was granted, the easement is extinguished. Hence, if an easement is not granted for all purposes, but for a particular use only, the right continues while the dominant tenement is used for that purpose, and ceases when the specified use ceases. *FL AUSTIN FAMILY v. City of High Point*, 630 SE 2d 37 - NC: Court of Appeals 2006.
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> An easement may be extinguished when the purpose for which it originally was created no longer exists and there is no reason for its continued existence. *Edgell v. Divver,* 402 A.2d 395, 397 (Del. Ch. 1979). *Green v. Templin*, Del: Court of Chancery 2010.

> In general, we think that the rule regarding extinguishment by cessation of purpose should be applied only where easements are qualified by express limitations. *Barrett v. Kunz*, 604 A. 2d 1278 - Vt: Supreme Court 1992. [internal citations intentionally omitted]

Appurtenant easements may also be extinguished when the dominant or servient estate no longer exists; no purpose for the easement thus remains.

> "[T]he existence of the dominant estate is ordinarily essential to the validity of the servitude granted, and the destruction of the dominant estate releases the servitude." *Stegall v. Housing Authority of City of Charlotte*, 178 SE 2d 824 - NC: Supreme Court 1971. [internal citations intentionally omitted]

Also, when an easement is associated with some improvement; for example, an easement to use an elevator in a building. If one or both of the buildings is subsequently demolished, the easement may terminate since it no longer serves any purpose.

> While an express easement generally does not terminate even when the necessity … of the easement ceases, an easement granted for a particular purpose may terminate as soon as such purpose ceases to exist, is abandoned, or is rendered impossible of accomplishment. *Poe v. Gaunce*, 371 SW 3d 769 - Ky: Court of Appeals 2011.

Extinguishment by Non-User/Abandonment

Termination by non-user/abandonment is not as readily achieved as one might think. They are generally not terminated or extinguished by simple non-use except as may be specifically allowed under state law.

> "An abandonment is proved by evidence of an intention to abandon as well as of the act by which that intention is put into effect; there must be a relinquishment of possession with intent to terminate the easement."
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> An easement created by grant is not lost by non-user, no matter how long continued. Thus, non-user for a twenty-four year period does not constitute abandonment. Further a non-user combined with failure to maintain and neglect of the roadway is insufficient to extinguish an easement. *KNOX COUNTY STONE v. BELLEFONTAINE QUARRY*, 985 SW 2d 356 - Mo: Court of Appeals, Eastern Dist., 3rd Div., 1998.

> An abandonment is proved by evidence of an intention to abandon as well as of the act by which that intention is put into effect; there must be a relinquishment of possession with intent to terminate the easement.
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> While an intention to abandon may be inferred from circumstances strong enough to warrant that inference, an abandonment must be proved by clear and convincing evidence. *Hennick v. Kansas City Southern Ry. Co.*, 269 SW 2d 646 - Mo: Supreme Court, 1st Div. 1954.

> The owner of the servient estate must "prove both non-use and an affirmative intent to abandon the easement on the part of the dominant estate." *Harvest Land Co-op, Inc. v. Sandlin*, 2006-Ohio-4207 citing *Snyder v. Monroe Twp. Trustees* (1996), 110 Ohio App.3d 443, 457.
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> Mere nonuse "alone does not create an abandonment of an easement which has been acquired by grant . . . The cases are agreed that at least where a right of way or other easement is created by grant, deed, or reservation, no duty is thereby cast upon the owner of the dominant estate thus created to make use thereof or enjoy the same as a condition to the right to retain his interest therein; the mere nonuser of an easement will not extinguish it. In fact, it is held that even nonuser for the length of the prescriptive period does not operate to extinguish an easement created by grant, deed, or reservation. . . . Abandonment of an easement or right of way granted by deed requires clear evidence of intent to abandon, not merely nonuse. *McGlone v. Hardin*, Ky: Court of Appeals 2016 (unpublished).

Likewise, a prescriptive easement may be abandoned through non-use and intent to abandon.

> The test for abandonment of a prescriptive easement is that "there must be, in addition to [nonuse], acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence." *Schonbek v. Chase*, 14 A. 3d 948 - Vt: Supreme Court 2 [internal citation intentionally omitted]

Extinguishment by Impossibility of Use

Easements may terminated when the purpose the easement was created for becomes impossible to achieve. This could be related to the extinguishment of one of the estates or the impossibility of use of the easement due to physical conditions.

> "an easement granted for a particular purpose terminates as soon as such purpose ceases to exist, is abandoned, or is rendered impossible of accomplishment." In Schuermann Enterprises, Inc. v. St. Louis County, 436 S.W.2d at 668, the Missouri Supreme Court held that an easement for a railroad right of way "is extinguished when the railroad ceases to run trains over the land… *Jordan v. Stallings*, 911 SW 2d 653 - Mo: Court of Appeals, Southern Dist., 1st Div. 1995.
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> Extinguishment of an easement is an extreme and powerful remedy which is utilized only when use of the easement has been rendered essentially impossible. *Reichardt et al., v. Hoffman* (1997) 52 Cal. App. 4th 754.

> Even if an easement is not intentionally abandoned it may still terminate when the purposes for which it was granted become impossible. [T]he right-of-way in the present case has been extinguished by impossibility of use because the sale and condemnation of portions of the right-of-way prevents . . . future use for railroad purposes. [Indiana Railroad Abandonment case].

Railroads and Rails to Trails

The National Trails System Act ("Trails Act"), 16 U.S.C. § 1247 provided a means by which a railroad right of way could be shifted to a temporary use as a trail by its transfer to a qualified entity in order to preserve that right of way for future reactivation.

The statute requires that the transfer occur *prior* to abandonment. If the right of way associated with a rail corridor was abandoned *prior* to transfer to a qualified entity, then any part of that right of way not held in fee by the railroad was extinguished and the right of way easement rights reverted to the adjoining owner(s). Thus when, or if, abandonment actually took place can be contentious.

Any right of way that *was*, in fact, held in fee by the railroad is obviously still owned by the railroad. Thus, the issue of what interest the railroad originally acquired is of paramount importance.

> The instrument's granting clauses are a natural starting point for discerning the parties' intent. The deed purports to convey a "right of way" that "consist[s]" of a "strip of land ... across [the parcels described in the deed]." As we recognized over seventy years ago in *Quinn,* a deed *granting* a right-of-way typically conveys an easement, whereas a deed granting *land itself* is more appropriately characterized as conveying a fee or some other estate:
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> Where the grant is not of the land but is merely of the use or of the right of way, or, in some cases, of the land specifically for a right of way, it is held to convey an easement only. Where the land itself is conveyed, although for railroad purposes only, without specific designation of a right of way, the conveyance is in fee and not of an easement.
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> Here, the deed's granting clause conveys only a right-of-way. The plain language of the deed, as well as the rule of construction articulated in *Quinn,* therefore indicate that the deed conveyed an easement rather than a fee simple.
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> *DNR v. Carmody-Lahti Real Estate, Inc.,* 699 NW 2d 272 - Mich: Supreme Court 2005. [footnotes intentionally excluded]

Cases in Indiana have delved into this issue to a great extent over the years.

> In the instant case, the granting clause refers to a "right". As in the case last cited, the granting clause is not the only limiting clause in the conveyance. In the last paragraph of the instrument it is stated:
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> "Said grantee, its successors and assigns further promise and agree that they will

build their tracks over and upon the above described right of way, a line between the City of Noblesville and the City of Indianapolis, Indiana, and have the same in operation on or before the first day of January, 1905, and if said line is not constructed, or if constructed is not operated for a period of sixty (60) days (except in case of strikes) all rights granted herein to said grantee, its successors and assigns, shall revert to the grantors, and said grantee, its successors and assigns, shall remove its tracks from said right of way."

The rule relating to construction of conveyances is well stated in Tiffany on Real Property, Vol. 4, Third Edition, § 980, p. 65, as follows:

"... The habendum and subsequent covenants may modify, limit and explain the grant, but they cannot defeat it when it is expressed in clear and unambiguous language."

In 44 Am. Jur. at p. 285 et. seq., is found another note on the subject, "Railroad Property and Rights of Way". We quote the general rule for construction of conveyances on such subjects there given:

"The general rule is that a conveyance to a railroad of a strip, piece, or parcel of land, without additional language as to the use or purpose to which the land is to be put in other ways limiting the estate conveyed, is to be construed as passing an estate in fee, but reference to right of way in such a conveyance generally leads to its construction as conveying only an easement."

Thus we have supplied in a single sentence a general rule for determining whether a fee or an easement is conveyed. While there are occasional variances such rule appears to be the one generally followed in a majority of the cases.

In construing instruments creating easements, it is the duty of the court to ascertain and give effect to the intention of the parties. The intention of the parties is determined by a proper construction of the language of the instrument. Where the language is unambiguous other matters may not be considered. 28 C.J.S., § 26, p. 680.

Generally where a particular or special right or easement in land is conveyed, which may well co-exist and be engaged and used by the grantee consistently with the fee in the grantor, the fee does not pass because it is not essential to the right or interest which is described in the deed.

Our own cases generally hold that a deed conveying a right of way to a railroad company conveys an easement only.

In *Lake Erie & Western Railroad Company v. Ziebarth*, supra, the conveyance to a railroad company in consideration of one dollar, which "conveys and warrants" to the grantee "its successors and assigns", the right of way for the construction and operation of said company's "railroad", being a strip of land 100 feet in width "through and over the following described land," and which contained the further

provision: "The estate granted hereby is upon condition that the strip of land shall be used for said railroad purposes only, and when the same shall, after the road is constructed, cease to be used for such purposes, then the same shall revert to the party of the first part (grantor), his heirs and assigns." It was held that the deed does not purport to convey a fee, conditional or otherwise, that the language of the deed clearly imports an intention to convey an easement to the grantee for a particular purpose, the construction and operation of a railroad thereon, and that the theory of forfeiture was not applicable to the case.

In *Ingalls v. Byers, Administrator, et al.*, supra, it was held that a conveyance to a railroad company of the right of way for the use of said railway over and across the east half of the northwest quarter ... "to have and to hold said rights and privileges to the use of the said company so long as it shall be required for the uses and purposes of said railway company," does not purport to convey a fee; on the contrary its language clearly imports an intention to convey an easement to the grantee for a particular purpose.

In *Douglass v. Thomas*, supra, our Supreme Court held that a deed conveying to a railroad company "the right of way" of an undefined width, over certain real estate, such deed containing a stipulation that such company was "to have and hold the said rights and privileges to the use of the company so long as the same shall be required for the uses and purposes of said road," conveys nothing more than an easement in or right of way over the land and not the fee simple.

In *Cincinnati, Indianapolis, St. Louis and Chicago Ry. Co. v. Geisel*, supra, the Court held that a deed releasing and quitclaiming to a railroad company "the right of way for so much of said railroad, being eighty feet wide, as may pass through the following described land", conveys merely an easement, the fee remaining in the grantor.

The other Indiana cases above cited are to the same effect.

In 132 A.L.R., at p. 172, under subtitle, "III. Deed Conveying `right' rather than `land'," the author cites the foregoing Indiana cases in support of the principle: "that a deed to a railroad company which conveys a `right' rather than a strip, piece, parcel, or tract of `land' ... must be construed as conveying an easement rather than a fee...." Citing a large number of cases from other jurisdictions holding to the same effect.

In *Graham v. St. Louis, I.M. & S.R. Co.* (1901), 69 Ark. 562, 65 S.W. 1048, the Court, after setting forth the terms of the conveyance, conveying to the railroad "the right of way and depot grounds" to have and to hold the same to the said party of the second part so long as said lands are used for the purposes of a railroad, and no longer, the court held:

"Giving force and meaning to every word and clause in the deed, the most

reasonable construction is that deeds of the kind under consideration convey a perpetual easement in the land, or an easement in the nature of a fee. Neither the intention nor the effect of such instruments could be the conveyance of an estate in fee, but only an incorporeal hereditament — an easement."

The following leading cases from other jurisdictions are here cited as containing questions analogous to those involved in the instant case, in each of which it is held that the interest conveyed is an easement and not a fee.

In *Sherman v. Petroleum Exploration, supra*, a conveyance of land stated in the granting clause to be "for railroad right of way", conveys only an easement, although the habendum clause states that the land is conveyed to the railroad "and its successors and assigns forever, with covenant of general warranty of title".

[I]n interpreting the deed, we do not consider the cover and title of the instrument where the granting language is clear and unambiguous. See *Brown v. State*, 130 Wash.2d 430, 924 P.2d 908, 915 (1996) (concluding that deed, which followed statutory language of fee simple and was void of limiting language, conveyed fee simple title regardless of the caption "Right of Way Deed"), recons. denied. Thus, while the title may provide additional evidence of intent where the language of the deed is unclear, it is not dispositive of the nature of the conveyance. Likewise, words such as "over, across, and through" may provide evidence of a party's intent to convey an easement where the words describe the use of the land. *Tazian*, 686 N.E. 2d at 99.

The mere presence of the term "right of way" does not, in and of itself, indicate an intent to convey an easement. Rather, when appearing outside of the granting clause, the term is of limited value because it has two meanings. Right of way refers to 1) a right to cross over the land of another, an easement, and 2) the strip of land upon which a railroad is constructed. *Joy v. City of St. Louis*, 138 U.S. 1, 11 S.Ct. 243, 34 L.Ed. 843 (1891); see also IND.CODE § 32-5-12-4 (providing that "`right-of-way' means a strip or parcel of real property in which a railroad has acquired an interest for use as a part of the railroad's transportation corridor"); BLACK'S LAW DICTIONARY 191 (5th ed.1979) (stating that the "[t]erm `right of way' sometimes is used to describe a right belonging to a party to pass over land of another, but it is also used to describe that strip of land upon which railroad companies construct their road bed, and, when so used, the term refers to the land itself, not the right of passage over it").

Deeds generally contain three important clauses: the granting clause, the habendum clause, and the descriptive clause. We initially examine the granting clause to determine the object of the conveyance. *Tazian*, 686 N.E.2d at 98. As our supreme court stated in Brown:

A deed that conveys a right generally conveys only an easement. The general rule is

that a conveyance to a railroad of a strip, piece, or parcel of land, without additional language as to the use or purpose to which the land is to be put or in other ways limiting the estate conveyed, is to be construed as passing an estate in fee, but reference to a right-of-way in such a conveyance generally leads to its construction as conveying only an easement.

510 N.E.2d at 644 (citations omitted). The habendum clause may modify or limit the grant, but it does not defeat a clear, unambiguous grant. It is generally held that if there are any inconsistencies between the granting clause and the habendum clause, the granting clause will prevail because the granting clause is "the most dependable expression of the grantor's intention" and "is considered to be the very essence of the deed." The descriptive clause provides a means for identification of the land but is not intended to identify the land.

Additionally, in construing a deed, the court considers the instrument relative to the statutes in effect at the time of the conveyance. The property statute in effect at the time of conveyance provides that any conveyance worded: "`A.B. conveys and warrants to C.D.' (here describe the premises) `for the sum of' (here insert the consideration,) ... shall be deemed and held to be a conveyance in fee simple to the grantee...." Ind. Rev. Stats. 1852, ch. 23, § 12; IND.CODE § 32-1-2-12.

The consideration paid by the railroad may be further evidence of the parties' intent. However, lack of consideration or nominal consideration alone is not sufficient cause for setting aside a deed. "It is a well-known fact that often a conveyance recites a nominal consideration whereas the true consideration is not nominal. It is therefore never certain that the recited consideration is the true consideration." We conclude that nominal monetary consideration, alone, does not make the instrument ambiguous, nor does it create an easement. *Elton Schmidt & Sons Farm Co. v. Kneib*, 2 Neb.App. 12, 19, 507 N.W.2d 305, 308-09 (1993) (holding that recited consideration of one dollar does not render deed ambiguous as "other good and valuable consideration" may have been given). See also *Coleman v. Missouri Pac. R.R.*, 294 Ark. 633, 638, 745 S.W.2d 622, 625 (1988) (stating that deed which recited consideration consisting "of the benefits to accrue to the [grantors] from the building of the railway company" did not create an ambiguity in a deed conveying fee simple as such consideration "could well have been most valuable"); *Kingsland v. Godbold*, 456 So.2d 501, 502 (Fla.App.1984) ("Even a nominal consideration will support a deed. The sufficiency of consideration is not a relevant basis upon which to void a deed."); *Fuchs v. Reorganized School Dist. No. 2, Gasconade County*, 251 S.W.2d 677, 679-80 (Mo. 1952) (stating that nominal consideration "might, in connection with language lacking in preciseness or in connection with other circumstances surrounding the conveyance," aid in determining the nature of the conveyance, but "the fact of nominal consideration, standing alone, is not sufficient from which to find an intention to convey other than an unlimited fee").

> Where a deed is ambiguous as to the character of the interest conveyed and the railroad was responsible for the form of the deed, we will construe the language of the deed in favor of the grantor and against the railroad. Thus, in the absence of language conveying the strip of land in fee simple, we will construe such deed as conveying an easement. Furthermore, public policy dictates that we construe any ambiguity in favor of the original grantors. As our supreme court has stated:
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> > Public policy does not favor the conveyance of strips of land by simple titles to railroad companies for right-of-way purposes; either by deed or condemnation. This policy is based upon the fact that the alienation of such strips or belts of land from and across the primary or parent bodies of the land from which they are severed, is obviously not necessary to the purpose for which such conveyances are made after abandonment of the intended uses as expressed in the conveyance, and that thereafter such severance generally operates adversely to the normal and best use of the property involved. Therefore, where there is ambiguity as to the character of the interest or title conveyed such ambiguity will generally be construed in favor of the original grantors, their heirs or assigns.
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> *Clark v. CSX Transp., Inc.*, 737 NE 2d 752 - Ind: Court of Appeals 2000 [internal citations intentionally omitted]

Sometimes adjoining owners are concerned about liability associated with the trail when those adoiners have retained fee.

> If the [rails-to-trails] trail section in question is owned in fee by abutting property owners and the operator of the trail has only the railroad's travel easement, the liability will ordinarily be no more than that to which the property owner was exposed when the railroad had exclusive use of the right-of-way. This liability is usually nonexistent. *** Suppose, however, that the sections of the right-of-way sought for recreational trail use have reverted and that the landowner will grant only a recreational easement or license. In that situation, a crucial element for securing the easement or for protecting the fee owner may be a strong state recreational use statute that limits the owner's liability to willful or malicious misconduct or maintenance of an attractive nuisance. For example, the Minnesota legislature recently amended its recreational use statute to limit landowner liability to conduct *intended* to cause injury in the case of recreational trail use. Samuel H. Morgan, Esq. *Rails to Trails Magazine*, September/October 1994.

The question of *when* a railroad has been abandoned for the purpose of exercising reversionary rights has been addressed in a number of states.

> In this case, it is clear that the railway is no longer used. The question, therefore, is whether Soo Line manifested an intent to abandon the underlying *easement* and not simply the railway that utilized the easement.

> This intent cannot *necessarily* be inferred from the fact that a railroad company sought and obtained permission from the ICC/STB to abandon a railway and took action consistent with that federal authorization.[57] A railway located on an easement is analytically distinct, after all, from the easement itself. But as already shown, the easement in this case is *itself* limited to railroad purposes under the 1873 deed. Therefore, in both seeking federal permission to abandon its railroad and removing the rails themselves, Soo Line manifested an intent to abandon the underlying easement (which was limited to railroad uses) and took action consistent with that intent.[58]
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> ***
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> Soo Line's decision to seek federal permission to cease all rail operations on the right-of-way, its subsequent cessation of those activities after the 120-day period prescribed by the ICC, and its removal of all railroad tracks on the strip of land constituted an abandonment of the underlying property interest.
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> *DNR v. Carmody-Lahti Real Estate, Inc.*, 699 NW 2d 272 - Mich: Supreme Court 2005.

Reversionary Rights

With regard to easements and rights of way that are abandoned, vacated or otherwise extinguished, questions often arise with regard to reversionary rights. Basically, the underlying title to the land over which a grant of right of way or easement exists, vests (and has always been vested) with whatever property the right of way was initially derived from.

> It is frequently stated that when an easement is extinguished through abandonment, the land "reverts" to the grantors or their successors. We are not wholly convinced of the appropriateness of the term "reverts" in such circumstances. … Regardless of the terminology utilized, the effect of a right-of-way easement's abandonment is the same: such easement no longer burdens the servient tenement. Thus, the servient owner of the strip of land constituting the right of way is entitled to enjoyment free of burden. This is the same rule applied upon the discontinuance of county or state maintained roads. KRS 178.116. *Illinois Cent. R. Co. v. Roberts*, 928 SW 2d 822 - Ky: Court of Appeals 1996.

In cases where a right of way is owned in fee by the jurisdiction, statutes or municipal codes will likely dictate the disposal of such real estate after the right of way use is extinguished.

When reversionary rights exist in the abutting property, those rights are generally attached as an appurtenance to the abutting real estate. As such, they will automatically pass with the conveyance of the abutting property, but that may not be the case when the street has been vacated.

> Upon vacation of a public easement, the affected street or alley is considered a separate tract of land, regardless of whether the dedication had created a public easement or a fee simple interest. *Alexander v. McClellan,* 39 P. 3d 1265 - Colo: Court of Appeals, 5th Div. [internal citation intentionally omitted]

Due to the nature of the uses allowed by a jurisdiction within a right of way; however, the reversionary rights do not always have a significant appraised value.

> [I]t [i]s immaterial whether the owners of adjoining lots owned the fee or not. Their reason for this opinion was, that though the fee of the street be in the owners of adjoining lots, yet as the town or city has a right to the use of the ground as a highway, and for various other purposes consistent therewith, such as the making of sewers and the laying of gas or water pipes and other purposes, for which a street may be legitimately used, which right to use the street is practically an exclusion of the owner of the fee in the street, so long as it is used by the town without obstructing the surface of the ground, and as this right of user on the part of the city or town is permanent, and may and in all probability will last forever, the reversionary right of the owner of the fee in the surface of the street is too remote and contingent to be of any appreciable value or to be regarded as property, which under the Constitution is required to be paid for when its use is appropriated by the public. *Herold v. Hughes*, 90 SE 2d 451 - W Va: Supreme Court of Appeals 1955. [internal citations intentionally omitted]

Even when a right of way exists as an easement and is not held in fee by the jurisdiction, abutting owners may or may not be able to convey their abutting lands without including their underlying interest in the right of way (essentially severing their reversionary rights from the abutting lands). In some states, this can be readily done, and in other states it is generally not allowed. State laws dictate the disposition of reversionary rights and different states deal with the issue of railroad reversions differently.

> When a grantor conveys title to land abutting the railroad right of way easement, it is presumed, absent evidence to the contrary, that the grantor intended to convey to the middle line of the railroad right of way. This would then place grantees land to the center of the railroad right of way if the line became abandoned. *City of Columbia v. Baurichter*, 729 SW 2d 475 - Mo: Court of Appeals, Western Dist. 1987.

> Indiana's Supreme Court recently ruled on the effect of reversionary rights vis-à-vis railroad abandonments pointing out that the Federal rail-banking statute was upheld a number of years ago, but under *Presault v. I.C.C.*, "[s]tate law generally governs

the disposition of reversionary interests."[4] It then proceeded to decide that that rail-banking, for trails originally acquired as easements for railways, is not allowed under Indiana law, viz.,

> Because the rail lines are no longer in use, the railroad, pursuant to federal law, 49 U.S.C. § 10903, sought authorization from the Surface Transportation Board ("STB") to abandon the easements. The STB authorized the railroad to negotiate transfer of the railroad corridor to the Indiana Trails Fund for use as a public trail ("interim trail use") in accordance with the National Trails System Act ("Trails Act"), 16 U.S.C. § 1247. The Trails Act authorizes the STB to facilitate such transactions in order to "preserve established railroad rights-of-way for future reactivation," *Id.* § 1247(d), a process frequently called "railbanking." *** The Court of Federal Claims certified this question to us in accordance with *Preseault v. I.C.C.*, which upheld the constitutionality of the Trails Act but noted that "[s]tate law generally governs the disposition of reversionary interests" and that, "[b]y deeming interim trail use to be like discontinuance rather than abandonment, Congress prevented property interests from reverting under state law." 494 U.S. 1, 8, 110 S. Ct. 914, 920, 108 L. Ed. 2d 1, 11 (1990). [W]e hold that a public trail is not within the scope of easements acquired for the purpose of operating a line of railway. The original interest obtained as against the landowners' predecessors in title was no greater than the purpose for which the easement was used at that time. *Yarian*, 219 Ind. at 482–83, 39 N.E.2d at 606. That purpose was the transportation of goods through the operation of a railroad line. The easement cannot now be recast for use as a public recreational trail without exceeding the scope of the easement and in-fringing the rights of the landowners. *** We hold that, under Indiana law, railbanking and interim trail use pursuant to the federal Trails Act are not within the scope of railroad easements and that railbanking and interim trail use do not constitute a permissible shifting public use. *Howard v. United States*, Indiana Supreme Court, No. 94S00-1106-CQ-333, March 20, 2012.[5]

Missouri Statutes

Select Missouri Statutes related to railroads can be found in 2017 Missouri Revised Statutes Title XXV INCORPORATION AND REGULATION OF CERTAIN UTILITIES AND CARRIERS, Chapter 389 Regulation of Railroad Corporations.

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[4] In a ruling that essentially doubled down on the Preseault decision, the Federal Circuit court opined, "[A] Fifth Amendment taking occurs when, pursuant to the Trails Act, state law reversionary interests are effectively eliminated in connection with a conversion of a railroad right-of-way to trail use." *Caldwell v. United States*, 391 F.3d 1226, 1228 (Fed.Cir.2004); see also *Hash v. United States*, 403 F.3d 1308 (Fed.Cir. 2005).

[5] See Exhibit 7

1968 - National Trails System Act

Public Law 90-543

AN ACT

To establish a national trails system, and for other purposes.

October 2, 1968
[S. 827]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

National Trails System Act.

SHORT TITLE

SECTION 1. This Act may be cited as the "National Trails System Act".

STATEMENT OF POLICY

SEC. 2. (a) In order to provide for the ever-increasing outdoor recreation needs of an expanding population and in order to promote public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas of the Nation, trails should be established (i) primarily, near the urban areas of the Nation, and (ii) secondarily, within established scenic areas more remotely located.

(b) the purpose of this Act is to provide the means for attaining these objectives by instituting a national system of recreation and scenic trails, by designating the Appalachian Trail and the Pacific Crest Trail as the initial components of that system, and by prescribing the methods by which, and standards according to which, additional components may be added to the system.

NATIONAL TRAILS SYSTEM

SEC. 3. The national system of trails shall be composed of—

(a) National recreation trails, established as provided in section 4 of this Act, which will provide a variety of outdoor recreation uses in or reasonably accessible to urban areas.

(b) National scenic trails, established as provided in section 5 of this Act, which will be extended trails so located as to provide for maximum outdoor recreation potential and for the conservation and enjoyment of the nationally significant scenic, historic, natural, or cultural qualities of the areas through which such trails may pass.

(c) Connecting or side trails, established as provided in section 6 of this Act, which will provide additional points of public access to national recreation or national scenic trails or which will provide connections between such trails.

The Secretary of the Interior and the Secretary of Agriculture, in consultation with appropriate governmental agencies and public and private organizations, shall establish a uniform marker for the national trails system.

NATIONAL RECREATION TRAILS

SEC. 4. (a) The Secretary of the Interior, or the Secretary of Agriculture where lands administered by him are involved, may establish and designate national recreation trails, with the consent of the Federal agency, State, or political subdivision having jurisdiction over the lands involved, upon finding that—

(i) such trails are reasonably accessible to urban areas, and, or

(ii) such trails meet the criteria established in this Act and such supplementary criteria as he may prescribe.

(b) As provided in this section, trails within park, forest, and other recreation areas administered by the Secretary of the Interior or the Secretary of Agriculture or in other federally administered areas may be established and designated as "National Recreation Trails" by the

96-600 O - 69 - 61

appropriate Secretary and, when no Federal land acquisition is involved—

(i) trails in or reasonably accessible to urban areas may be designated as "National Recreation Trails" by the Secretary of the Interior with the consent of the States, their political subdivisions, or other appropriate administering agencies, and

(ii) trails within park, forest, and other recreation areas owned or administered by States may be designated as "National Recreation Trails" by the Secretary of the Interior with the consent of the State.

NATIONAL SCENIC TRAILS

SEC. 5. (a) National scenic trails shall be authorized and designated only by Act of Congress. There are hereby established as the initial National Scenic Trails:

(1) The Appalachian Trail, a trail of approximately two thousand miles extending generally along the Appalachian Mountains from Mount Katahdin, Maine, to Springer Mountain, Georgia. Insofar as practicable, the right-of-way for such trail shall comprise the trail depicted on the maps identified as "Nationwide System of Trails, Proposed Appalachian Trail, NST–AT–101–May 1967", which shall be on file and available for public inspection in the office of the Director of the National Park Service. Where practicable, such rights-of-way shall include lands protected for it under agreements in effect as of the date of enactment of this Act, to which Federal agencies and States were parties. The Appalachian Trail shall be administered primarily as a footpath by the Secretary of the Interior, in consultation with the Secretary of Agriculture.

Rights-of-way.

(2) The Pacific Crest Trail, a trail of approximately two thousand three hundred fifty miles, extending from the Mexican-California border northward generally along the mountain ranges of the west coast States to the Canadian-Washington border near Lake Ross, following the route as generally depicted on the map, identified as "Nationwide System of Trails, Proposed Pacific Crest Trail, NST–PC–103–May 1967" which shall be on file and available for public inspection in the office of the Chief of the Forest Service. The Pacific Crest Trail shall be administered by the Secretary of Agriculture, in consultation with the Secretary of the Interior.

Administration.

(3) The Secretary of the Interior shall establish an advisory council for the Appalachian National Scenic Trail, and the Secretary of Agriculture shall establish an advisory council for the Pacific Crest National Scenic Trail. The appropriate Secretary shall consult with such council from time to time with respect to matters relating to the trail, including the selection of rights-of-way, standards of the erection and maintenance of markers along the trail, and the administration of the trail. The members of each advisory council, which shall not exceed thirty-five in number, shall serve without compensation or expense to the Federal Government for a term of five years and shall be appointed by the appropriate Secretary as follows:

Advisory councils.

Members; term of office.

(i) A member appointed to represent each Federal department or independent agency administering lands through which the trail route passes and each appointee shall be the person designated by the head of such department or agency;

(ii) A member appointed to represent each State through which the trail passes and such appointments shall be made from recommendations of the Governors of such States;

(iii) One or more members appointed to represent private organizations, including landowners and land users, that, in the opinion of the Secretary, have an established and recognized interest in the trail and such appointments shall be made from recommendations

of the heads of such organizations: *Provided*, That the Appalachian Trail Conference shall be represented by a sufficient number of persons to represent the various sections of the country through which the Appalachian Trail passes; and

(iv) The Secretary shall designate one member to be chairman and shall fill vacancies in the same manner as the original appointment.

Additional studies.

(b) The Secretary of the Interior, and the Secretary of Agriculture where lands administered by him are involved, shall make such additional studies as are herein or may hereafter be authorized by the Congress for the purpose of determining the feasibility and desirability of designating other trails as national scenic trails. Such studies shall be made in consultation with the heads of other Federal agencies administering lands through which such additional proposed trails would pass and in cooperation with interested interstate, State, and local governmental agencies, public and private organizations, and landowners and land users concerned. When completed, such studies shall be the basis of appropriate proposals for additional national scenic trails which shall be submitted from time to time to the President and to the Congress. Such proposals shall be accompanied by a report, which shall be printed as a House or Senate document, showing among other things—

Report to President and Congress.

(1) the proposed route of such trail (including maps and illustrations);

(2) the areas adjacent to such trails, to be utilized for scenic, historic, natural, cultural, or developmental, purposes;

(3) the characteristics which, in the judgment of the appropriate Secretary, make the proposed trail worthy of designation as a national scenic trail;

(4) the current status of land ownership and current and potential use along the designated route;

(5) the estimated cost of acquisition of lands or interest in lands, if any;

(6) the plans for developing and maintaining the trail and the cost thereof;

(7) the proposed Federal administering agency (which, in the case of a national scenic trail wholly or substantially within a national forest, shall be the Department of Agriculture);

(8) the extent to which a State or its political subdivisions and public and private organizations might reasonably be expected to participate in acquiring the necessary lands and in the administration thereof; and

(9) the relative uses of the lands involved, including: the number of anticipated visitor-days for the entire length of, as well as for segments of, such trail; the number of months which such trail, or segments thereof, will be open for recreation purposes; the economic and social benefits which might accrue from alternate land uses; and the estimated man-years of civilian employment and expenditures expected for the purposes of maintenance, supervision, and regulation of such trail.

(c) The following routes shall be studied in accordance with the objectives outlined in subsection (b) of this section:

(1) Continental Divide Trail, a three-thousand-one-hundred-mile trail extending from near the Mexican border in southwestern New Mexico northward generally along the Continental Divide to the Canadian border in Glacier National Park.

(2) Potomac Heritage Trail, an eight-hundred-and-twenty-five-mile trail extending generally from the mouth of the Potomac River to its sources in Pennsylvania and West Virginia, including the one-hundred-and-seventy-mile Chesapeake and Ohio Canal towpath.

(3) Old Cattle Trails of the Southwest from the vicinity of San Antonio, Texas, approximately eight hundred miles through Oklahoma via Baxter Springs and Chetopa, Kansas, to Fort Scott, Kansas, including the Chisholm Trail, from the vicinity of San Antonio or Cuero, Texas, approximately eight hundred miles north through Oklahoma to Abilene, Kansas.

(4) Lewis and Clark Trail, from Wood River, Illinois, to the Pacific Ocean in Oregon, following both the outbound and inbound routes of the Lewis and Clark Expedition.

(5) Natchez Trace, from Nashville, Tennessee, approximately six hundred miles to Natchez, Mississippi.

(6) North Country Trail, from the Appalachian Trail in Vermont, approximately three thousand two hundred miles through the States of New York, Pennsylvania, Ohio, Michigan, Wisconsin, and Minnesota, to the Lewis and Clark Trail in North Dakota.

(7) Kittanning Trail from Shirleysburg in Huntingdon County to Kittanning, Armstrong County, Pennsylvania.

(8) Oregon Trail, from Independence, Missouri, approximately two thousand miles to near Fort Vancouver, Washington.

(9) Santa Fe Trail, from Independence, Missouri, approximately eight hundred miles to Sante Fe, New Mexico.

(10) Long Trail, extending two hundred and fifty-five miles from the Massachusetts border northward through Vermont to the Canadian border.

(11) Mormon Trail, extending from Nauvoo, Illinois, to Salt Lake City, Utah, through the States of Iowa, Nebraska, and Wyoming.

(12) Gold Rush Trails in Alaska.

(13) Mormon Battalion Trail, extending two thousand miles from Mount Pisgah, Iowa, through Kansas, Colorado, New Mexico, and Arizona to Los Angeles, California.

(14) El Camino Real from St. Augustine to San Mateo, Florida, approximately 20 miles along the southern boundary of the St. Johns River from Fort Caroline National Memorial to the St. Augustine National Park Monument.

CONNECTING AND SIDE TRAILS

SEC. 6. Connecting or side trails within park, forest, and other recreation areas administered by the Secretary of the Interior or Secretary of Agriculture may be established, designated, and marked as components of a national recreation or national scenic trail. When no Federal land acquisition is involved, connecting or side trails may be located across lands administered by interstate, State, or local governmental agencies with their consent: *Provided*, That such trails provide additional points of public access to national recreation or scenic trails.

ADMINISTRATION AND DEVELOPMENT

Publication in Federal Register.

SEC. 7. (a) Pursuant to section 5(a), the appropriate Secretary shall select the rights-of-way for National Scenic Trails and shall publish notice thereof in the Federal Register, together with appropriate maps and descriptions: *Provided*, That in selecting the rights-of-way full consideration shall be given to minimizing the adverse effects upon the adjacent landowner or user and his operation. Development and management of each segment of the National Trails System shall be designed to harmonize with and complement any established multiple-use plans for that specific area in order to insure continued maximum benefits from the land. The location and width of such rights-of-way across Federal lands under the jurisdiction of another Federal agency shall be by agreement between the head of that agency and the appro-

priate Secretary. In selecting rights-of-way for trail purposes, the Secretary shall obtain the advice and assistance of the States, local governments, private organizations, and landowners and land users concerned.

Relocation of right-of-way, determination.

(b) After publication of notice in the Federal Register, together with appropriate maps and descriptions, the Secretary charged with the administration of a national scenic trail may relocate segments of a national scenic trail right-of-way, with the concurrence of the head of the Federal agency having jurisdiction over the lands involved, upon a determination that: (i) such a relocation is necessary to preserve the purposes for which the trail was established, or (ii) the relocation is necessary to promote a sound land management program in accordance with established multiple-use principles: *Provided*, That a substantial relocation of the rights-of-way for such trail shall be by Act of Congress.

Facilities on trails.

(c) National scenic trails may contain campsites, shelters, and related-public-use facilities. Other uses along the trail, which will not substantially interfere with the nature and purposes of the trail, may be permitted by the Secretary charged with the administration of the trail. Reasonable efforts shall be made to provide sufficient access opportunities to such trails and, to the extent practicable, efforts shall be made to avoid activities incompatible with the purposes for which such trails were established. The use of motorized vehicles by the general public along any national scenic trail shall be prohibited and nothing in this Act shall be construed as authorizing the use of motorized vehicles within the natural and historical areas of the national park system, the national wildlife refuge system, the national wilderness preservation system where they are presently prohibited or on other Federal lands where trails are designated as being closed to such use by the appropriate Secretary: *Provided*, That the Secretary charged with the administration of such trail shall establish regulations which shall authorize the use of motorized vehicles when, in his judgment, such vehicles are necessary to meet emergencies or to enable adjacent landowners or land users to have reasonable access to their lands or timber rights: *Provided further*, That private lands included in the national recreation or scenic trails by cooperative agreement of a landowner shall not preclude such owner from using motorized vehicles on or across such trails or adjacent lands from time to time in accordance with regulations to be established by the appropriate Secretary. The Secretary of the Interior and the Secretary of Agriculture, in consultation with appropriate governmental agencies and public and private organizations, shall establish a uniform marker, including thereon an appropriate and distinctive symbol for each national recreation and scenic trail. Where the trails cross lands administered by Federal agencies such markers shall be erected at appropriate points along the trails and maintained by the Federal agency administering the trail in accordance with standards established by the appropriate Secretary and where the trails cross non-Federal lands, in accordance with written cooperative agreements, the appropriate Secretary shall provide such uniform markers to cooperating agencies and shall require such agencies to erect and maintain them in accordance with the standards established.

Motorized vehicles; prohibition, exceptions.

Uniform markers.

Acquisition of lands, use.

(d) Within the exterior boundaries of areas under their administration that are included in the right-of-way selected for a national recreation or scenic trail, the heads of Federal agencies may use lands for trail purposes and may acquire lands or interests in lands by written cooperative agreement, donation, purchase with donated or appropriated funds or exchange: *Provided*, That not more than twenty-five acres in any one mile may be acquired without the consent of the owner.

Acreage limitation.

Right-of-way lands outside exterior boundries.

(e) Where the lands included in a national scenic trail right-of-way are outside of the exterior boundaries of federally administered areas, the Secretary charged with the administration of such trail shall encourage the States or local governments involved (1) to enter into written cooperative agreements with landowners, private organizations, and individuals to provide the necessary trail right-of-way, or (2) to acquire such lands or interests therein to be utilized as segments of the national scenic trail: *Provided*, That if the State or local governments fail to enter into such written cooperative agreements or to acquire such lands or interests therein within two years after notice of the selection of the right-of-way is published, the appropriate Secretary may (i) enter into such agreements with landowners, States, local governments, private organizations, and individuals for the use of lands for trail purposes, or (ii) acquire private lands or interests therein by donation, purchase with donated or appropriated funds or exchange in accordance with the provisions of subsection (g) of this section. The lands involved in such rights-of-way should be acquired in fee, if other methods of public control are not sufficient to assure their use for the purpose for which they are acquired: *Provided*, That if the Secretary charged with the administration of such trail permanently relocates the right-of-way and disposes of all title or interest in the land, the original owner, or his heirs or assigns, shall be offered, by notice given at the former owner's last known address, the right of first refusal at the fair market price.

Property suitable for exchange.

(f) The Secretary of the Interior, in the exercise of his exchange authority, may accept title to any non-Federal property within the right-of-way and in exchange therefor he may convey to the grantor of such property any federally owned property under his jurisdiction which is located in the State wherein such property is located and which he classifies as suitable for exchange or other disposal. The values of the properties so exchanged either shall be approximately equal, or if they are not approximately equal the values shall be equalized by the payment of cash to the grantor or to the Secretary as the circumstances require. The Secretary of Agriculture, in the exercise of his exchange authority, may utilize authorities and procedures available to him in connection with exchanges of national forest lands.

Use of condemnation proceedings to acquire private lands.

(g) The appropriate Secretary may utilize condemnation proceedings without the consent of the owner to acquire private lands or interests therein pursuant to this section only in cases where, in his judgment, all reasonable efforts to acquire such lands or interests therein by negotiation have failed, and in such cases he shall acquire only such title as, in his judgment, is reasonably necessary to provide passage across such lands: *Provided*, That condemnation proceedings may not be utilized to acquire fee title or lesser interests to more than twenty-five acres in any one mile and when used such authority shall be limited to the most direct or practicable connecting trail right-of-way: *Provided further*, That condemnation is prohibited with respect to all acquisition of lands or interest in lands for the purposes of the Pacific Crest Trail. Money appropriated for Federal purposes from the land and water conservation fund shall, without prejudice to appropriations from other sources, be available to Federal departments for the acquisition of lands or interests in lands for the purposes of this Act.

Limitation.

Pacific Crest Trail.

Lands within federally administered areas.

(h) The Secretary charged with the administration of a national recreation or scenic trail shall provide for the development and maintenance of such trails within federally administered areas and shall cooperate with and encourage the States to operate, develop, and maintain portions of such trails which are located outside the boundaries of federally administered areas. When deemed to be in the public interest, such Secretary may enter written cooperative agreements with the States or their political subdivisions, landowners, private organi-

zations, or individuals to operate, develop, and maintain any portion of a national scenic trail either within or outside a federally administered area.

Whenever the Secretary of the Interior makes any conveyance of land under any of the public land laws, he may reserve a right-of-way for trails to the extent he deems necessary to carry out the purposes of this Act. Right-of-way reservation.

(i) The appropriate Secretary, with the concurrence of the heads of any other Federal agencies administering lands through which a national recreation or scenic trail passes, and after consultation with the States, local governments, and organizations concerned, may issue regulations, which may be revised from time to time, governing the use, protection, management, development, and administration of trails of the national trails system. In order to maintain good conduct on and along the trails located within federally administered areas and to provide for the proper government and protection of such trails, the Secretary of the Interior and the Secretary of Agriculture shall prescribe and publish such uniform regulations as they deem necessary and any person who violates such regulations shall be guilty of a misdemeanor, and may be punished by a fine of not more than $500, or by imprisonment not exceeding six months, or by both such fine and imprisonment. Regulations. Publication. Penalty.

STATE AND METROPOLITAN AREA TRAILS

SEC. 8. (a) The Secretary of the Interior is directed to encourage States to consider, in their comprehensive statewide outdoor recreation plans and proposals for financial assistance for State and local projects submitted pursuant to the Land and Water Conservation Fund Act, needs and opportunities for establishing park, forest, and other recreation trails on lands owned or administered by States, and recreation trails on lands in or near urban areas. He is further directed, in accordance with the authority contained in the Act of May 28, 1963 (77 Stat. 49), to encourage States, political subdivisions, and private interests, including nonprofit organizations, to establish such trails. 78 Stat. 897. 16 USC 460*l*-4 note. 16 USC 460*l*-460*l*-3.

(b) The Secretary of Housing and Urban Development is directed, in administering the program of comprehensive urban planning and assistance under section 701 of the Housing Act of 1954, to encourage the planning of recreation trails in connection with the recreation and transportation planning for metropolitan and other urban areas. He is further directed, in administering the urban open-space program under title VII of the Housing Act of 1961, to encourage such recreation trails. 73 Stat. 678; 78 Stat. 792; 81 Stat. 262. 40 USC 461. 75 Stat. 183. 42 USC 1500 *et seq.*

(c) The Secretary of Agriculture is directed, in accordance with authority vested in him, to encourage States and local agencies and private interests to establish such trails.

(d) Such trails may be designated and suitably marked as parts of the nationwide system of trails by the States, their political subdivisions, or other appropriate administering agencies with the approval of the Secretary of the Interior. Suitable markings.

RIGHTS-OF-WAY AND OTHER PROPERTIES

SEC. 9. (a) The Secretary of the Interior or the Secretary of Agriculture as the case may be, may grant easements and rights-of-way upon, over, under, across, or along any component of the national trails system in accordance with the laws applicable to the national park system and the national forest system, respectively: *Provided*, That any conditions contained in such easements and rights-of-way shall be related to the policy and purposes of this Act. Easements and rights-of-way.

Cooperation of Federal agencies.

(b) The Department of Defense, the Department of Transportation, the Interstate Commerce Commission, the Federal Communications Commission, the Federal Power Commission, and other Federal agencies having jurisdiction or control over or information concerning the use, abandonment, or disposition of roadways, utility rights-of-way, or other properties which may be suitable for the purpose of improving or expanding the national trails system shall cooperate with the Secretary of the Interior and the Secretary of Agriculture in order to assure, to the extent practicable, that any such properties having values suitable for trail purposes may be made available for such use.

AUTHORIZATION OF APPROPRIATIONS

SEC. 10. There are hereby authorized to be appropriated for the acquisition of lands or interests in lands not more than $5,000,000 for the Appalachian National Scenic Trail and not more than $500,000 for the Pacific Crest National Scenic Trail.

Approved October 2, 1968.

1983 Amendment to National Trails System Act

Public Law 98-11
98th Congress

An Act

Mar. 28, 1983
[S. 271]

To amend the National Trails System Act by designating additional national scenic and historic trails, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

National Trails System Act, amendment.

TITLE I—LIMITATION ON APPROPRIATIONS

16 USC 1249 note.

SEC. 101. Authorizations of appropriations under this Act shall be effective only for the fiscal year beginning on October 1, 1983, and subsequent fiscal years. Notwithstanding any other provision of this Act, authority to enter into contracts, and to make payments, under this Act shall be effective only to such extent or in such amounts as are provided in advance in appropriation Acts.

TITLE II—AMENDMENTS TO THE NATIONAL TRAILS SYSTEM ACT

National Trails System Act Amendments of 1983.
16 USC 1241 note.

SEC. 201. This title may be cited as the "National Trails System Act Amendments of 1983".

SEC. 202. Section 2 of the National Trails System Act (82 Stat. 919; 16 U.S.C. 1241 et seq.) is amended—

(1) in subsection (b), by striking out "the purpose" and inserting in lieu thereof "The purpose"; and

(2) by adding at the end thereof the following new subsection:

"(c) The Congress recognizes the valuable contributions that volunteers and private, nonprofit trail groups have made to the development and maintenance of the Nation's trails. In recognition of these contributions, it is further the purpose of this Act to encourage and assist volunteer citizen involvement in the planning, development, maintenance, and management, where appropriate, of trails.".

16 USC 1242.

SEC. 203. Section 3 of the National Trails System Act is amended—

(1) by striking out "composed of—" and inserting in lieu thereof "composed of the following:";

(2) by redesignating paragraphs (a) through (d) as paragraphs (1) through (4), respectively, and by inserting "(a)" after "SEC. 3.";

(3) in paragraph (2) of subsection (a) (as so redesignated), by adding at the end thereof the following: "National scenic trails may be located so as to represent desert, marsh, grassland, mountain, canyon, river, forest, and other areas, as well as landforms which exhibit significant characteristics of the physiographic regions of the Nation.";

(4) in the fourth sentence of paragraph (3) of subsection (a) (as so redesignated), by striking out "Act, are established as initial" and inserting in lieu thereof "Act are included as";

(5) in the fifth sentence of paragraph (3) of subsection (a) (as so redesignated), by striking out "subsequently"; and

(6) by adding at the end thereof the following new subsections:

"(b) For purposes of this section, the term 'extended trails' means trails or trail segments which total at least one hundred miles in length, except that historic trails of less than one hundred miles may be designated as extended trails. While it is desirable that extended trails be continuous, studies of such trails may conclude that it is feasible to propose one or more trail segments which, in the aggregate, constitute at least one hundred miles in length. "Extended trails."

"(c) On October 1, 1982, and at the beginning of each odd numbered fiscal year thereafter, the Secretary of the Interior shall submit to the Speaker of the United States House of Representatives and to the President of the United States Senate, an initial and revised (respectively) National Trails System plan. Such comprehensive plan shall indicate the scope and extent of a completed nationwide system of trails, to include (1) desirable nationally significant scenic and historic components which are considered necessary to complete a comprehensive national system, and (2) other trails which would balance out a complete and comprehensive nationwide system of trails. Such plan, and the periodic revisions thereto, shall be prepared in full consultation with the Secretary of Agriculture, the Governors of the various States, and the trails community.". Plan submittal.

SEC. 204. Section 4(b) of the National Trails System Act is amended— 16 USC 1243.

(1) in clauses (i) and (ii) by striking out "Secretary of the Interior" and inserting in lieu thereof "appropriate Secretary";

(2) in clause (i), by striking out "agencies, and" and inserting in lieu thereof "agencies;";

(3) in clause (ii), by striking out the period at the end thereof and inserting in lieu thereof "; and"; and

(4) by adding at the end thereof the following:

"(iii) trails on privately owned lands may be designated 'National Recreation Trails' by the appropriate Secretary with the written consent of the owner of the property involved.".

SEC. 205. (a) Section 5(a) of the National Trails System Act is amended by adding at the end thereof the following: 16 USC 1244.

"(11) The Potomac Heritage National Scenic Trail, a corridor of approximately seven hundred and four miles following the route as generally depicted on the map identified as 'National Trails System, Proposed Potomac Heritage Trail' in 'The Potomac Heritage Trail', a report prepared by the Department of the Interior and dated December 1974, except that no designation of the trail shall be made in the State of West Virginia. The map shall be on file and available for public inspection in the office of the Director of the National Park Service, Washington, District of Columbia. The trail shall initially consist of only those segments of the corridor located within the exterior boundaries of federally administered areas. No lands or interests therein outside the exterior boundaries of any federally administered area may be acquired by the Federal Government for the Potomac Heritage Trail. The Secretary of the Interior may designate lands outside of federally administered areas as segments of the trail, only upon application from the States or local governmental agencies involved, if such segments meet the criteria established in this Act and are administered by such agencies without expense to the United States. The trail shall be administered by the Secretary of the Interior. Potomac Heritage National Scenic Trail. Map; public availability.

Natchez Trace National Scenic Trail.

"(12) The Natchez Trace National Scenic Trail, a trail system of approximately six hundred and ninety-four miles extending from Nashville, Tennessee, to Natchez, Mississippi, as depicted on the map entitled 'Concept Plan, Natchez Trace Trails Study' in 'The Natchez Trace', a report prepared by the Department of the Interior and dated August 1979. The map shall be on file and available for public inspection in the office of the Director of the National Park Service, Department of the Interior, Washington, District of Columbia. The trail shall be administered by the Secretary of the Interior.

Map; public availability.

Florida National Scenic Trail.

"(13) The Florida National Scenic Trail, a route of approximately thirteen hundred miles extending through the State of Florida as generally depicted in 'The Florida Trail', a national scenic trail study draft report prepared by the Department of the Interior and dated February 1980. The report shall be on file and available for public inspection in the office of the Chief of the Forest Service, Washington, District of Columbia. No lands or interests therein outside the exterior boundaries of any federally administered area may be acquired by the Federal Government for the Florida Trail except with the consent of the owner thereof. The Secretary of Agriculture may designate lands outside of federally administered areas as segments of the trail, only upon application from the States or local governmental agencies involved, if such segments meet the criteria established in this Act and are administered by such agencies without expense to the United States. The trail shall be administered by the Secretary of Agriculture.".

Report; public availability.

16 USC 1244.

(b) Section 5(b) of the National Trails System Act is amended—

(1) by inserting after the second sentence the following: "The feasibility of designating a trail shall be determined on the basis of an evaluation of whether or not it is physically possible to develop a trail along a route being studied, and whether the development of a trail would be financially feasible.";

(2) in paragraph (b)(3), by inserting "16" before "U.S.C."; and

(3) in paragraph (b)(11)(B) by inserting the word "exploration," after "commerce," in the first sentence.

(c) Section 5(c) of the National Trails System Act is amended—

(1) in paragraph (9), by striking out "Sante Fe" and inserting in lieu thereof "Santa Fe"; and

(2) by adding after paragraph (23) the following:

"(24) Juan Bautista de Anza Trail, following the overland route taken by Juan Bautista de Anza in connection with his travels from the United Mexican States to San Francisco, California.

"(25) Trail of Tears, including the associated forts and specifically, Fort Mitchell, Alabama, and historic properties, extending from the vicinity of Murphy, North Carolina, through Georgia, Alabama, Tennessee, Kentucky, Illinois, Missouri, and Arkansas, to the vicinity of Tahlequah, Oklahoma.

"(26) Illinois Trail, extending from the Lewis and Clark Trail at Wood River, Illinois, to the Chicago Portage National Historic Site, generally following the Illinois River and the Illinois and Michigan Canal.

"(27) Jedediah Smith Trail, to include the routes of the explorations led by Jedediah Smith—

"(A) during the period 1826-1827, extending from the Idaho-Wyoming border, through the Great Salt Lake, Sevier, Virgin, and Colorado River Valleys, and the Mojave Desert, to the San Gabriel Mission, California; thence through the Tehachapi Mountains, San Joaquin and Stanislaus River Valleys, Ebbetts

Pass, Walker River Valley, Bald Mount, Mount Grafton, and Great Salt Lake to Bear Lake, Utah; and

"(B) during 1828, extending from the Sacramento and Trinity River Valleys along the Pacific coastline, through the Smith and Willamette River Valleys to the Fort Vancouver National Historic Site, Washington, on the Columbia River.

"(28) General Crook Trail, extending from Prescott, Arizona, across the Mogollon Rim to Fort Apache.

"(29) Beale Wagon Road, within the Kaibab and Coconino National Forests in Arizona: *Provided,* That such study may be prepared in conjunction with ongoing planning processes for these National Forests to be completed before 1990.".

(d) Section 5(d) of the National Trails System Act is amended— 16 USC 1244.

(1) by inserting after the first sentence the following: "If the appropriate Secretary is unable to establish such an advisory council because of the lack of adequate public interest, the Secretary shall so advise the appropriate committees of the Congress."; and

(2) by redesignating paragraphs (i) through (iv) as paragraphs (1) through (4), respectively, and by amending paragraph (1) (as so redesignated) to read as follows:

"(1) the head of each Federal department or independent agency administering lands through which the trail route passes, or his designee;".

(e) Section 5(f) of the National Trails System Act is amended—

(1) in paragraph (1), by striking out "national recreational" and inserting in lieu thereof "national historic", and by striking out "and" after the semicolon;

(2) by striking out the period at the end of paragraph (2) and inserting in lieu thereof a semicolon; and

(3) by adding at the end thereof the following:

"(3) a protection plan for any high potential historic sites or high potential route segments; and

"(4) general and site-specific development plans, including anticipated costs.".

SEC. 206. Section 6 of the National Trails System Act is amended— 16 USC 1245.

(1) in the first sentence, by inserting "by the appropriate Secretary" after "marked"; and

(2) by striking out ": *Provided*" and all that follows through the period and inserting in lieu thereof the following: ", or, where the appropriate Secretary deems necessary or desirable, on privately owned lands with the consent of the landowner. Applications for approval and designation of connecting and side trails on non-Federal lands shall be submitted to the appropriate Secretary.".

SEC. 207. (a) Section 7 of the National Trails System Act is amended— 16 USC 1246.

(1) by striking out "SEC. 7. (a)" and inserting in lieu thereof "(2)"; and

(2) by inserting the following immediately after the section heading:

"SEC. 7. (a)(1)(A) The Secretary charged with the overall administration of a trail pursuant to section 5(a) shall, in administering and managing the trail, consult with the heads of all other affected State and Federal agencies. Nothing contained in this Act shall be deemed to transfer among Federal agencies any management responsibil- *Ante*, p. 43.

ities established under any other law for federally administered lands which are components of the National Trails System. Any transfer of management responsibilities may be carried out between the Secretary of the Interior and the Secretary of Agriculture only as provided under subparagraph (B).

Management transference, procedure. *Ante*, p. 43.

"(B) The Secretary charged with the overall administration of any trail pursuant to section 5(a) may transfer management of any specified trail segment of such trail to the other appropriate Secretary pursuant to a joint memorandum of agreement containing such terms and conditions as the Secretaries consider most appropriate to accomplish the purposes of this Act. During any period in which management responsibilities for any trail segment are transferred under such an agreement, the management of any such segment shall be subject to the laws, rules, and regulations of the Secretary provided with the management authority under the agreement, except to such extent as the agreement may otherwise expressly provide.";

(3) in the first sentence of paragraph (2) of this subsection (a) (as redesignated by paragraph (1) of this subsection), by striking out "thereof", and inserting in lieu thereof "of the availability of appropriate maps or descriptions", and striking out ", together with appropriate maps and descriptions".

16 USC 1246.

(b) Section 7(b) is amended—

(1) by inserting "of the availability of appropriate maps or descriptions" after "notice"; and

(2) by striking out "together with appropriate maps and descriptions,".

Trail interpretation sites.

(c) Section 7(c) is amended by adding at the end thereof the following: "The appropriate Secretary may also provide for trail interpretation sites, which shall be located at historic sites along the route of any national scenic or national historic trail, in order to present information to the public about the trail, at the lowest possible cost, with emphasis on the portion of the trail passing through the State in which the site is located. Wherever possible, the sites shall be maintained by a State agency under a cooperative agreement between the appropriate Secretary and the State agency.".

16 USC 1246.

(d) Section 7(e) of the National Trails System Act is amended by—

(1) deleting reference in the first sentence to "subsection (g)" and substituting, in lieu thereof, "subsection (f)"; and

(2) by deleting the period at the end of the first sentence, and in lieu thereof, substituting a colon and the following proviso: "*Provided further,* That the appropriate Secretary may acquire lands or interests therein from local governments or governmental corporations with the consent of such entities.".

(e) Section 7(f) of the National Trails System Act is amended by inserting "(1)" after "(f)" and by adding at the end thereof the following:

"(2) In acquiring lands or interests therein for a National Scenic or Historic Trail, the appropriate Secretary may, with consent of a landowner, acquire whole tracts notwithstanding that parts of such tracts may lie outside the area of trail acquisition. In furtherance of the purposes of this Act, lands so acquired outside the area of trail acquisition may be exchanged for any non-Federal lands or interests therein within the trail right-of-way, or disposed of in accordance with such procedures or regulations as the appropriate Secretary shall prescribe, including: (i) provisions for conveyance of such

Procedures or regulations.

acquired lands or interests therein at not less than fair market value to the highest bidder, and (ii) provisions for allowing the last owners of record a right to purchase said acquired lands or interests therein upon payment or agreement to pay an amount equal to the highest bid price. For lands designated for exchange or disposal, the appropriate Secretary may convey these lands with any reservations or covenants deemed desirable to further the purposes of this Act. The proceeds from any disposal shall be credited to the appropriation bearing the costs of land acquisition for the affected trail.".

(f) Section 7(g) of the National Trails System Act is amended in the last sentence by striking out "No" and inserting in lieu thereof "Except for designated protected components of the trail, no". 16 USC 1246.

(g) Section 7(h) of the National Trails System Act is amended—

(1) by inserting "(1)" after "(h)";

(2) in the second sentence, by striking out "a national scenic or national historic trail" and inserting in lieu thereof "such a trail";

(3) by inserting after the second sentence the following: "Such agreements may include provisions for limited financial assistance to encourage participation in the acquisition, protection, operation, development, or maintenance of such trails, provisions providing volunteer in the park or volunteer in the forest status (in accordance with the Volunteers in the Parks Act of 1969 and the Volunteers in the Forests Act of 1972) to individuals, private organizations, or landowners participating in such activities, or provisions of both types. The appropriate Secretary shall also initiate consultations with affected States and their political subdivisions to encourage— 16 USC 18g note, 558a note.

"(A) the development and implementation by such entities of appropriate measures to protect private landowners from trespass resulting from trail use and from unreasonable personal liability and property damage caused by trail use, and

"(B) the development and implementation by such entities of provisions for land practices, compatible with the purposes of this Act,

for property within or adjacent to trail rights-of-way. After consulting with States and their political subdivisions under the preceding sentence, the Secretary may provide assistance to such entities under appropriate cooperative agreements in the manner provided by this subsection."; and

(4) by striking out "Whenever the" in the last sentence of such subsection and inserting in lieu thereof the following: "(2) Whenever the".

(h) Section 7(i) of the National Trails System Act is amended by adding at the end thereof the following new sentence: "The Secretary responsible for the administration of any segment of any component of the National Trails System (as determined in a manner consistent with subsection (a)(1) of this section) may also utilize authorities related to units of the national park system or the national forest system, as the case may be, in carrying out his administrative responsibilities for such component.". 16 USC 1246.

(i) Section 7 of the National Trails System Act is amended by inserting after subsection (i) the following:

"(j) Potential trail uses allowed on designated components of the national trails system may include, but are not limited to, the following: bicycling, cross-country skiing, day hiking, equestrian Trail, uses.

activities, jogging or similar fitness activities, trail biking, overnight and long-distance backpacking, snowmobiling, and surface water and underwater activities. Vehicles which may be permitted on certain trails may include, but need not be limited to, motorcycles, bicycles, four-wheel drive or all-terrain off-road vehicles. In addition, trail access for handicapped individuals may be provided. The provisions of this subsection shall not supersede any other provisions of this Act or other Federal laws, or any State or local laws.

Restrictions.

"(k) For the conservation purpose of preserving or enhancing the recreational, scenic, natural, or historical values of components of the national trails system, and environs thereof as determined by the appropriate Secretary, landowners are authorized to donate or otherwise convey qualified real property interests to qualified organizations consistent with section 170(h)(3) of the Internal Revenue Code of 1954, including, but not limited to, right-of-way, open space, scenic, or conservation easements, without regard to any limitation on the nature of the estate or interest otherwise transferable within the jurisdiction where the land is located. The conveyance of any such interest in land in accordance with this subsection shall be deemed to further a Federal conservation policy and yield a significant public benefit for purposes of section 6 of Public Law 96-541.".

26 USC 170.

26 USC 170 and note.

SEC. 208. Section 8 of the National Trails System Act is amended—

16 USC 1247.

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following:

"(d) The Secretary of Transportation, the Chairman of the Interstate Commerce Commission, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976, shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with the National Trails System Act, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this Act, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.".

45 USC 801 note.

Railroad rights-of-way.

SEC. 209. Section 10 of the National Trails System Act is amended—

16 USC 1249.

(1) by inserting "(a)(1)" after "SEC. 10.";

(2) by striking out "(a) The" in the second sentence and inserting in lieu thereof "for the";

(3) by striking out "It is the express intent" and inserting in lieu thereof the following:

"(2) It is the express intent";

* * *

494 U.S. 1 (1990)

PRESEAULT ET UX.
v.
INTERSTATE COMMERCE COMMISSION ET AL.

No. 88-1076.

Supreme Court of United States.

Argued November 1, 1989
Decided February 21, 1990

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Michael M. Berger argued the cause for petitioners. With him on the briefs were *Clarke A. Gravel, Richard E. Davis,* and *T. Christopher Greene.*

Brian J. Martin argued the cause for the federal respondents. With him on the brief were *Acting Solicitor General Bryson, Acting Assistant Attorney General Carr, Deputy Solicitor General Wallace, Anne S. Almy, James E. Brookshire, Robert S. Burk,* and *Ellen D. Hanson, John K. Dunleavy,* Assistant Attorney General, argued the cause for respondents State of Vermont et al. With him on the brief were *Jeffrey L. Amestoy,* Attorney General, and *John T. Leddy.*[*]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is the constitutionality of a federal "rails-to-trails" statute under which unused railroad rights-of-way are converted into recreational trails notwithstanding whatever reversionary property interests may exist under state law. Petitioners contend that the statute violates both the Fifth Amendment Takings Clause and the Commerce Clause, Art. I, § 8. We find it unnecessary to evaluate the merits of the takings claim because we hold that even if the rails-to-trails statute gives rise to a taking, compensation is available to petitioners under the Tucker Act, 28 U. S. C. § 1491(a)(1) (1982 ed.), and the requirements of the Fifth Amendment are satisfied. We also hold that the statute is a valid exercise of congressional power under the Commerce Clause.

964 N.E.2d 779 (2012)

Henry L. HOWARD, et al., Plaintiffs,
v.
UNITED STATES, Defendant.

No. 94S00-1106-CQ-333.
Supreme Court of Indiana.
March 20, 2012.

Brent W. Baldwin, J. Robert Sears, Baker Sterchi Cowden & Rice, L.L.C., St. Louis, MO, Bryan H. Babb, Alan S. Townsend, Bose McKinney & Evans LLP, Indianapolis, IN, Attorneys for Plaintiffs.

Ignacia S. Moreno, Assistant Attorney General, David C. Shilton, United States Department of Justice, Environment & Natural Resources Division, Washington, DC, Joseph H. Hogsett, United States Attorney, Southern District of Indiana, Shelese Woods, United States Attorneys Office, Indianapolis, IN, Attorneys for Defendant.

DICKSON, Justice.

The United States Court of Federal Claims has certified for our resolution the following question:

Under Indiana law, are railbanking and interim trail use pursuant to 16 U.S.C. § 1247(d) uses that are within the scope of the easements acquired by the railroad companies either by prescription, condemnation, or the deed at issue; and if either is not within the scope of the easements originally acquired, is railbanking with interim tr[ai]l use a shifting public use?

Pursuant to Indiana Appellate Rule 64, we accepted the question and now answer both parts in the negative. Under Indiana law, railbanking and interim trail use pursuant to 16 U.S.C. § 1247(d) are not uses within the scope of the easements, and railbanking with interim trail use does not constitute a permissible shifting public use.

911 S.W.2d 653 (1995)

Jerry JORDAN and Shirley Jordan, Plaintiffs-Respondents,
v.
John H. STALLINGS, Jr., Defendant-Appellant.

Missouri Court of Appeals, Southern District, Division One

November 27, 1995

King E. Sidwell, Blanton, Rice, Sidwell & Ottinger, Sikeston, defendant-appellant.

James M. McClellan, Dempster, Barkett, McClellan & Edwards, Sikeston, plaintiffs-respondents.

GARRISON, Judge.

This is an appeal by John H. Stallings, Jr. (Defendant) from a $5000 judgment entered by the trial court on the petition of Jerry Jordan and his wife, Shirley (Plaintiffs). The court found that Defendant "did trespass on the property of the Plaintiffs and without Plaintiffs' consent removed dirt and soil from Plaintiffs' land thereby causing a permanent nuisance with run off water onto Plaintiffs' property constituting an unreasonable interference with the use and enjoyment of Plaintiffs' land." We affirm in part and reverse in part.

436 S.W.2d 666 (1969)

SCHUERMANN ENTERPRISES, INC., formerly known as Land Investment Corporation, a Corporation, Appellant,
v.
ST. LOUIS COUNTY, Union Electric Company, Terminal Railroad Association of St. Louis, and Title Insurance Corporation, Respondents.

Supreme Court of Missouri, Division No. 1.

January 13, 1969.
Motion to Correct Opinion for Rehearing or to Transfer Denied February 10, 1969.

Robert A. Hamilton, Kenneth S. Lay, Tremayne, Joaquin, La & Carr, Clayton, Carroll J. Donohue, Shulamith, Simon, Husch, Eppenberger, Donohue, Elson & Cornfeld, St. Louis, for appellant.

Joseph B. Moore, St. Louis County Counselor, Clayton, for respondent, St. Louis County.

George P. Mueller, St. Louis, for respondent, Terminal R. R. Assn. of St. Louis.

Jesse E. Bishop, St. Louis, for respondent, Title Ins. Corp.

C. Kenneth Thies, Kerth, Thies, Schreiber & Hamel, Clayton, for respondent Union Electric Co.

Motion to Correct Opinon for Rehearing or to Transfer to Court En Banc Denied February 10, 1969.

HIGGINS, Commissioner.

Plaintiff's action was for a declaratory judgment that a deed of April 17, 1902, conveyed only an easement to the grantee; and defendants sought and had judgment determining that the deed conveyed a fee simple title.

981 S.W.2d 644 (1998)

Carroll Lee and Mary BOYLES, et al., Respondents,

v.

MISSOURI FRIENDS OF THE WABASH TRACE NATURE TRAIL, INC., et al., Appellants.

Missouri Court of Appeals, Western District.

November 17, 1998.

Motion for Rehearing and/or Transfer Denied December 22, 1998.

Application for Transfer Denied January 19, 1999.

Jerold L. Drake, Stephens, Drake & Larison, Grant City, for appellants.

Rochelle B. Ecker, Stinson, Mag & Fizzell, P.C., Kansas City, John Thomas Crawford, III, Missouri Farm Bureau, Jefferson City, for amicus curiae for respondents.

Before ULRICH, P.J., and SMART, J., and EDWIN H. SMITH, J.

Motion for Rehearing and/or Transfer to Supreme Court Denied December 22, 1998.

ULRICH, Presiding Judge.

Appellant, Missouri Friends of the Wabash Trace Nature Trail, Inc. (Wabash), appeals the trial court's order granting summary judgment in favor of Carroll Lee and Mary A. Boyles and other landowners[1] (Landowners) in Landowners' action to quiet title to a 100-foot strip of land in Nodaway County formerly used as a railroad right-of-way and in Wabash's counterclaim for waste against the Boyles. Wabash contends that the trial court erred in granting summary judgment to Landowners on Landowners' action and on its counterclaim because (1) after purchasing the land in 1995 from Norfolk and Western Railway Company, it continued to use the land for rail or transportation purposes; (2) Landowners were not the original owners, heirs, or grantees of owners from whom the property was taken by condemnation in 1879, and the deeds by which Landowners acquired their land excluded the land corridor from the legal description; and (3) it and its predecessors in title acquired title to the land through adverse possession for a period of over ten years. The judgment of the trial court is affirmed.

KANSAS CITY AREA TRANSPORTATION AUTHORITY, Respondent,
v.
GERARD H. DONOVAN, ET AL., Appellants.

Court of Appeals of Missouri, Western District.

Opinion Filed February 4, 2020.

Bernard J. Rhodes, for Respondent.

Sherry D. DeJanes, for Appellants.

Appeal from the Circuit Court of Jackson County, Missouri, The Honorable Charles H. McKenzie, Judge.

Special Division: Edward R. Ardini, Jr., Presiding Judge, Mark D. Pfeiffer, Judge and Cynthia L. Martin, Judge.

At issue in this appeal is ownership of a parcel of real property: the Kansas City Area Transit Authority ("KCATA") claims that the property is part of the right of way it owns in fee simple and upon which it maintains the Harry Wiggins Trolley Track Trail; Gerard Donovan and Sherry DeJanes Donovan, husband and wife, claim ownership of the property as part of their backyard. In 1989, the Donovans erected a wooden privacy fence that extended approximately 40 feet beyond what was originally platted as the rear line of their property. To the rear of the Donovans' property is the land upon which the trail is located. In 2016, the Donovans replaced most of the fence due to deterioration and erected a new fence in essentially the same place as the 1989 fence.

In 2016, the KCATA filed this action against the Donovans seeking a declaratory judgment that the Donovans had no interest in the parcel of trail property enclosed by their fence, and asserting claims of quiet title and ejectment. In their answers, the Donovans raised various affirmative defenses, including laches and equitable estoppel. They also asserted counterclaims for declaratory judgment, quiet title, and adverse possession.

The parties filed cross-motions for summary judgment. In its motion, the KCATA claimed that the property enclosed by the Donovans' fence which extends beyond their original property line is owned by the KCATA in fee simple. The Donovans claimed that the KCATA never acquired a fee simple interest in that property; rather, the series of conveyances which resulted in the KCATA claiming ownership of the trail property only conveyed a railroad easement. The Donovans asserted that the railroad easement was abandoned prior to the attempted transfer to the KCATA, and that as a result of the abandonment, ownership of the trail property formerly burdened by the easement vested in them as abutting landowners.

The trial court granted the KCATA's motion and denied the Donovans' motion, finding that the KCATA had acquired a fee simple interest in the trail property, the Donovans' counterclaim of adverse possession failed as a matter of law, and that the affirmative defenses raised by the Donovans were inapplicable to the issues in this case. The Donovans appealed.

AFFIRMED.

134 S.Ct. 1257 (2014)

MARVIN M. BRANDT REVOCABLE TRUST, et al., Petitioners
v.
UNITED STATES.

No. 12-1173.

Supreme Court of United States.

Argued January 14, 2014.
Decided March 10, 2014.

Steven J. Lechner, Denver, CO, for Petitioners. Anthony A. Yang, Washington, D.C., for Respondent.

Steven J. Lechner, Esq., Counsel of Record, Jeffrey W. McCoy, Esq., Mountain States Legal Foundation, Lakewood, CO, for Petitioners.

Donald B. Verrilli, Jr., Solicitor General, Robert Dreher, Acting Assistant Attorney General, Edwin S. Kneedler, Deputy Solicitor General, Anthony A. Yang, Assistant to the Solicitor General, Counsel of Record, William B. Lazarus, John L. Smeltzer, Katherine J. Barton, Department of Justice, Washington, D.C., for Respondent.

Chief Justice ROBERTS delivered the opinion of the Court.

In the mid-19th century, Congress began granting private railroad companies rights of way over public lands to encourage the settlement and development of the West. Many of those same public lands were later conveyed by the Government to homesteaders and other settlers, with the lands continuing to be subject to the railroads' rights of way. The settlers and their successors remained, but many of the railroads did not. This case presents the question of what happens to a railroad's right of way granted under a particular statute — the General Railroad Right-of-Way Act of 1875 — when the railroad abandons it: does it go to the Government, or to the private party who acquired the land underlying the right of way?

More than 70 years ago, the Government argued before this Court that a right of way granted under the 1875 Act was a simple easement. The Court was persuaded, and so ruled. Now the Government argues that such a right of way is tantamount to a limited fee with an implied reversionary interest. We decline to endorse such a stark change in position, especially given "the special need for certainty and predictability where land titles are concerned." *Leo Sheep Co., supra,* at 687, 99 S.Ct. 1403.

The judgment of the United States Court of Appeals for the Tenth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, dissenting.