APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GARY E. ALBRIGHT, *et al.*,
Plaintiff-Appellants
CLAUDE J. ALLBRITTON, *et al.*,
Plaintiff-Appellants,
v.
UNITED STATES,
Defendant- Appellee.

PERRY LOVERIDGE, *et al.*,
Plaintiffs
NEAL ABRAHAMSON, *et al.*,
Plaintiff-Appellants,
v.
UNITED STATES,
Defendant- Appellee.

GARY E. ALBRIGHT, *et al.*,
Plaintiffs
DANIEL EARL HIGGINS, III, MICHAEL J. OPOKA,
ZELDA L. OPOKA,
Plaintiff-Appellants,
v.
UNITED STATES,
Defendant- Appellee.

Nos. 2019-2078, 2019-2080, 2019-2090, 2019-2316

Appeals from the United States Court of Federal Claims in Nos. 1:16-cv-00912-NBF, 1:16-cv-01565-NBF, 1:18-cv-00375-NBF, Senior Judge Nancy B. Firestone

DECIDED: DECEMBER 1, 2020

Before PROST, *Chief Judge*, LINN and TARANTO, *Circuit Judges*.

PROST, *Chief Judge*.

These consolidated appeals stem from a "rails-to-trails" conversion in Oregon. The Court of Federal Claims determined that the twenty-six deeds at issue each conveyed fee simple title, not an easement from Appellants' predecessors-in-interest to the railroad.[1] *See generally Loveridge v. United*

[1] Like the parties, we identify the deeds by the grantor's name or, if the grantor executed more than one deed, by both the grantor's name and the book and leading page number. The deeds at issue on appeal are Beals 18/40 (J.A. 20, 1219); Bryden (J.A. 24, 1234); Burgholzer 83/99 (J.A. 26, 1238); Cummings (J.A. 35, 1263); DuBois 24/40 (J.A. 41, 1281); Friday (J.A. 44, 1296); Galvani (J.A. 45, 1300); Gattrell (J.A. 46, 1302); Goodwin (J.A. 50, 1310); Hagen (J.A. 51, 1312); Jeffries (J.A. 63, 1357); Rinck (J.A. 88, 1438); Rupp (J.A. 92, 1446); Slattery (J.A. 96, 1462); Smith (J.A. 97, 4871); Stowell (J.A. 100, 1473); Thayer 11/355 (J.A. 103, 1478); Watt 12/343 (J.A. 112, 1478); Watt 12/344 (J.A. 113, 1502); Watt 12/345 (J.A. 114, 1504); Westinghouse 85/39 (J.A. 117, 1504); Wheeler Lum- ber 16/3 (J.A. 119, 2133); Wheeler Lumber 16/5 (J.A. 120, 4773); Wilson 75/244 (J.A. 122, 1524); Woodbury 16/481 (J.A. 123, 4864); and Woodbury 23/399 (J.A. 124, 4829).

States, No. 16-912L, 2019 WL 495578 (Fed. Cl. Feb. 8, 2019) ("*Reconsideration*"); *Loveridge v. United States*, 139 Fed. Cl. 122 (2018) ("*Decision*"). For that reason, the Court of Federal Claims concluded that Appellants have no compensable property interest in the land to which the deeds pertain. Appellants appealed. We affirm.

I

The United States Surface and Transportation Board ("STB") has regulatory authority over rail carriers who wish to discontinue or abandon any part of their railroad line. 49 U.S.C. §§ 10501(b), 10903. Discontinuance "allows a railroad to cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service in the future." *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 4 n.3 (1990) ("*Preseault I*"). Abandon- ment "removes the line from the national rail system and terminates the railroad's common carrier obligation for the line." *Chi. Coating Co., LLC v. United States*, 892 F.3d 1164, 1166 (Fed. Cir. 2018). A railroad seeking to abandon any part of its railroad line must either file a standard abandonment application under 49 U.S.C. § 10903 or seek an exemption under 49 U.S.C. § 10502. *See Caldwell v. United States*, 391 F.3d 1226, 1228 & n.3 (Fed. Cir. 2004).

A provision of the National Trails System Act Amendments of 1983, Pub. L. No. 98-11, sec. 208(1), 97 Stat. 42, 48 (codified as amended at 16 U.S.C. § 1247(d)), provides an alternative to abandonment called "railbanking," which preserves the possibility of future

use of the land for railroad purposes but permits a trail sponsor to both take responsibility for the land and convert it in the interim to a recreational trail. *Preseault I*, 494 U.S. at 6–7; *Chi. Coating*, 892 F.3d at 1167. To initiate this process, a prospective trail sponsor must first notify the STB of its interest to repurpose the land to interim trail use. *Preseault I*, 494 U.S. at 7 n.5; *Chi. Coating*, 892 F.3d at 1167 & n.3. If the railroad agrees to negotiate an interim trail use/rail- banking agreement with the prospective trail sponsor, the STB issues a Certificate of Interim Trail Use ("CITU") or, in the case of exemption proceedings, a Notice of Interim Trail Use ("NITU"). *See* 49 C.F.R. § 1152.29(c)–(d); *Caquelin v. United States*, 959 F.3d 1360, 1363 (Fed. Cir. 2020); *Chi. Coating*, 892 F.3d at 1167. The CITU or NITU provides the parties with a period of time to negotiate a trail use agreement. *See* 49 C.F.R. § 1152.29. If the parties reach an agreement, upon notifying the STB, the corridor is railbanked, and the trail sponsor may convert the rail segment to a trail. *See Preseault I*, 494 U.S. at 7.

Turning now to this case, on May 26, 2016, the Port of Tillamook Bay Railroad ("POTB") filed an exemption notice with the STB to abandon the portion of its rail line located between milepost 775.1 (near Banks, Oregon) and milepost 856.08 (near Tillamook, Oregon). On June 7, 2016, the Salmonberry Trail Intergovernmental Agency ("STIA") asked the STB to issue a NITU for the segment. The STB issued the NITU on July 26, 2016, after POTB expressed its willingness to negotiate with STIA for interim trail use and railbanking. STIA and POTB ultimately reached an

interim trail use agreement and notified the STB of the agreement on October 23, 2017.

Shortly after the NITU issued, Plaintiffs-Appellants filed the underlying action in the Court of Federal Claims, alleging that the conversion of the land to interim trail use amounted to a Fifth Amendment taking. One hundred thirty-two deeds were initially at issue in the case. Twenty-six deeds remain at issue in this appeal. Appellants contend that "their predecessors-in-interest granted only easements to the railroad which terminated when the railroad became dormant" and, as a result, "conversion of the rail corridor gave rise to a" compensable Fifth Amend- ment taking. *See Decision*, 139 Fed. Cl. at 127. In re- sponse, the government argued that there was no compensable taking because the deeds at issue "conveyed the property within the rail corridor to the railroads in fee simple absolute." *Id*. The Court of Federal Claims agreed with the government, concluding on partial summary judg- ment that the twenty-six deeds at issue conveyed fee sim- ple title to the railroad and that, therefore, no Fifth Amendment taking occurred.

Appellants appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

II

We review de novo the decision of the Court of Federal Claims on summary judgment. *Cienega Gardens v. United States*, 331 F.3d 1319, 1328 (Fed. Cir. 2003); *see also Chi. Coating*, 892 F.3d at 1169. "Summary judgment is appropriate where there is no genuine dispute as to any material fact and the moving

party is entitled to judgment as a mat- ter of law." *Arko Exec. Servs., Inc. v. United States*, 553 F.3d 1375, 1378 (Fed. Cir. 2009) (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986)); see also R. Ct. Fed. Cl. 56(a).

The Fifth Amendment of the Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V, cl. 4. Here, the only issue on appeal is whether the twenty-six deeds at issue conveyed to the railroad an estate in fee sim- ple absolute or an easement. If the deeds conveyed only an easement, then the Appellants might have a valid takings claim. *See Preseault v. United States*, 100 F.3d 1525, 1533 (Fed. Cir. 1996) (en banc) ("*Preseault II*"); *see also Chi. Coating*, 892 F.3d at 1170; *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009). But if the railroad "obtained fee simple title to the land over which it was to operate, and that title inures, as it would, to its successors, the [Appellants] would have no right or interest in those parcels and could have no claim related to those par- cels for a taking." *Preseault II*, 100 F.3d at 1533; *see also Chi. Coating*, 892 F.3d at 1170; *Ellamae Phillips*, 564 F.3d at 1373. To determine the nature of the conveyance, we apply Oregon law as it is "the law of the state where the property interest[s] arise[]." *Chi. Coating*, 892 F.3d at 1170.

For the reasons below, we agree with the Court of Federal Claims that each of the twenty-six deeds conveyed fee simple title to the railroad and, accordingly, Appellants have no compensable Fifth

Amendment takings claim relating to these deeds.

A

Under Oregon law, "[w]hether an instrument conveys ownership of land or only an easement depends upon the intention of the parties."[2] *Bouche v. Wagner*, 293 P.2d 203, 208 (Or. 1956) (internal quotation marks omitted); *see also Bernards v. Link*, 248 P.2d 341, 344 (Or. 1952).

In *Wason v. Pilz*, a case that did not involve a railroad deed, the Oregon Supreme Court considered a deed conveying a parcel of land for road purposes. 48 P. 701, 701–02 (Or. 1897). The court concluded that because the convey- ance granted land only for limited purposes, the language of the conveyance was "indicative of an easement only" and was "controlling as the measure of the estate granted." *Id*.

In *Bernards*, the Oregon Supreme Court held that the railroad deed at issue granted an easement, not a fee simple estate, and stated:

> It will be observed from the deed that (1) it was en- titled "Right of Way Deed"; (2) a conveyance of the strip was made "for use as a right of way"; (3) the consideration was only $1

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[2] The parties dispute whether, under Oregon law, it is presumed that the parties intended to convey a fee simple estate unless the intent to pass a lesser estate was expressly stated or necessarily implied. We need not decide this issue to resolve the case, as we conclude that the deeds at issue convey a fee simple estate even if there is no presumption that they did so.

> [i.e., the consideration was nominal]; (4) the conveyance was subject to a condition subsequent which revested all title in the grantors in the event the stipulated condition oc- curred; (5) the grantees were required to construct for the use of the grantors a cattle crossing; (6) the description included the phrase "over and across and out of the land of the grantors"; (7) the phraseology employed repeatedly the term "strip of land"; [and] (8) the grantee was required to "build and keep in repair a good and substantial fence along each side of the strip."

Bernards, 248 P.2d at 343–44. Although "[v]arious tests ha[d] been suggested by the commentators for facilitating a determination whether a deed like the one before [the court] grants an easement or conveys the fee," the court "deem[ed] it unnecessary to set forth . . . a review of the many authorities cited by the parties" because "the [*Wason*] decision is determinative of the issues under consideration." *Id*. at 343–44. In particular, like the deed in *Wason*, the deed in *Bernards* similarly conveyed land only for a limited purpose: specifically, the deed "convey[ed] . . . *for its use as a right of way for a railroad*, a strip of land." *Id*. at 342 (emphasis added.

The Oregon Supreme Court considered another rail- road deed in *Bouche* but this time concluded that the deed conveyed fee simple title. 293 P.2d at 210. As in *Bernards*, the court stressed the importance of what the deed purports to convey. Specifically, the court explained:

> A study of the cited cases suggests that the courts have little difficulty, where a railroad company is the grantee, in declaring that the instrument creates only an easement whenever the grant is a use to be made of the property, usually, but not invariably, described as for use as a right of way in the grant.
>
> On the other hand, . . .[c]onveyances to railroads, which purport to grant and convey a strip, piece, parcel, or tract of land, and which do not contain additional language relating to the use or purpose to which the land is to be put or in other ways cutting down or limiting, directly or indirectly, the estate conveyed, are usually construed as passing an estate in fee.

Id. at 209 (internal quotation marks omitted).

The court further remarked that courts had "express[ed] a divergence of opinion when the conveyance merely has a reference to the use or purpose to which the land is to be put, and which is contained in either the granting or habendum clause, and, except for the reference, would uniformly be construed as passing title in fee." *Id*. The court explained that the "confusion . . . arises for the most part in the failure to distinguish the twofold meaning of the words 'right of way.'" *Id*. Specifically, the term right of way is "sometimes used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed." *Id*. (quoting *Joy v. City of St. Louis*, 138 U.S. 1, 44 (1891) (emphasis omitted)).

In considering the 1921 deed at issue in the case, the court concluded that "it was the intention of the parties that the fee in the land should pass," reasoning:

> The conveyance is not entitled (1) a "right of way deed"; (2) the granting clause conveys land, not a right; (3) the consideration was substantial ($650); (4) there is no reverter provided for; (5) the words "over and across the lands of the grantors" do not appear; and (6) the land conveyed is described with precision.

Id. at 206, 209–10. The court explained further that "[t]he only indication that the parties may have intended an easement should pass is the incidental reference to a 'right of way' in the covenant following the granting and habendum clause," but that term "could have referred to either the right of passage or to the land itself," and there was nothing in the deed that limited the use the grantee might make of the land. *Id*. at 209.

The court also concluded that the 1919 deed at issue "conveyed the fee simple title to the land involved," reasoning:

> [The deed] contained no mention of a right of way; it described the subject of the grant as "a strip of land," not as a "right," and there was no statement of the purposes for which it was granted; it de- scribed the land conveyed with a relatively high degree of precision; and the habendum clause is of the type usually employed to convey a fee simple title.

Id. at 206–07, 210.

B

We conclude that each of the twenty-six deeds conveyed fee simple title, not merely an easement, and we thus affirm the decision of the Court of Federal Claims.

Importantly, the granting clauses of all twenty-six deeds at issue purport to convey land—not an easement, not a right of way, and not property for specified purposes. Seventeen of the deeds provide, with at most minor and immaterial grammatical differences: "[The grantors] bargain, sell, grant, convey, and confirm" to the railroad company "and to its successors and assigns forever, *all of* the following described real property . . . to wit: *a strip of land* . . . ." (emphasis added).[3] Four deeds provide, again with at most minor and immaterial grammatical differences: "[The grantors] grant, bargain and sell, convey[,] and confirm . . . *all that certain lot, piece, parcel and tract of land* . . . ." (emphasis added).[4] Four more deeds provide, yet again with at most minor immaterial grammatical differences: "[The grantors] bargain, sell, grant, convey[,] and confirm . . . *a strip of land*. . . ." (emphasis

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[3] These deeds are Beals 18/40, Burgholzer 83/99, Cummings, DuBois 24/40, Goodwin, Jeffries, Rinck, Slat- tery, Smith, Thayer 11/355, Watt 12/343, Watt 12/344, Watt 12/345, Westinghouse 85/39, Wheeler Lumber 16/3, Wheeler Lumber 16/5, and Wilson 75/244.

[4] These deeds are Friday, Galvani, Hagen, and Stowell.

added).[5] And the remaining deed—Bryden—provides: "[The grantors] grant, bargain, sell and convey . . . *all of* the following bounded and described real property. . . *a strip of land*. . . ." (emphasis added).

Although four of the deeds—Bryden, Friday, Smith, and Stowell—include the word "right of way," the deeds do so only in their descriptions of the property conveyed and only to describe the land itself, not to describe what was being conveyed. *Reconsideration*, 2019 WL 495578, at *51–52, 56–57; *see Bouche*, 293 P.2d at 209 (discussing the "twofold meaning" of right of way).

In addition, although seven deeds—DuBois, Gattrell, Goodwin, Rinck, Slattery, Wheeler Lumber 16/3, and Wheeler Lumber 16/5—further indicate that the right to operate a railroad is conveyed, this language is clearly em- ployed merely to confirm that the conveyance includes that right, not to limit the interest conveyed to that right. *E.g.*, J.A. 50–51, 1310 (providing that "real property" is conveyed to the railroad "and to its successors and assigns forever[,] . . . together with the appurtenances[,] tenements[,] and hereditaments thereunto belonging or in anywise appertaining, together *also* with the right to maintain and operate a railroad thereover" (emphasis added)); J.A. 120– 121, 4773 (providing that "real property" is conveyed to the railroad "and to its successors and assigns forever . . . [t]ogether with the appurtenances, tenements[,] and hereditaments thereunto belonging or

[5] hese deeds are Gattrell, Rupp, Woodbury 16/481, and Woodbury 23/399.

in anywise appertaining[,] . . . grantors *confirming* also to the grantee, its successors and assigns, the right to build, maintain and operate a line of railway thereover" (emphasis added)).

In addition, none of the deeds provide for a reverter or otherwise contain language limiting the use that the grantee could make of the land. To the contrary, each of the deeds purport to convey land to the grantee and "to its successors and assigns *forever*." And twenty-five of the twenty-six deeds specify that the land is conveyed with all appurtenances, tenements and hereditaments. The deeds at issue are thus much more akin to the 1921 deed in Bouche than to the deed in *Bernards*. *Compare Bouche*, 293 P.2d at 209 (concluding that the 1921 deed conveyed a fee simple in part because "there [was] no reverter provided for"), *with Bernards*, 248 P.2d at 342 (deed at issue provid- ing that "should [the grantee] fail so to build such railroad, this grant shall become null and void, and the title to said strip so conveyed shall revert to said grantors and their successors in interest").

In sum, like the granting clause at issue in *Bouche*, the granting clauses in all the deeds at issue here plainly pur- port to convey real property. And the deeds state that the property is conveyed to the grantee and its successors and assigns "forever." The granting clauses do not purport to convey an easement, a right of way, or something else that would indicate an intent to convey an easement, such as property for specific purposes like the deed at issue in Ber- nards. Nor do the deeds provide for reverter or otherwise limit the uses the grantee can make of the land. These observations

strongly support the conclusion that the deeds transferred fee simple absolute title to the land. *See Bouche*, 293 P.2d at 209–10; *Bernards,* 248 P.2d at 342–44.

Nothing points us to a different conclusion. Appellants argue that the deeds' use of the phrase "strip of land" evidences that the deeds conveyed only an easement. Appellants rely on *Bernards*'s "observation" that the deed at issue, which the court construed as conveying an easement, "employed repeatedly the term 'strip of land.'" *Bernards*, 248 P.2d at 343.

Appellants' argument is unpersuasive. For starters, the *Bouche* court stated that "[c]onveyances to railroads, which purport to grant and convey a strip . . . of land" and do not otherwise limit the estate conveyed "are usually construed as passing an estate in fee." *Bouche*, 293 P.2d at 209. The *Bouche* court also specifically concluded that the 1919 deed at issue conveyed fee simple title in part because "it described the subject of the grant as 'a strip of land,' not as a 'right.'" *Id*. at 210. Accordingly, although the deeds describe the land conveyed as a strip, that fact, standing alone, does not evidence that the parties to the deed intended to convey only an easement.

Even assuming Appellants are correct that *Bernards* attached significance to the deeds' use of the term "strip of land," *Bouche* appears to have reduced or eliminated such significance. And it is not at all clear that *Bernards* did attach great significance to the term, considering *Bernards* merely observed that the deed

included the term but otherwise rested heavily on *Wason*—which did not relate to the significance of the term strip of land—in reaching its decision. *See Bernards*, 248 P.2d at 343–44. Furthermore, at most *Bernards* attached significance to "repeated[]" use of the term strip of land, but here the deeds use the term infrequently: most use the term only once to describe the land being conveyed, and the deeds that more often use the term do so only because they describe more than one strip of land.

Appellants further point to a number of Oregon Supreme Court cases stating that it is against public policy to have numerous strips of land all held separately in fee simple absolute. *See, e.g., Cross v. Talbot*, 254 P. 827, 828 (Or. 1927). This argument is also unpersuasive. Our decision relies on the relevant Oregon case law, including *Bernards* and *Bouche*. Appellants have failed to persuade us that *Bernards* and *Bouche* are not good law or otherwise do not already account for this public policy, particularly con- sidering that the Oregon Supreme Court announced this public policy long before *Bernards* and *Bouche*. Furthermore, we note that it is beyond question that, under Oregon law, railroads sometimes obtained fee simple title to strips of land used for their rail lines. *See, e.g., Bouche*, 293 P.2d 203. This is such a case.

In addition, Appellants contend that the deeds do not describe the land with precision, which favors finding that the deeds convey an easement. This argument falls short because each of the deeds describes the land conveyed with at least some precision. In particular, each deed identifies the boundaries of the

strip of land conveyed in reference to the centerline of the railroad that had been surveyed and located before executing the deeds. Under such circum- stances, it can hardly be said that the deeds failed to adequately specify the boundaries of the land conveyed. *See, e.g.*, Restatement (First) of Property § 471 (1944) (observing that "a conveyance creating an estate" can describe the land conveyed "in any of many different ways," including "by reference to an area to be located by survey with reference to a known point or points").

Appellants also highlight that many of the deeds use the term "through" or "across," which they contend is similar to the *Bernards* deed's usage of "over and across and out of the land of the grantors." *Bernards*, 248 P.2d at 342–43. We are not convinced. The deed in *Bernards* used that phrase in the granting clause to describe what was conveyed, and the usage suggested that the deed conveyed not a possessory interest in the property itself but rather a nonpossessory right of way over and across the land. *See id*. In contrast, here the deeds do not use "through" and "across" to limit what was conveyed by the deed. Rather, the deeds use the terms only in the description of the property conveyed and merely to communicate that the railroad had been located through certain property.

Furthermore, Appellants argue that, for many of the deeds, the stated consideration was nominal, which Appellants contend evidences that the parties intended to convey only an easement. Under these circumstances, reciting nominal consideration is insufficient to overcome the other factors supporting a determination that the deeds convey an estate in fee

simple absolute. We also note that, on at least one occasion, an Oregon appellate court gave little weight to a pre-1967 deed's recitation of nominal consider- ation of $1 on the basis that "[i]t was not until 1967 that the legislature" began "requiring that conveyances state true and actual consideration," and there was "no evidence that one dollar was the true consideration." *Realvest Corp. v. Lane Cnty.*, 100 P.3d 1109, 1118 & n.6 (Or. Ct. App. 2004). Likewise, the deeds at issue here were all executed prior to 1967, and there is no evidence that the recited consideration is the true consideration.

Finally, Appellants contend that we should construe the deeds as passing an easement because each deed specifically states that the railroad had already surveyed and located a railway across the grantor's land prior to executing the deed. Appellants rely on our decision in *Preseault II*. There, we interpreted Vermont law as providing that where a railroad company's survey and location of the railway precedes the execution of a written instrument, the survey and location, not the subsequent written instrument, "is the operative determinant." *Preseault II*, 100 F.3d at 1536–37. We explained that railroads in Vermont had eminent domain power to acquire easements in land necessary to operate rail lines. *Id*. We reasoned that where a railroad company surveys and locates its right of way prior to any written agreement, such action evidences the company's intent to acquire only an easement pursuant to its eminent domain authority, and any subsequent written conveyance "retain[s] [that] eminent domain flavor." *Id*.

Appellants' reliance on *Preseault II* is unpersuasive.

Preseault II applied Vermont law, not Oregon law, and we are unaware of any authority in Oregon that supports Appellants' position. To the contrary, the 1921 deed construed in *Bouche* plainly indicated that it was executed after the railroad was "located and established," and the *Bouche* court gave no significance whatsoever to that. *Bouche*, 206 Or. at 206, 209. We do not accept Appellants' invitation to depart from *Bouche*.

Furthermore, even the Supreme Court of Vermont has not interpreted *Preseault II* to support Appellants' position. In *Old Railroad Bed, LLV v. Marcus*, the Supreme Court of Vermont explained that "[t]o the extent that . . . *Preseault* [*II*] holds that a location survey automatically converts a subsequent fee-simple conveyance into an easement, we know of no law in Vermont or elsewhere to support such a claim." 196 Vt. 74, 79 (2014). Indeed, a location survey does not "preclude[] a railroad from subsequently purchasing, or the landowner from subsequently conveying, a deeded fee-simple interest." *Id*. at 81. For at least these reasons, we do not read *Preseault II* as broadly as Appellants, and even if we did, *Preseault II* would nevertheless not justify departing from *Bouche* and *Bernards*.

In short, we conclude that the twenty-six deeds at issue here each conveyed an estate in fee simple absolute, not an easement, to the railroad company. Importantly, each of the deeds purports to convey land, not an easement, right of way, or property for specified purposes. In addition, the deeds purport to convey the land forever and do not provide for reverter or

otherwise restrict the use the grantee could make of the land. Even though some of the deeds recite only nominal consideration and the deeds were executed after the railroad was surveyed and located, on balance and under these circumstances, we conclude that the parties conveyed estates in fee simple absolute to the railroad company.[6]

III

We have considered Appellants' remaining arguments but find them unpersuasive. For the foregoing reasons, we affirm the decision of the Court of Federal Claims.

AFFIRMED

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[6] We further note that even if we were to conclude, for one or more deeds, that there was irreconcilably conflicting language between the granting clause and other parts of the deed, the granting clause—which purports to convey land, not a right of way or property for specified purposes—would control. *Palmateer v. Reid*, 254 P. 359, 361 (Or. 1927); *see also First Nat'l Bank of Or. v. Townsend*, 555 P.2d 477, 478 (Or. Ct. App. 1976) ("There is also authority for the more technical proposition that if the in- tent of the parties cannot be discerned from the deed and there is, as here, an irreconcilable conflict between the granting clause and other parts of the deed, the estate con- veyed in the granting clause will prevail.").

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GARY E. ALBRIGHT, *et al.*,
Plaintiff-Appellants
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Defendant- Appellee.

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Nos. 2019-2078, 2019-2080, 2019-2090, 2019-2316

Appeals from the United States Court of Federal Claims in Nos. 1:16-cv-00912-NBF, 1:16-cv-01565-NBF, 1:18-cv-00375-NBF, Senior Judge Nancy B. Firestone

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

December 1, 2020 /s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX C

UNITED STATES COURT OF FEDERAL CLAIMS

PERRY LOVERIDGE, *et al*.,
Plaintiffs,
v.
THE UNITED STATES,
Defendant.

ALBRIGHT, *et al*.,
Plaintiffs,
and
THE UNITED STATES,
Defendant.

No. 16-912L and 16-1565L
and No. 18-375L Consolidated
(FILED: February 8, 2019)
NOT FOR PUBLICATION

Motion for Reconsideration; Rails-to-Trails; Oregon Law; Easement; Fee Simple

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OPINION ON PLAINTIFFS' MOTIONS FOR RECONSIDERATION

I. INTRODUCTION

The *Albright* and *Loveridge* plaintiffs have asked this court to reconsider its rulings in its August 13, 2018 Opinion regarding 57 of the 132

deeds at issue in this case.[1] The plaintiffs dispute the court's findings that under Oregon law, certain deeds conveyed fee title to the railroad in these rails-to-trails cases as opposed to an easement. The *Albright* plaintiffs ask the court to reconsider its rulings as to 44 deeds while the *Loveridge* plaintiffs request reconsideration with respect to 25 deeds of which 12 are also included in the *Albright* plaintiffs' motion. In total the plaintiffs in these cases are seeking reconsideration on 57 deeds that the court determined conveyed a fee to the railroad.

The *Albright* and *Loveridge* plaintiffs move for reconsideration under Rule 59(a)(1) of the Rules of the United States Court of Federal Claims. Under that Rule, this court, "in its discretion, 'may grant a motion for reconsideration [,]'" but only if "'there has been an intervening change in the controlling law, newly discovered evidence, or a need to correct clear factual or legal error or prevent manifest injustice.'" *Biery v. United States*, 818 F.3d 704, 711 (Fed. Cir. 2016) (quoting *Young v. United States*, 94 Fed. Cl. 671, 674 (2010)). Accordingly, "[a] motion for reconsideration must also be supported 'by a showing of extraordinary circumstances which justify relief.'" *Id*. (citing *Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004)). The Supreme Court has held that motions for

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1 Prior to the court issuing its August 13, 2018 decision, the parties agreed as to whether 30 of the deeds conveyed a fee or an easement. Additionally, the parties do not challenge the court's legal conclusions regarding 45 of the deeds. At issue on reconsideration are certain deeds which the court determined conveyed a fee to the railroad and which plaintiffs argue should have been determined ot have conveyed an easement.

reconsideration "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (quoting 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2810.1 (2d ed. 1995)). *See also Lone Star Indus., Inc. v. United States*, 111 Fed. Cl. 257, 259 (2013) ("A Rule 59 motion 'must be based upon manifest error of law, or mistake of fact, and is not intended to give an unhappy litigant an additional chance to sway the court.'" (quoting *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 300 (1999))). "A court . . . will not grant a motion for reconsideration if the movant 'merely reasserts . . . arguments previously made . . . all of which were carefully considered by the Court.'" *Ammex, Inc. v. United States*, 52 Fed. Cl. 555, 557 (2002) (quoting *Principal Mut. Life Ins. Co. v. United States*, 29 Fed. Cl. 157, 164 (1993)). Rather, "the movant must point to a manifest (i.e., clearly apparent or obvious) error of law or a mistake of fact." *Id*. (citing *Principal Mut. Life Ins. Co.*, 29 Fed. Cl. at 164)*; Lucier v. United States*, 138 Fed. Cl. 793, 798-99 (2018). "'Manifest,' as in 'manifest injustice,' is defined as clearly apparent or obvious," *Lucier*, 138 Fed. Cl. at 799 (quoting *Ammex*, 52 Fed. Cl. at 557), and therefore, as the court recently explained, a party "seek[ing] reconsideration on the ground of manifest injustice, . . . cannot prevail unless it demonstrates that any injustice is apparent to the point of being almost indisputable." *Id*. (citations and internal quotation marks omitted). The plaintiffs contend that there has been a manifest injustice on the grounds that the court misapplied Oregon law and that

its rulings are inconsistent with this court's prior rulings in *Boyer v. United States*, 123 Fed. Cl. 430 (2015), a different rails to trails case arising in Oregon.[2]

II. THE COURT'S RULINGS ARE CONSISTENT WITH OREGON LAW.

Both the *Albright* and *Loveridge* plaintiffs argue that in its August 13, 2018 Opinion, the court did not properly consider the factors the Oregon Supreme Court laid out in *Bernards v. Link*, 248 P.2d 341 (Or. 1952), *opinion adhered to on reh'g*, 263 P.2d 794 (Or. 1953) (Mem.), and *Bouche v. Wagner*, 293 P.2d 203 (Or. 1956) when seeking to determine whether a conveyance of a strip of land to a railroad conveyed an easement or a fee simple interest. In *Bernards* the Oregon Supreme

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[2] The *Loveridge* plaintiffs also seek reconsideration with regard to the Goodspeed 16/487 and Goodspeed 9/200 deeds and the Smith, Lloyd 16/515 deed under Rule 60(a) for clerical errors. Rule 60(a) provides that "[t]he court may correct a clerical mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." First, the *Loveridge* plaintiffs argue that the court switched the text of the deed and analyses of the Goodspeed 16/487 and Goodspeed 9/200 in its August 13, 2018 opinion. Upon careful review the court agrees with the plaintiffs and the discussion of the Goodspeed 16/487 and Goodspeed 9/200 deeds in this opinion are consistent with this correction. Second the *Loveridge* plaintiffs argue that the court committed a clerical error when it recited the consideration of the Smith, Lloyd 16/515 deed as $1 rather that $150. The court agrees and the court's analysis of the effect of this correction is reflected in the court's analysis of the plaintiffs' Rule 59 motion for reconsideration of the Smith, Lloyd 16/515 deed. Therefore, the *Loveridge* plaintiffs Rule 60(a) motion for reconsideration is GRANTED.

Court, in finding that an easement had been conveyed to a railroad, identified eight factors courts have looked at to determine the intent of the parties to convey an easement or a fee when the intent is not clear from the face of the deed. The factors examined include: 1) whether the deed is entitled a right of way; 2) whether the interest conveyed is described as a strip of land for use as a right of way; 3) whether the deed contains a reverter clause that makes clear that the property will be returned to the grantor if it no longer will be used as a right of way; 4) whether the consideration is nominal; 5) whether the grantees have to provide crossings; 6) whether the phrase "strip of land" is used repeatedly to describe the interest being conveyed; 7) whether the property conveyed is described with precision (if not it is more likely an easement); and 8) whether fencing is required to be maintained by the railroad. *Bernards* 248 P.2d at 343. In *Bernards*, the Oregon Supreme Court found that a deed conveyed only an easement when the deed was labeled a right of way deed, nominal consideration was paid, the grant was for a strip of land to be used as a right of way for a railroad, the right of way was not described with precision, the grant was by its terms for the construction of a railroad and the property would revert back to the grantors if a railroad line was not built. *Id*.

Later in *Bouche* the Oregon Supreme Court was asked to decide whether a different deed conveyed an easement or fee to the railroad. In that decision, the Oregon Supreme Court explained that courts, in endeavoring to ascertain the intent of parties where the intent is not express, but the phrase "right of way" is

used, will generally find an easement when the grant references the use to be made of the property in the granting or habendum clause. Bouche, 293 P.2d at 209. Thus in *Bouche*, the Oregon Supreme Court held that a deed conveyed a fee to the railroad where the deed: 1) described the conveyance as a strip of land without identifying the grant as only a right; 2) did not include a statement of purpose; 3) described the land to be conveyed with precision; and 4) used language in the habendum clause consistent with the grant of fee. In reaching this conclusion, the *Bouche* court explained that the fundamental task of a court in deciding whether a deed conveys a fee or an easement to the railroad is "to ascertain the intent of the original parties *by considering the language of the deed in its entirety* and the surrounding circumstances." *Bouche*, 293 P.2d at 208. *See also Doyle v. Gilbert*, 469 P.2d 624, 626 (Or. 1970); *U.S. Nat'l Bank of LaGrande v. Miller*, 258 P.2d 205, 209 (Or. 1927)).

In this case, after looking at the language of all of the deeds, including the ones not in dispute, the court found that certain of the *Bernards/Bouche* factors were not very helpful in discerning whether a deed conveyed a fee or easement because the parties had agreed that deeds with these factors conveyed both fees and easements. For example, the Alderman 11/614, Bryden 74/274, Cone 7/339, Handley 21/99, Hobson 7/39, and Illingworth 7/164 deeds, which the parties stipulated conveyed a fee to the railroad, all contained the phrase "strip of land" and language such as "through" and "across". Relying on the parties stipulations and comparing the language of the deeds that the parties

agreed conveyed either an easement or a fee, the court concluded that although it would consider the phrase "strip of land" as an indication of an intent to convey an easement under Oregon law, the phrase "strip of land" without more was not very helpful in determining the parties' intent in most instances. The court also found that use of the word "through," which the *Albright* plaintiffs contend is interchangeable with "over and across," was also of limited value in discerning the original parties' intent because virtually all of the fee and easement deeds used "through" to describe the location of the "strip of land" conveyed on the grantor's property. Furthermore, the court also found that the precision used to describe fee interest conveyed was not consistent between the properties the parties agreed were conveyed in fee and thus the court did not give that factor much weight. The Alderman 11/614 deed contained a far more precise description of the land being conveyed which included specific references to boundary markers and precise metes and bounds description while the Cone 7/339 deed only described the land being conveyed as a land which runs through certain parcels.[3]

In the court's view limiting the use of certain factors that were not helpful in discerning the parties' intent was in keeping with the Oregon Supreme Court's

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[3] The government notes that the Restatement (First) of Property §471, cmt. c. (1944) provides that references to "an area to be located by survey with reference to a known point or points" or an "area to be determined by survey" may be sufficient to indicate the intent to convey a fee. The more precise the more likely the deed conveys a fee.

decision in *Bouche*. In that case, the Oregon Supreme Court explained that under Oregon law, ORS 93.120, "any conveyance of real estate passes all the estate of the grantor, unless the intent to pass a lesser estate appears by express terms, or is necessarily implied in the terms of the grant." Thus, the Oregon Supreme Court went on to explain that in deciding what was conveyed to a railroad, courts must pay special attention to whether the deed limits the railroad's use of the property to only a right:

> [deeds] which purport to grant and convey a strip, piece, parcel, or tract of land, [but] which do not contain additional language *relating to the use or purpose to which the land is to be put or in other ways cutting down or limiting, directly or indirectly, the estate conveyed* . . . . [convey a fee]. *Id*. (quoting Annotation, *Deed to Railroad Co. as Conveying Fee or Easement*, 132 A.L.R. 142 (1941)).

In view of the foregoing, the court does not find that reconsideration is warranted solely on the grounds that the court did not give equal weight or sufficient weight to all of the eight *Bernards/Bouche* factors in deciding whether the original grantor conveyed a fee or easement to the railroad. This court examined each deed and applied the *Bernards/Bouche* factors as appropriate. Only to the extent that plaintiffs can show that these factors were misapplied will the court consider whether reconsideration is warranted.

III. DIFFERENCES BETWEEN THE COURT'S AUGUST 13 OPINION AND

THE RULING IN *BOYER* DO NOT WARRANT RECONSIDERATION.

Both the *Loveridge* and *Albright* plaintiffs also argue that this court's rulings in the August 13 Opinion are contrary to, and inconsistent with, the court's rulings three years ago in *Boyer v. United States*, 123 Fed. Cl. 430 (2015) and for this reason the court's rulings must be reconsidered. As discussed below, the court finds that any inconsistencies between the decisions do not warrant reconsideration of any ruling.

First, the *Boyer* and *Loveridge* and *Albright* cases involve different railroad lines and deeds and therefore the Boyer decision is of limited value in discerning the intent of the original parties to the deeds in this case.[4] While non-binding decisions may provide persuasive authority in certain circumstances, this is ordinarily only true, "when the facts at issue are substantially similar." *Tamerlane, Ltd. v. United States*, 81 Fed. Cl. 752, 759 (2008) (citing *Kerr-McGee Corp. v. United States*, 77 Fed. Cl. 309, 317 n. 10 (2007)). Here, the facts are not "substantially similar" to those in *Boyer*. The deeds and rail line are not the same. Second, in this case, the parties stipulated to certain deeds and the court relied on those stipulations in deciding the original parties' intent when considering the other deeds at issue. It is not appropriate to reconsider the court's ruling on the deeds in this case based on the

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[4] In its decision in *Boyer* the court considered several deeds in connection with the Portland, Eugene, and Eastern Railway. In the above-captioned cases the relevant rail line was the Port of Tillamook Bay Railroad.

court's ruling in *Boyer* regarding different rail lines and different deeds. The court applied the same Oregon law in both cases. Reconsideration, as noted above, is only appropriate if the court misapplied Oregon law.

IV. THE INDIVIDUAL DEEDS

Plaintiffs' motions for reconsideration of specific deeds are divided into the five categories the court asked the parties to use on reconsideration. *See* Oct. 22, 2018 Order. In its order, the court noted that the five categories may overlap and in that instance, the court explained that all of a plaintiffs' objections to the court's determination should "be addressed in the first category where the deed appears." *Id*.

A. Category I: Deeds that contain the language "together with the right to build, maintain, and operate thereover a railway" or other similar language.

Category I includes 10 deeds: Brinn 6/328; Cummings 77/262; DuBois 22/40; Gattrel 13/311; Goodwin 81/147; Large 5/536; Rinck 77/454; Slattery 94/161; Wheeler Lumber Co. 16/3; and Wheeler Lumber Co. 16/5.

For each of these 10 deeds in Category I, the *Albright* plaintiffs argue based on the language quoted above ("right to build, maintain, and operate language") that although the deeds do not include any right of way language that under *Bouche* these deeds must be read to convey only an easement. Specifically, the plaintiffs argue that under the standard set forth in *Bouche* any deed containing language relating to the

use of the property being conveyed for railroad use must be construed to convey an easement.

The government argues in support of the court's previous ruling that the subject deeds in Category I convey a fee that plaintiffs have mis-read *Bouche*. *Bouche* states that

> [c]ourts have little difficulty, where a railroad company is grantee, in declaring that the instrument creates only an easement whenever the grant is a use to be made of the property, usually, but not invariably, describe as for the use as a right of way in the grant. . . . The courts, however, seem to express a divergence of opinion when the conveyance merely has a reference to the use or purpose to which the land is to be put, and which is contained in either the granting or habendum clause, and, except for the reference, would uniformly be construed as passing title in fee.

The government argues that because the right to build, maintain, and operate language does not appear in either the granting or habendum clauses of the 10 deeds and because there is no right of way language in any of the deeds, the court was correct in determining that the right to build, maintain, and operate language does not indicate an intent by the original parties to grant an easement.

The court agrees with the government and sees no reason to re-examine its holding concerning the relevance of the right to build, maintain, and operate language unless that language appears in connection

with the grant of the property interest being conveyed. In other words, if the right to build, maintain, and operate language does not appear to affect the interest being conveyed, the court sees no reason to change its holding that such language indicates that the original parties intended to convey a fee to the railroad. However, the court will reevaluate each of these deeds to determine if the right to build, maintain, and operate language can be read in connection with the grant of the property interest and thus is better read as a limitation of that interest.

In further support of their motion for reconsideration of eight of the ten deeds[5] in Category I, the plaintiffs argue that the court incorrectly determined that the deeds described the strip of land conveyed with precision and thus the court should have determined that the deeds conveyed an easement and not a fee.[6] As stated above, the court will examine whether it correctly applied the *Bernards/Bouche* factors. The court's review of each of the deeds for which plaintiffs seek reconsideration in Category I are set forth below.

1. Brinn 6/328 Deed

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[5] These deeds are Cummings 77/262; Du Bois 22/40; Gattrel 13/311; Goodwin 81/147; Rinck 77/454; Slattery 94/161; Wheeler Lumber Co. 16/3; and Wheeler Lumber Co. 16/5.

[6] Additionally, the plaintiffs argue that the Du Bois 22/40; Wheeler Lumber Co. 16/3; and Wheeler Lumber Co. 16/5 deeds also contain nominal consideration which also indicates that the parties intended to convey only an easement and not a fee to the railroad.

The **Brinn 6/328 deed (Def.'s Ex. 11)** provides in pertinent part

> KNOW ALL MEN BY THESE PRESENTS: That foR [sic] and in consideration of the sum of $150.00 to them in hand paid, the receipt whereof is hereby acknowledged, G. A. Brinn and Annie Brinn, his wife, do hereby grant, bargain, sell and convey to the Pacific Railway and Navigation Company, and to its successors and assigns forever, all that portion of the land owned by them embraced in a strip of land 100 ft. wide, being 50 ft. on each side of the center line of the Pacific Railway and Navigation Company's Railway, as now surveyed, located and adopted thru the lands of the aforesaid G. A. and Annie Brinn, in Lots 1- 2- 3- 4- 5- 6- 7- and 8, [sic] Block "A", [sic] Plat of East Garibaldi, Sec. 21, T. 1 N. R. 10 W., W.M., said center line being more particularly described as follows:
>
> * * * [Description] * * *
>
> Together with the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining;
>
> TO HAVE AND TO HOLD unto the Pacific Railway and Navigation Company, and to its successoRs [sic] and assigns forever; together with the right to build, maintain and operate thereover a railway and telegraph line.

The court had found that the Brinn 6/328 deed

conveyed fee simple title to the railroad because the language confirming the right to build a railroad did not limit the railroad's use of the grant to only railroad purposes, the amount of consideration was substantial ($150), there was no "right of way" language used in the title or body of the deed nor any right of reverter if the railroad discontinued railroad use, and there was no requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.[7]

Given these findings, which are not disputed, the court rejects plaintiffs' contention that the right to build, maintain, and operate language in the final portion of the Brinn 6/328 deed mandates that the court find the Brinn 6/328 deed conveyed an easement. The Brinn 6/328 deed does not contain any of the other factors to suggest that the original parties intended to convey an easement. Therefore, the motion for reconsideration is denied.

2. Cummings 77/262 Deed

The **Cummings 77/262 deed (Def.'s Ex. 25)** provides in pertinent part:

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[7] The court compared the Brinn 6/328 deed as well as the other nine deeds in Category I with the Alley 5/475 deed which was the first deed analyzed by this court to contain the right to build, maintain, and operate language. The court notes that although the plaintiffs are challenging the court's legal conclusion about the significance of the right to build, maintain, and operate language in determining whether a fee or an easement was conveyed, they are not challenging the court's determination that the Alley 5/475 deed conveyed a fee and not an easement.

KNOW ALL MEN BY THESE PRESENTS, That for and in consideration of the sum of $217.00 to them in hand paid, the receipt whereof is hereby acknowledged, James Cummings and Ann Cummings[,] his wife, hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Washington and State of Oregon, to-wit:-

A strip of land one hundred feet in width, being fifty feet on each side of and parallel with the center line of the track of the grantee as the same is surveyed and located through the West half of the Southeast quarter of Section 29 in Township 3 North of Range 4 West of the Willamette Meridian, containing 7.70 acres more or less.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD to the above named grantee and to its successors and assigns forever.

The grantors do further covenant that the grantee may operate a railway line over the properties above described and also do all things convenient or useful to be done in

> connection therewith. The grantors do covenant that they are seised of the aforesaid premises in fee simple; that their estate therein is free from all liens and encumbrances, and that they will and their heirs, executors and administrators shall forever warrant and defend the above granted premises unto the grantee herein and unto its successors and assigns forever against the lawful claims and demands of all persons.

The court had found that the Cummings 77/262 deed conveyed fee simple title to the railroad because the language confirming that the right to build a railroad did not limit the railroad's use of the grant to only railroad purposes, the amount of consideration was substantial ($217), there was no "right of way" language used in the title or body of the deed nor any right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Given these findings, which are not disputed, the court rejects plaintiffs' contention that the right to build, maintain, and operate language in the final portion of the deed mandates that the court find the Cummings 77/262 deed conveyed an easement.

The plaintiffs also argue that the description of the property conveyed is not precise and thus the court should have found that the deed conveyed an easement and not a fee. The court disagrees. First, the description of the location of the land being conveyed to the

railroad is sufficient to determine where that land was and the deed specifically states how many acres of land was conveyed to the railroad. Additionally, the description of the land is nearly identical to the description provided for in several other deeds that both the plaintiffs and the government agreed conveyed a fee to the railroad. *See* Cone 7/339[8], Handley 21/99[9], Hobson 7/39[10], Illingworth 7/164[11]. Furthermore, in the description of the location of the property interest being

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[8] The Cone 7/339 deed states in relevant part: "A strip of land one hundred (100) feet wide being fifty (50) feet on each side of the centerline of the railway of the grantee as the same is surveyed and located through Lot One of Block ten in Cone & McCoy's Addition to Bay City, according to the recorded plat thereof; Also through Lots twenty eight, thirty, and thirty one in J.J. McCoy's Addition to Bay City, according to the recorded plat thereof."

[9] Handley 21/99 deed states in relevant part "A strip of land one hundred (100) feet wide being fifty (50) feet on each side of the centerline of the railway of the grantee as the same is now surveyed and located through the south half (1/2) of block "B" in East Garfald Oregon, all being in Tillamook County State of Oregon"

[10] Hobson 7/39 deed states in relevant part "A strip of land one hundred (100) feet wide being fifty (50) feet on each side of the centerline of the railway grantee as the same is surveyed and located through Lots three, four and seven of section twenty-two, in Township of North of Range Ten West of Willamette Meridian."

[11] Illingworth 7/164 deed states in relevant part "A strip of land one hundred (100) feet wide being (50) feet on each side of the centerline of the railway of the grantee as the same is surveyed and located through Lot five of section 22, in Township One North of Range ten west of Willamette Meridian."

conveyed the parties indicate that the land had already been surveyed which when read in conjunction with Restatement (First) of Property §471, cmt. c. (1944) (See, n. 3 supra) shows sufficient precision in the description of the location of the conveyed land to conclude that the parties intended to convey a fee. Thus, the court finds that its original conclusion that the *Bernards/Bouce* factors weighed in favor of finding that the Cummings 77/262 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

3. Du Bois 24/40 Deed

The Du Bois 24/40 deed (Def.'s Ex. 32) provides in pertinent part:

> Know All Men by These Presents: That for and in consideration of the sum of One Dollar[]($1.00), the receipt whereof is hereby acknowledged, Willie G. Du Bois and John E. Du Bois, her husband, hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situated in the county of Tillamook and state of Oregon, to-wit:
>
> A strip of land sixty feet in width being thirty feet on each side of the center line of grantee's railway as the same is last located, staked out, surveyed and being constructed through the following described tract, to- wit:

Beginning at the […] corner on the south bank of the Nehalen Bay on the section line between sections two (2) and three (3) in township two (2) north. Range ten (10) west in said county and state and running thence south on said section line 5.26 chains to a post: thence south 55° 30° West 5.88 chains to post at the Southeast corner of the tract of land hereby described: thence South 55°330° West 6.46 chains to the southwest corner: thence north 34°30° West 6.38 chains to the south bank of Nehalen Bay: thence easterly up said Nehaluen Bay following the meanderings thereof to appoint and post north 34°30° West 5.55 chains from the said southeast corner of the lands hereby described; thence south 34°30° east 5.55 chains to the said southeast corner and place of beginning.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

To Have and to Hold to the above named grantee and to its successors and assigns forever; the grantors confirming also to the grantee, its successors and assigns, the right to build, maintain and operate a line of railway thereover.

The aforesaid grantors do hereby covenant that they are the owners in fee simple of the above granted premises and that they will forever Warrant and Defend the same unto the

> said grantee, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Du Bois 24/40 deed conveyed fee simple title to the railroad despite the nominal consideration ($1) because the language confirming the right to build a railroad did not limit the railroad's use to only railroad purposes, there was no "right of way" language used in the title or body of the deed nor any right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Given these findings, which are not disputed, the court rejects plaintiffs' contention that the right to build, maintain, and operate language in the final portion of the deed mandates that the court find the Du Bois 24/40 deed conveyed an easement.

The plaintiffs also argue that the description of the property conveyed is not precise and thus the court should have found that the deed conveyed an easement and not a fee. The court disagrees. First, the description of the location of the land being conveyed to the railroad is sufficient to determine its precise location. Additionally, the description of the land is nearly identical to the description provided for in several other deeds that both the plaintiffs and the government agreed conveyed a fee to the railroad. *See* Cone 7/339, Handley 21/99, Hobson 7/39, Illingworth 7/164. Furthermore, in the description of the location of the property interest being conveyed the parties indicate

that the land had already been surveyed which when read in conjunction with Restatement (First) of Property §471, cmt. c. (1944) shows sufficient precision in the description of the location of the conveyed land to conclude that the parties intended to convey a fee. Thus, the court finds that its original conclusion that the *Bernards*/*Bouche* factors weighed in favor of finding that the Du Bois 24/40 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[12]

4. Gattrell 13/311 Deed

The Gattrell 13/311 deed (Def.'s Ex. 40) provides in pertinent part:

> Know all Men by These Presents: That for and in consideration of the sum of One ($1.00), to him in hand paid, the receipt whereof is hereby acknowledged, F.J. Gattrell an unmarried man, hereinafter called the grantor, does bargain, sell, grant[,] convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its

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[12] The plaintiffs also argue that because the consideration in the deed was nominal ($1) the court improperly determined that the Du Bois 24/40 deed conveyed a fee rather than an easement. However, the plaintiffs and the government stipulated that that Johnson 11/353 deed and the Parks 11/329 deed conveyed a fee to the railroad despite the amount of consideration only being $1.00 and the deed containing "strip of land" and "through". Thus given the parties stipulations, the court finds that the fact that the consideration in the deed was nominal is not determinative in concluding that the deed conveyed an easement rather than a fee.

> successors and assigns forever, a strip of land sixty (60) feet in width, being thirty (30) feet on each side of and parallel with the center line of the railway of the grantee as the same is now located, surveyed and staked out through lot two (2) of section twenty nine (29) in township two (2) North of range ten (10) West of the Willamette Meridian, in the County of Tillamook and State of Oregon.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> To have and to hold unto the [above named] grantee and to its successors and assigns forever, confirming to the grantee likewise the right to build, maintain and operate a railway line thereover.

The court had found that the Gattrell 13/311 deed conveyed fee simple title to the railroad despite the nominal consideration ($1) because the language confirming the right to build a railroad did not limit the railroad's use to only railroad purposes, there was no "right of way" language used in the title or body of the deed nor any right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Given these findings, which are not disputed, the court rejects plaintiffs' contention that the right to build, maintain, and operate language in the final

portion of the deed mandates that the court find the Gattrell 13/311 deed conveyed an easement.

The plaintiffs also argue that the description of the property conveyed is not precise and thus the court should have found that the deed conveyed an easement and not a fee. The court disagrees. First, the description of the location of the land being conveyed to the railroad is sufficient to determine its precise location. Additionally, the description of the land is nearly identical to the description provided for in several other deeds that both the plaintiffs and the government agreed conveyed a fee to the railroad. See Cone 7/339, Handley 21/99, Hobson 7/39, Illingworth 7/164. Furthermore, in the description of the location of the property interest being conveyed the parties indicate that the land had already been surveyed which when read in conjunction with Restatement (First) of Property §471, cmt. c. (1944) shows sufficient precision in the description of the location of the conveyed land to conclude that the parties intended to convey a fee. Thus, the court finds that its original conclusion that the *Bernards/Bouce* factors weighed in favor of finding that the Gattrell 13/311 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[13]

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[13] The plaintiffs also argue that because the deed provide only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee.

5. Goodwin 81/147 Deed

The Goodwin 81/147 deed (Def.'s Ex. 43) provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of Three Hundred and [Fifty] Dollars, to them in hand paid, the receipt whereof is hereby acknowledged, Nathan J. Goodwin and M. M. Goodwin his wife, hereinafter called the grantors, do bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property, situate in the County of Washington and State of Oregon, to-wit: A strip of land One hundred feet in width, being fifty feet on each side of the center line of the track of the grantee, as the same is surveyed and located through the east half of the southwest quarter of section twenty seven in township three north of range five west, together with the appurtenances[,] tenements and hereditaments thereunto belonging or in anywise appertaining, together also with the right to maintain and operate a railroad thereover. TO HAVE AND TO HOLD to the grantee, and to its successors and assigns forever. The grantors, above named, do

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As such, the court finds that the fact that the Gattrell 13/311 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

> covenant with the grantee, and with its successors and assigns, that they are seized of the said premises in fee simple, and that they will, and their heirs, executors and administrators shall, warrant and defend the same against the lawful claims and demands of all persons whomsoever.

The court had found that the Goodwin 81/147 deed conveyed fee simple title to the railroad because the language confirming the right to build a railroad did not limit the railroad's use to only railroad purposes, the amount of consideration was substantial ($350), there was no "right of way" language used in the title or body of the deed nor any right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Given these findings, which are not disputed, the court rejects plaintiffs' contention that the right to build, maintain, and operate language in the final portion of the deed mandates that the court find the Goodwin 81/147 deed conveyed an easement.

The plaintiffs also argue that the description of the property conveyed is not precise and thus the court should have found that the deed conveyed an easement and not a fee. The court disagrees. First, the description of the location of the land being conveyed to the railroad is sufficient to determine its precise location. Additionally, the description of the land is nearly identical to the description provided for in several other deeds that both the plaintiffs and the government

agreed conveyed a fee to the railroad. *See* Cone 7/339, Handley 21/99, Hobson 7/39, Illingworth 7/164. Furthermore, in the description of the location of the property interest being conveyed the parties indicate that the land had already been surveyed which when read in conjunction with Restatement (First) of Property §471, cmt. c. (1944) shows sufficient precision in the description of the location of the conveyed land to conclude that the parties intended to convey a fee. Thus, the court finds that its original conclusion that the *Bernards*/*Bouche* factors weighed in favor of finding that the Goodwin 81/147 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

6. Large 5/536 Deed

The **Large 5/536 deed (Def.'s Ex. 69)** provides in pertinent part:

> Know All Men By These Presents:
>
> That for and in consideration of the sum of $250.00 to her in hand paid, the receipt whereof is hereby acknowledged, Mrs. J. Large does hereby grant, bargain, sell and convey to the Pacific Railway and Navigation Company, and to its successors and assigns forever: a strip of land 100 ft. wide, being 50 ft. on each side of the center line of the railway of the Pacific Railway and Navigation Company, as now surveyed and located thru this land of the aforesaid Mrs. J. Large in Lots 3 and 4, Sec. 21, T. 1 N. R. 10 W., W.M. said center line being more particularly described as follows, to wit:

> [Description]
>
> Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining;
>
> To Have and to Hold unto the Pacific Railway and Navigation Company and to its successors and assigns forever; together with the right to build, maintain and operate thereover a railway and telegraph line.

The court had found that the Large 5/536 deed conveyed fee simple title to the railroad because the language confirming the right to build a railroad did not limit the railroad's use to only railroad purposes, the amount of consideration was substantial ($250), there was no "right of way" language used in the title or body of the deed nor any right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Given these findings, which are not disputed, the court rejects plaintiffs' contention that the right to build, maintain, and operate language in the final portion of the Large 5/536 deed mandates that the court find the Large 5/536 deed conveyed an easement. Therefore, the motion for reconsideration is denied.

7. Rinck 77/454 Deed

The **Rinck 77/454 deed (Def.'s Ex. 90)** provides in pertinent part:

KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One Dollar to him in hand paid, the receipt whereof is hereby acknowledged, and other valuable considerations moving to him, J. H. Rinck, an unmarried man, hereinafter called the grantor, does hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forevEr, [sic] all of the following described real property situate in the County of Washington and State of Oregon, to wit:

A strip of land 100 feet wide, being 50 feet on each side of the centereline [sic] of the track of the Pacific Railway and Navigation Company as the same is constructed through the North half of the northeast quarter of Section 32, in township 3 North of range 4 west of the Willamette Meridian containing 3.17 acres."

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining, granting also the grantee the right to operate a railway line thereover *as well as the fee of the aforesaid premises*. The grantor does covenant that he is seased [sic] of the aforesaid premises in fee simple and that the same are free from all liens and encumbrances, and that he will and his heirs, executors and administrators shall forever warrant and defend the same against the lawful claims and demands of all persons

whomsoever.

The court had found that the Rinck 77/454 deed conveyed fee simple title to the railroad despite the nominal consideration ($1) because the language confirming the right to build a railroad did not limit the railroad's use to only railroad purposes, there was no "right of way" language used in the title or body of the deed nor any right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Given these findings, which are not disputed, the court rejects plaintiffs' contention that the right to build, maintain, and operate language in the final portion of the deed mandates that the court find the Rinck 77/454 deed conveyed an easement.

The plaintiffs also argue that the description of the property conveyed is not precise and thus the court should have found that the deed conveyed an easement and not a fee. The court disagrees. First, the description of the location of the land being conveyed to the railroad is sufficient to determine its precise location. Additionally, the description of the land is nearly identical to the description provided for in several other deeds that both the plaintiffs and the government agreed conveyed a fee to the railroad. *See* Cone 7/339, Handley 21/99, Hobson 7/39, Illingworth 7/164. Furthermore, in the description of the location of the property interest being conveyed the parties indicate that the land had already been surveyed which when read in conjunction with Restatement (First) of

Property §471, cmt. c. (1944) shows sufficient precision in the description of the location of the conveyed land to conclude that the parties intended to convey a fee. Thus, the court finds that its original conclusion that the *Bernards/Bouche* factors weighed in favor of finding that Rinck 77/454 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[14]

8. Slattery 94/161 Deed

The **Slattery 94/161 deed (Def.'s Ex. 101)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of Ten Dollars to them in hand paid, the receipt whereof is hereby acknowledged, and other valuable considerations moving to them, W. C. Slattery and Delia Slattery, his wife, hereinafter called the grantors , do bargain, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real

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[14] The plaintiffs also argue that because the deed provide only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Rinck 77/454 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

> property situate in the County of Washington and State[]of Oregon, to-wit: A strip of land one hundred feet in width, being fifty feet on each side of the center line of the grantee's railway as the same is surveyed, staked out and located through the northwest quArter [sic] of Section 32 in Township 3 North of Range 5 West of the Willamette Meridian. Together with the appurtenances, tenements and hereditaments thereunto belonging, or in any wise [sic] appertaining, with the right to construct, maintain and operate a railway thereover. TO HAVE AND TO HOLD to the grantee and to its successors and assigns forever. A n d t h e grantors do covenant with the grantee that they will warrant and defend the premises above granted unto the grantee, and to its successors and assigns against the lawful claims and demands of all persons whomsoever claiming or to claim under the grantors.

The court had found that the Slattery 94/161 deed conveyed fee simple title to the railroad because the language confirming the right to build a railroad did not limit the railroad's use to only railroad purposes, the amount of consideration was substantial ($10), there was no "right of way" language used in the title or body of the deed nor any right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Given these findings, which are not disputed, the court rejects plaintiffs' contention that the right to

build, maintain, and operate language in the final portion of the deed mandates that the court find the Slattery 94/161 deed conveyed an easement.

The plaintiffs also argue that the description of the property conveyed is not precise and thus the court should have found that the deed conveyed an easement and not a fee. The court disagrees. First, the description of the location of the land being conveyed to the railroad is sufficient to determine its precise location. Additionally, the description of the land is nearly identical to the description provided for in several other deeds that both the plaintiffs and the government agreed conveyed a fee to the railroad. *See* Cone 7/339, Handley 21/99, Hobson 7/39, Illingworth 7/164. Furthermore, in the description of the location of the property interest being conveyed the parties indicate that the land had already been surveyed which when read in conjunction with Restatement (First) of Property §471, cmt. c. (1944) shows sufficient precision in the description of the location of the conveyed land to conclude that the parties intended to convey a fee. Thus, the court finds that its original conclusion that the Bernards/Bouche factors weighed in favor of finding that the Slattery 94/161 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

9. Wheeler Lumber Co. 16/3 Deed

The **Wheeler Lumber Co. 16/3 deed (Albright, ECF No. 34, Ex. 82)** provides in part:

Know All Men by These Presents: That for and

> in consideration of the sum of $1.00 to it in hand paid, the receipt whereof is hereby acknowledged, The Wheeler Lumber Company, hereinafter called the grantor, does hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the county of Tillamook and State of Oregon, to-wit:
>
> A strip of land 60 feet in width, being thirty 30 feet on each side of and parallel with the center line of the grantee's railway as the same is located, staked out, and surveyed through the following described three parcels of real property, to-wit:
>
> * * * * [Describing the three parcels through which the strip being conveyed runs] * * *
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> To Have and to Hold to the above named grantee and to its successors and assigns forever; the grantors confirming also to the grantee, its successors and assigns, the right to build, maintain and operate a line of railway thereover.

The court had found that the Wheeler Lumber Co. 16/3 deed conveyed fee simple title to the railroad

despite the nominal consideration ($1) because the language confirming that the right to build a railroad did not limit the railroad's use to only railroad purposes, there was no "right of way" language used in the title or body of the deed nor any right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Given these findings, which are not disputed, the court rejects plaintiffs' contention that the right to build, maintain, and operate language in the final portion of the deed mandates that the court find the Wheeler Lumber Co. 16/3 deed conveyed an easement.

The plaintiffs also argue that the description of the property conveyed is not precise and thus the court should have found that the deed conveyed an easement and not a fee. The court disagrees. First, the description of the location of the land being conveyed to the railroad is sufficient to determine its precise location. Additionally, the description of the land is nearly identical to the description provided for in several other deeds that both the plaintiffs and the government agreed conveyed a fee to the railroad. *See* Cone 7/339, Handley 21/99, Hobson 7/39, Illingworth 7/164. Furthermore, in the description of the location of the property interest being conveyed the parties indicate that the land had already been surveyed which when read in conjunction with Restatement (First) of Property §471, cmt. c. (1944) shows sufficient precision in the description of the location of the conveyed land to conclude that the parties intended to convey a fee.

Thus, the court finds that its original conclusion that the Bernards/Bouche factors weighed in favor of finding that the Wheeler Lumber Co. 16/3 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[15]

10. Wheeler Lumber Co. 16/5 Deed

The Wheeler Lumber Co. 16/5 deed (Def.'s Ex. 123), provides in pertinent part:

> Know All Men by These Presents, that for and in consideration of the sum of One Dollar ($1.00) to it in hand paid, the receipt whereof is hereby acknowledged, The Wheeler Lumber Company, hereinafter called the grantor, does hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the county of Tillamook and state of Oregon, to-wit:
>
> A strip of land sixty feet in width being thirty

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[15] The plaintiffs also argue that because the deed provide only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word throughconveyed a fee. As such, the court finds that the fact that the Wheeler Lumber Co. 16/3 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

feet on each side of and parallel with the center line of the grantee's railway as the same is last located, staked out, surveyed and being constructed through Lots Four (4), Five[](5), Six[](6) and that part of Lot Three (3) lying west of the lands in said lot heretofore conveyed by said grantor to Willie G. Du Bois, all in Section Three (3) and the East Half (E ½) of Lot One (1) in Section Four (4) and through all tide lands fronting and abutting on all of the above described lands, all in Township Two[](2), North Range Ten

(10) West Willamette Meridian.

Also, a strip of land sixty feet in width being thirty feet on each side of and parallel with the center line of the grantee's railway as the same is last located, staked out, surveyed and being constructed through all the tide lands fronting and abutting on that part of said Lot Three (3) in said Section Three (3) in said Township Two[](2) North, Range Ten (20) West, Willamette Meridian, described as follows: * * * * [Describing the land through which the strip being conveyed runs] * * *

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

To Have and to Hold to the above named grantee and to its successors and assigns forever; the grantors confirming also to the grantee, its successors and assigns, the right to

> build, maintain and operate a line of railway thereover.
>
> The aforesaid grantor does hereby covenant that it is the owner in fee simple of the above granted premises, and that it will warrant and defend same unto the said grantee aforesaid, its successors and assigns, against the lawful claims and demands of all persons whomsoever.

The court had found that the Wheeler Lumber Co. 16/5 deed conveyed fee simple title to the railroad despite the nominal consideration ($1) because the language confirming that the right to build a railroad did not limit the railroad's use to only railroad purposes, there was no "right of way" language used in the title or body of the deed nor any right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Given these findings, which are not disputed, the court rejects plaintiffs' contention that the right to build, maintain, and operate language in the final portion of the deed mandates that the court find the Wheeler Lumber Co. 16/5 deed conveyed an easement.

The plaintiffs also argue that the description of the property conveyed is not precise and thus the court should have found that the deed conveyed an easement and not a fee. The court disagrees. First, the description of the location of the land being conveyed to the railroad is sufficient to determine its precise location. Additionally, the description of the land is nearly

identical to the description provided for in several other deeds that both the plaintiffs and the government agreed conveyed a fee to the railroad. *See* Cone 7/339, Handley 21/99, Hobson 7/39, Illingworth 7/164. Furthermore, in the description of the location of the property interest being conveyed the parties indicate that the land had already been surveyed which when read in conjunction with Restatement (First) of Property §471, cmt. c. (1944) shows sufficient precision in the description of the location of the conveyed land to conclude that the parties intended to convey a fee. Thus, the court finds that its original conclusion that the *Bernards* factors weighed in favor of finding that the Wheeler Lumber 16/5 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[16]

B. Category II: Deeds titled "Railway Deeds."

Category II includes the following deeds: Batterson 12/163, Easom 11/515, McMillan 11/328, Ostrander 9/205, Roy 11/516, and Shrader & Groat 11/354. The *Albright* plaintiffs make two separate legal arguments

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[16] The plaintiffs also argue that because the deed provide only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Wheeler Lumber Co. 16/5 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

as to why the court should reconsider its determination that these six deeds conveyed a fee to the railroad. Each of these legal arguments will be addressed in turn.

i. Deeds Entitled "Railway Deed" Do Not Automatically Convey An Easement To The Railroad.

The *Albright* plaintiffs contend that these six deeds should be interpreted as having conveyed only easements. Plaintiffs argue that "railway" in the title of a deed, is the same as, or interchangeable with, "right of way," *Albright* Mot. at 8, and that the title of the deed alone, regardless of whether "Right-of Way Deed" or "Railway Deed," is "enough under Oregon law to find an easement." *Id*. at 9.

The *Albright* plaintiffs did not raise this argument in their summary judgment motion or reply, but rather raised the issue for the first time in their objections to the Court's Preliminary Findings on summary judgment, ECF No. 49. The United States therefore maintains, as it did in oral argument, Oral Arg. Tr. 99:11-20, that the *Albright* plaintiffs have waived this argument.

Plaintiffs cite no Oregon law or other controlling authority in support of their argument, and the court is aware of no Oregon cases that hold, or even suggest, that a deed entitled "Railway Deed" cannot convey a fee. Indeed, to the contrary, as the United States previously noted, Def.'s XMSJ at 14-15, Oregon law is clear that railroads can own strips of land in fee. *See Bouche*, 293 P.2d at 206, 210. And the Oregon Supreme Court has held that, in conveyances to railroads, the

phrase "right of way" can refer to the land itself and not be an indication of the estate being conveyed. *Id*. at 209. In this case, the Category II deeds do not use either the terms "right-of way" or "railway" in the body of the deed, but only in the title. Thus, because railroads can hold either fee title or easements in strips of land on which they construct a right of way, the title, "Railway Deed," does not dictate that the property interest being conveyed is an easement, rather it merely indicates that the deed is a form that can be used when a railroad is a party to a land conveyance.

In sum, as to this issue, particularly in light of the substantial consideration for each of the six conveyances (Batterson - $800; Easom - $800; McMillan - $300; Ostrander - $550; Roy- $1,000; Shrader & Groat - $200),[17] and based on the absence of any "right of way" or other limiting language, the court finds that reconsideration is not needed.

ii. Strip of land, through, and lack of precision

The *Albright* plaintiffs also challenge each of the Category II deeds on other grounds the deeds' use of "strip of land," and "through," and the lack of precision in their descriptions of the property being conveyed, which they claim are "additional indicia" indicating that the deeds were intended to convey easements and not fees as the court had previously determined. The court will review each deed in turn for reconsideration.

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[17] In *Boyer*, this Court recognized that "where consideration is substantial, the balance tips in favor of finding a fee . . . ." 123 Fed. Cl. at 439.

1. Batterson 12/163

The **Batterson 12/163 deed (Def.'s Ex. 5)** provides in pertinent part:

S. M. Batterson et al Railway Deed.
to NO. 7948.
Pacific Railway and Navigation Co.

> KNOWN ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of Eight [sic] Hundred & 00 DOLLARS, [sic] the receipt whereof is hereby acknowledged, we, S M. Batterson [sic] and Harriet E. McMaine, sole heirs at law of William Batterson, deceased, and Pauline O. Batterson wife of said S. M. Matterson, hereinafter called the grantors, do hereby bargain, sell, grant[,] convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:
>
> A strip of land one hundred (100) feet wide being fifty (500 [sic] feet on each side of the center line of the railway of the grantee, as the same is surveyed and located through Lots 4, 6 and 7 and the North West quarter of South East quarter of Section 34 and LOt [sic] 6 of Section 35, in Township 3 North of Range nine West of Willamette Meridian.

> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.
>
> The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court found that the Batterson 12/163 deed granted fee simple title to the railroad because "Railway Deed" on its own did not indicate an intent to convey an easement, the amount of consideration was substantial ($800), there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I deeds the Batterson 12/163 deed describes

the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Batterson 12/163 deed conveyed a fee to the railroad. The court disagrees. First "strip of land" only indicates an intent to convey an easement when it is used in connection with language limiting its use. In this instance it is clear that "strip of land" is describing the property being conveyed. Similarly, deeds which contain the word "through" when describing the location of the "strip of land" does not indicate an intent by the original parties to convey an easement. The use of the word "through" is not the same as "over and across" which the Oregon Supreme Court found indicated an intent to convey an easement, and the use of "through" not in connection with a right to cross does not indicate an intent to convey an easement but rather is a description of the location of the property interest being conveyed. As such, the use of "through" in the Batterson 12/163 deed is not used in connection with a right and as such does not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards*/*Bouche* factors weighed in favor of finding that the Batterson 12/163 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

2. Easom 11/515 Deed

The **Easom 11/515 deed (Def.'s Ex. 33)** provides in pertinent part:

Elnora [sic] F. Easement et vir.	Railway Deed.
to	No. 7463.
Pacific Railway and Navigation Co.	

> KNOW ALL MEN BY THESE[]PRESENTS : [sic] That for and in consideration of the sum of Eight Hundred & 00/100 DOLLARS, the receipt whereof is hereby acknowledged, we, Elnora [sic] F. Easom and Chas. E. Easom, wife and husband[,] do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:
>
> A strip of land one hundred (100) feet wide being fifty (50) feet on each side of the center line of the railway of the grantee <u>as the same is surveyed and located</u> through Lots One, two, six and seven in Section thirty six, in Township three North of Range ten West of Willamette Meridian, except a certain three acre tract in said Lot One [sic] heretofore sold to Felix Roy.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above

> named grantee and unto its successors and assigns forever.
>
> The grantors above named do covenant that they are seized of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court found that the Easom 11/515 deed granted fee simple title to the railroad because "Railway Deed" on its own did not indicate an intent to convey an easement, the amount of consideration was substantial ($800), there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I deeds the Easom 11/515 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed

refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Easom 11/515 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the courts analysis of the Batterson 12/163 deed in Category II, the use of "strip of land" and through in the Easom 11/515 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards/Bouche* factors weighed in favor of finding that the Easom 11/515 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

3. McMillan 11/328 Deed

The **McMillan 11/328 deed (Def.'s Ex. 75)** provides in pertinent part:

Nillus McMillan and wife	Railway Deed.
to	No. 7181.
Pacific Railway and Navigation Co.	

> KNOW ALL MEN BY THESE PRESENTS, That for and in onsideration of the sum of Three Hundred & 00/100 DOLLARS, the receipt whereof is hereby acknowledged, We, Nillus McMillan and Sarah McMillan, husband and wife, hereinafter called the grantors, do hereby bargain, sell[,] grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real

property, situate in the County of Tillamook and State of Oregon, to-wit:

A strip of land Sixty [sic] (60) feet wide, being thirty (30) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through

Beginning at the mouth of a certain water ditch in Lot three of Section twenty Township two North of Range ten west, running hence in a South easterly direction following said ditch to its intersection with a small lake, thence out South across said lake to its South Bank, thence in an Easterly direction following the foot of the hill to the East line of said Lot three, thence North on said line to the Nehalem Riven, thence Southerly on line of ordinary high water mark to point of beginning, containing 10 acres more or less, all in Sec. 20, T. 2 N. R. 10 W. Also the north half of South East quarter and West half of North East quarter of Section 20, T. 2 N. R. 10 W. all being situated in Tillamook County, Oregon.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD unto the above named grantee and unto its successors and assigns forever. The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will

> warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court found that the McMillan 11/328 deed granted fee simple title to the railroad because "Railway Deed" on its own did not indicate an intent to convey an easement, the amount of consideration was substantial ($300), there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I deeds the McMillan 11/328 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the McMillan 11/328 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the courts analysis of the Batterson 12/163 deed in Category II, the use of "strip

of land" and through in the McMillan 11/328 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards/Bouche* factors weighed in favor of finding that the McMillan 11/328 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

4. Ostrander 9/205 Deed

The **Ostrander 9/205 deed (Def.'s Ex. 80)** provides in pertinent part:

Chas. [sic] Ostrander and wife	Railway Deed.
to	No. 5807.
Pacific Railway and Navigation Co.	

> KNOW ALL MEN BY THESE PRESENTS, That for and in consideration of the sum of Five Hundred Fifty & 00/100 DOLLARS[,] the receipt whereof is hereby acknowledged, we, Charles R. Ostrander and Frances A. Ostrander, husband and wife, of Bay City, in the County of Tillamook and State of Oregon, hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property, situate in the County of Tillamook and State of Oregon, to-wit:

A strip of land one hundred (100) feet wide, being fifty (50) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through that certain tract of land described as follows: Beginning at the North East corner of Bar View Addition to Bay City, in Tillamock County, State of Oregon, and running thence East thirteen hundred (1300) feet, thence South to the South line of the Hiram Smith Donation Land Claim, thence West to the South East corner of a seven and one half acre tract formerly owned by Peter Morgan, thence North thirty seven rods more or less to a slough and being the North East corner of said seven and one half acre tract, thence following down said slough in a South Westerly direction to appoint which would be in line with the Ease line of Bar View addition aforesaid, thence North to the place of beginning.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD unto the above named grantee and unto its successors and assigns forever.

The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the

> grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court found that the Ostrander 9/205 deed granted fee simple title to the railroad because "Railway Deed" on its own did not indicate an intent to convey an easement, the amount of consideration was substantial ($550), there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I deeds that the Ostrander 9/205 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Ostrander 9/205 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the courts analysis of the Batterson 12/163 deed in Category II, the use of "strip of land" and through in the Ostrander 9/205 deed are

not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards/Bouche* factors weighed in favor of finding that the Ostrander 9/205 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

5. Roy 11/516 Deed

The *Roy 11/516 deed (Def.'s Ex. 93)* provides in pertinent part:

Felix Roy
to
Pacific Railway and Navigation Co.

Railway Deed.
No. 7464.

> KNOWN ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One Thousand & 00/100 DOLLARS, the receipt whereof is hereby acknowledged, I Felix Roy, a bachelor of Tillamook County, Oregon, hereinafter called the grantors, [sic] do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:
>
> A strip of land one hundred (100) feet wide, being fifty (50) feet on each side of the center line of the railway of the grantee as the same is

> surveyed and located through Lot three of Section 36 Township 3 North of Range 9 West of W.M. Lots two, three and thirteen of Section 31, Township 3 North of Range 9 West of W. M. Also through a certain tract described as follows:- Beginning at the meander post on the North bank of Nehalem River on the line between Section 31 Tp. 3 N. Range 9 West and Section 36 Tp. 3 North Range 10 West, running thence North 30 rods, thence West 208 feet, thence South to Nehalem River, thence in an Easterly direction following the North bank of Nehalem River to place of beginning in Sec. 36 Tp. 3 N. R. 10 W. of W.M.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.
>
> The grantors [sic] above named do covenant that they are seised of the aforesaid premises in fee simple and that the same are free from all encumbrances, and that they [sic] will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court found that the Roy 11/516 deed granted fee simple title to the railroad because "Railway Deed" on its own did not indicate an intent to convey an

easement, the amount of consideration was substantial ($1000), there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I deeds the Roy 11/516 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that Roy 11/516 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the courts analysis of the Batterson 12/163 deed in Category II, the use of "strip of land" and through in the Roy 11/516 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the Bernards/Bouche factors weighed in favor of finding that the Roy 11/516 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

6. Schrader & Groat 11/354 Deed

The **Schrader & Groat 11/354 deed (Def.'s Ex. 98)** provides in pertinent part:

Paul Schrader et ux	
& John Groat et ux	Railway Deed.
to	No. 7235.
Pacific Railway and Navigation Co.	

> KNOWN ALL MEN BY THESE PRESENTS, That for and in consideration of Two Hundred & 00 DOLLARS, the receipt whereof is hereby acknowledged, we, Paul Schrader and Lillie R. Schrader[,] husband and wife, and John Groat and Lillian A. Groat, [sic] husband and wife, hereinafter called the grantors[,] do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee[,] and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:
>
> A strip of land sixty feet wide being thirty feet on each side of the center line of railway of the grantee as the same is surveyed and located through Lot one of Section five, in Township One North of range ten West of Willamette Meridian, save and except seven acres off the South[]and a strip of land twenty feet wide off the North end of said Lot one.
>
> Together with the appurtenances,

> tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.
>
> The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court found that the Schrader & Groat 11/354 deed granted fee simple title to the railroad because "Railway Deed" on its own did not indicate an intent to convey an easement, the amount of consideration was substantial ($200), there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest. .

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I deeds the Schrader & Groat 11/254 deed describes the location of the land being conveyed by the

grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Schrader & Groat 11/354 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the courts analysis of the Batterson 12/163 deed in Category II, the use of "strip of land" and through in the Schrader & Groat 11/354 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the Bernards/Bouche factors weighed in favor of finding that the Schrader & Groat 11/354 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

C. Category III: Deeds that conveyed a "strip of land" and used either "across", "through", "over" or "over and across" a grantor's land, without "right of way" language.

With respect to the twenty-eight deeds in Category III, plaintiffs argue that under Oregon law, this court should have determined that deeds which contained the phrase "strip of land" and the words "through," "over," "on," or "across" convey an easement. These are the same arguments made for the deeds in Category II except that the Category II deeds were all entitled "Railway Deed". As explained in the court's analysis of

the Category II deeds the phrase "strip of land" when not used in connection with limiting language does not indicate an intent by the original parties to convey an easement. Additionally, the court's analysis of the deeds use of the word through also applies to similar words offered by the plaintiffs including "over," "on," and "across". Applying these standards, the court will review each deed in Category III in turn for reconsideration.

1. Beals 18/40 Deed

The **Beals (Tr.) 18/40 deed (Def.'s Ex. 7)** provides in pertinent part:

F.R. Beals, Trustee
to 11135 Railway Deed
Pacific Railway + Navigation Co

> Know All Men by These Presents: That for and in consideration of the sum of One and 00/100 Dollars, [sic] the receipt whereof is hereby acknowledged, F R. Beals, Trustee, hereinafter called the grantors, [sic] do [sic] bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit:
>
> A strip of land sixty (60) feet wide being thirty (30) feet on each side of the center line of the railway of the grantee as the same is

> surveyed and located through Lot three of Section thirty two in Township two North of Range ten West of the Willamette Meridian.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> To have and to hold unto the above named grantee and unto its successors and assigns forever.

The court had found that the Beals 18/40 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds that the Beals 18/40 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly

concluded that the Beals 18/40 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Beals 18/40 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the Bernards/Bouche factors weighed in favor of finding that the Beals 18/40 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[18]

2. Bigelow 13/312 Deed

The **Bigelow 13/312 deed (Def.'s Ex. 9)** provides in pertinent part:

> Know All Men by These Presents: That for and in consideration of the sum of $1.00 to them in hand paid, the receipt whereof is hereby acknowledged, Mary M. Bigelow and Jay W. Bigelow, her husband, hereinafter called the grantors, do bargain, sell, grant, convey and confirm to Pacific Railway and Navigation

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[18] The plaintiffs also argue that because the deed provide only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Beals 18/40 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

> Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit:
>
> A strip of land 100 feet in width, being 50 feet on each side of and parallel with the center line of the grantee's railway as the same is surveyed, located and staked out through the Southeast quarter of the Southeast quarter of Section 32, in Township 3 North of Range 9 West of Willamette Meridian, and containing eighty-four hundredths of an acre[.]
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining
>
> To Have and to Hold to the grantee and to its successors and assigns forever.
>
> This deed is executed for the purpose of correcting an informality in a previous deed executed by the above named grantor, Mary M. Bigelow, without the joinder of her husband.

The court had found that the Bigelow 13/312 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle

guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds that the Bigelow 13/312 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Bigelow 13/312 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Bigelow 13/312 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the Bernards/Bouche factors weighed in favor of finding that the Bigelow 13/312 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[19]

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[19] The plaintiffs also argue that because the deed provide only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee.

3. Burgholzer 83/99 Deed

The **Burgholzer 83/99 deed (Def.'s Ex. 14)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That Joseph Burgholzer and Vina A. Burgholzer, his wife for and in consideration of the sum of One Dollar, to them in hand paid, the receipt whereof is hereby acknowledged, do hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, and[]to its successors and assigns forever, all of the following described real property situate in the County of Washington and State of Oregon, to-wit:
>
> A strip of land one hundred feet in width, being fifty feet on each side of and parallel with the center line of the track of the Pacific Railway and Navigation Company, as the same is surveyed and located through the East one half of the Northeast quarter of Section thirty (30) in Township three (3) North of Range four (4) West W. M.
>
> Together with the tenements, hereditaments and appurtenances [,] thereunto belonging or in anywise appertaining. TO HAVE[]AND TO HOLD to the said Pacific

As such, the court finds that the fact that the Bigelow 13/312 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

> Railway and Navigation Company, and to its successors and assigns forever.
>
> The aforesaid grantors Joseph Burgholzer and Vina A. Burgholzer do hereby covenant that they are the owners in fee simple of the aforesaid premises, and that they will forever warrant and defend the same unto the Pacific Railway and Navigation Company, its successors and assigns, against the lawful claims of all persons whomsoever.

The court had found that the Burgholzer 83/99 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's land.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds that the Burgholzer 83/99 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly

concluded that the Burgholzer 83/99 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Burgholzer 83/99 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the Bernards/Bouche factors weighed in favor of finding that the Burgholzer 83/99 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[20]

4. Campbell 85/208

The **Campbell 85/208 deed (Def.'s Ex. 18)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That D. F. Campbell and Cecily C. Campbell, his wife, for and in consideration[]of the sum of One Dollar ($1.00), to them in hand paid, the receipt whereof is hereby acknowledged, do hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company,

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[20] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Burgholzer 83/99 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

> and to its successors and assigns forever, all of the following described real property situate in the County of Washington and State of Oregon, to-wit: A strip of land one hundred feEt [sic] in width, being fifty feet on each side of and parallel with the center line of the track of the Pacific Railway and Navigation Company, as the same is now surverye d[]and [sic] located through the West half of the Northwest quarter of Section Thirty six (36) Township Three [sic] (3) North Range Five West, containing 2.84 acres. Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining. TO HAVE AND TO HOLD to the sAid [sic] Pacific Railway and Navigation Company and to its successors and assigns forever. The aforesaid D. F. Campbell and Cecily C. Campbell, his wife, do hereby covenant that they are the owners in fee simple of the above granted premises, and that they will forever warrant and defend the same unto the Pacific Railway and Navigation Company, its successors and assigns, against the lawful claims of all persons whomsoever.

The court had found that the Campbell 85/208 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle

guards, or fences to protect the grantor's land.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds that the Campbell 85/208 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Campbell 85/208 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Campbell 85/208 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the Bernards/Bouche factors weighed in favor of finding that the Campbell 85/208 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[21]

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[21] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee.

5. Cook 15/83 Deed

The **Cook 15/83 deed (Def.'s Ex. 24)** pertains in pertinent part:

> NOW ALL MEN BY THESE PRESENTS: That Vincent Cook and Martha G. Cook, his wife, hereinafter called the grantors, in consideration of the sum of Ten ($10.00) Dollars, to them in hand paid, the receipt whereof is hereby acknowledged, and other valuable considerations moving to them, do * * * bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns[]forever, a one half interest in the following described real property situate in the County of Tillamook and State of Oregon, to-wit:
>
> A strip of land one hundred (100) feet in width, being fifty (50) feet on each side of and parallel with the center line of the tract of the Pacific Railway and Navigation Company's railway as the same is now located, adopted, and constructed across the Northwest quarter[]of the Southwest quarter and the Southwest quarter of the Northwest quarter of Section eighteen (18) in Township one (1) South of Range nine (9) West of the Willamette

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As such, the court finds that the fact that the Campbell 85/208 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

> Meridian, containing 5.07 acres,
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining,
>
> TO HAVE AND TO HOLD to the above named grantee and to its successors and assigns forever.

The court had found that the Cook 15/83 deed conveyed fee simple title because the amount of consideration was substantial ($10), there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds that the Cook 15/183 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing across the land, the court incorrectly concluded that the Cook 15/83 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained

in the court's analysis of the Category II deeds, the use of "strip of land" and across in the Cook 15/83 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards/Bouche* factors weighed in favor of finding that the Cook 15/83 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

6. Davidson 11/509 Deed

The **Davidson 11/509 deed (Def.'s Ex. 27)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One and 00/100 Dollars, the receipt whereof is hereby acknowledged, we F. M. Davidson and Alvie Davidson, husband and wife[,] hereinafter called the grantors, do hereby bargain, sell, grant[,] convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:
>
> A strip of land one hundred (100) Feet [sic] wide being fifty (50) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through our undivided one third interest in the North East

> quarter of North East quarter of Section thirteen Township one South of Range ten West of Willamette Meridian; also a strip of land six rods wide off of the North side of South East quarter of North East quarter of Section thirteen, Township one South of Range ten West of Willamette Meridian.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee and unto its successors and assigns forever.
>
> And * * * grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Davidson 11/509 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds that the Davidson 11/509 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that Davidson 11/509 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Davidson 11/509 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards/Bouche* factors weighed in favor of finding that the Davidson 11/509 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[22]

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[22] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Davidson 11/509 deed contained only nominal consideration does not change the court's

7. Galvani 77/37 Deed

The **Galvani 77/37 deed (Def.'s Ex. 39)** provides in pertinent part:

> THIS INDENTURE made this 11th day of April A. D. 1907, between W. H. Galvani, a single man[]of Portland, Multnomah, Oregon, party of the first part, and the Pacific Railway & Navigation Company, a Corporation, party of the second part[,] WITNESSETH:
>
> That the said party of the first part for and in consideration of the sum of $1 to him in hand paid by the party of the second part, the receipt of which is hereby acknowledged[,] has granted, bargained and sold, conveyed and confirmed and by these presents does grant, bargain, sell [sic] convey and confirm unto the said party of the second part and its successors and assigns, all that certain lot, piece, parcel and tract of land, lying, being and situate in Washington County, Oregon, and being a portion of the Southwest quarter of Section 30, T. 3 N. R. 4 W. of the Will. Mer., being a strip of land 100 feet wide, being 50 feet on each side of the center line of the Pacific Railway & Navigation Company's railway as now surveyed, located and adopted across said lands, said center line being described as follows,[]to-wit

conclusion that it conveyed a fee rather than an easement.

> * * * [Description] * * * and containing 11.31 acres, reserving grade farm crossings at two points to be selected by the party of the first part.
>
> Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.
>
> TO HAVE AND TO HOLD all and singular, the said premises, together with the appurtenances unto the said party of the second part and unto its successors and assigns forever. And the party of the first part does hereby covenant to and with the party of the second part, its successors and assigns, forever, that the party of the first part is the owner in fee simple of the tract of land hereinbefore described; That [sic] said tract of land is free from all incumbrances and that the party of the first part shall warrant and forever defend said tract of land against the lawful claims and demands of all persons whomsoever.

The court had found that the Galvani 77/37 deed conveyed fee simple title even though the amount of consideration was nominal ($1) and the grantor reserved the right to two farm crossings because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, and no right of reverter if the

railroad discontinued railroad use.

Plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as across the land, the court incorrectly concluded that the Galvani 77/37 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and across in the Galvani 77/37 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards/Bouche* factors weighed in favor of finding that the Galvani 77/37 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[23]

8. Goodspeed 9/200 Deed

The **Goodspeed 9/200 deed (Def.'s Ex. 42)** and provides in pertinent part:

K D. R. Goodspeed and wife	RAILWAY DEED.
to	NO. 5802.

[23] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Galvani 77/37 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

Pacific Railway and Navigation Co.

KNOWN ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One & 00/100 DOLLARS[,] the receipt whereof is hereby acknowledged, We, [sic] D. E. Goodspeed and M. J. Goodspeed, husband and wife, of Tillamook County, Oregon, hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to Pacific RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit; [sic]

A strip of land one hundred (100) feet wide being fifty (50) feet on each side of the center line of the railway of the grantee as the same is now surveyed and located through

The [sic] South East quarter of the North East quarter of Section thirteen in Township one South of Range ten West of Willamette Meridian[.]

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.

The grantors above named do covenant

> that they are seised of the aforesaid premises in fee simple and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Goodspeed 9/200 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds that the Goodspeed 9/200 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Goodspeed 9/200 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the

Category II deeds, the use of "strip of land" and through in the Goodspeed 9/200 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards*/*Bouche* factors weighed in favor of finding that the Goodspeed 9/200 deed conveyed a fee was correct and therefore the plaintiff's motion for reconsideration is denied.[24]

9. Hagen 75/279 Deed

The **Hagen 75/279 deed (Def.'s Ex. 44)** provides in pertinent part:

> THIS INDENTURE, made this 22 day of April, 1907, between Bridget Hagen (a [sic] single woman) of Portland Multnomah County, Oregon, party of the first part, and the Pacific Railway & Navigation Company, a Corporation, party of the second part, WITNESSETH:
>
> That the said party[]of the first part, for and in consideration of the sum of One Dollar ($1) and other good and valuable

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[24] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Goodspeed 9/200 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

considerations, to her in hand paid by the party of the second part, the receipt of which is hereby acknowledged, h[]ave [sic] granted, bargained and sold, conveyed and confirmed, and by these presents do grant, bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns, all that certain lot, piece, parcel and tract of land, lying, being and situate in Washington County,[]Oregon, to-wit:

Being a portion of Section 30, T. 3 N. R. 4 W. of the Will. Mer. described as follows:

A strip of land 100 feet wide being 50 feet on each side of the center line of the Pacific Railway and Navigation Company's railway, as surveyed, located and adopted across said lands, said center line being described as follows:

* * * [Description] * * *

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders[,] rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular, the said premises together with the appurtenances unto the said party of the[]second part and unto its successors and assigns forever. And the party of the first part does hereby covenant to and with the party of

> the second part, its successors and assigns forever, that the party of the first part is the owner in fee simple of the tract of land hereinbefore described; that said tract of land is free from all incumbrances and that the party of the first part shall warrant and forever defend said tract of land against the lawful claims and demands of all persons whomsoever.

The court had found that the Hagen 75/279 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing across the land, the court incorrectly concluded that the Hagen 75/279 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and across in the Hagen 75/279 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the Bernards/Bouche factors weighed in favor of finding that the Hagen 75/279 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration

is denied.[25]

10. The Hamblin 85/284 Deed

The **Hamblin 85/284 deed (Def.'s Ex. 45)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That J.M. Hamblin, an unmarried man for and in consideration of the[]sum of One Dollars, to him in hand[]paid, the receipt whereof is hereby acknowledged[,] does bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company and to its successors and assigns forever, all of the following described real property situate in the County of Washington and State of Oregon, to-wit: A strip of land one hundred feet in width, being fifty feet on each side of and parallel with the center line of the track of the Pacific Railway and[]NavigaTion [sic] Company, as the same is surveyed and located through the Northwest quarter of the Northeast quarter of Section thirty two (32) Township Three(3) [sic] North range [sic] five (5) West Willamette Meridian.

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[25] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Hagen 75/279 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

> Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD to the said Pacific Railway and Navigation Company, and to successors and assigns forever.
>
> The aforesaid grantor J. M. Hamblin does hereby covenant that he is the owner in fee simple of[]the above granted premises, and that he will forever warrant and defend the same unto the Pacific Railway and Navigation Company, its successors and assigns, against the lawful claims of all parties whomsoever.

The court had found that the Hamblin 85/284 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds that the Hamblin 85/284 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Hamblin 85/284 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Hamblin 85/284 deed are not made in reference to any language limiting the use of the land andthus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards*/*Bouche* factors weighed in favor of finding that the Hamblin 85/284 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[26]

11. Haugen 9/204 Deed

The **Haugen 9/204 deed (Def.'s Ex. 54)** provides in pertinent part:

Thore [sic] Hagen. RAILWAY DEED.
to NO. 5806.
Pacific Railway and Navigation Co.

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[26] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Hamblin 85/284 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

KNOWN ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One & 00/100 DOLLARS[,] the receipt whereof is hereby acknowledged, we, Thore [sic] Hagen and Evia Jane Hagen, husband and wife, of Tillamook County, Oregon, hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:

A strip of land one hundred (100) feet wide being fifty (50) feet on each side of the center line of the railway of the grantee, as the same is surveyed and located through the following described tract, to-wit:

* * * [Describing the tract through which the strip being conveyed runs] * * *

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.

The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all

> encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Haugen 9/204 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds that the Haugen 9/204 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Haugen 9/204 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Haugen 9/204 deed are not made in reference to any

language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards*/*Bouche* factors weighed in favor of finding that the Haugen 9/204 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[27]

12. The Jeffries 85/70 Deed

The **Jeffries 85/70 deed (Def.'s Ex. 59)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That Minnie Jeffries and George H.[]Jeffries her husband for and in consideration of the sum of One Dollar to them in hand paid, the receipt whereof is hereby acknowledged, do hereby bargain, sell[,] grant, convey and confirm to Pacific Railway and Navigation Company, and to its successors and assigns forever, all of the following described real property situate in the County of Washington and State of Oregon, to-wit: A strip of land one hundred feet in width, being fifty feet on each

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[27] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word throughconveyed a fee. As such, the court finds that the fact that the Haugen 9/204 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

> side of and parallel with the center line of the track of the Pacific Railway and Navigation Company, as the same is surveyed and located through the North half of the Northwest quarter of Section Thirty (30) Township three (3) North, Range Four (4) West of W.M.
>
> Together with the tenements, hereditaments and appurtenances, thereunto belonging or in anywise appertaining. TO HAVE AND TO HOLD to the said Pacific Railway and Navigation Company, and to its successors and assigns forever.
>
> The aforesaid grantors Minnie Jeffries and George H. Jeffries do hereby covenant that they are the owners in fee simple of the above granted premises, and that they will forever warrant and defend the same unto the Pacific Railway and[]Navigation Company, its successors and assigns, against the lawful claims of all persons whomsoever.

The court had found that the Jeffries 85/70 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court

should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds that the Jeffries 85/70 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Jeffries 85/70 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Jeffries 85/70 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards*/*Bouche* factors weighed in favor of finding that the Jeffries 85/70 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[28]

13. Maroney 11/513 Deed

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[28] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Jeffries 85/70 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement

The **Maroney 11/513 deed (Def.'s Ex. 73)** provides in pertinent part:

Matt Maroney RAILWAY DEED.
to NO. 7461
Pacific Railway and Navigation Co.

> KNOWN ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One & 00/100 DOLLARS, [sic] the receipt whereof is hereby acknowledged, I Matt Maroney, unmarried, of Garibaldi, in Tillamook County, Oregon, hereinafter called the grantors, [sic] do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:
>
> A strip of land sixty (60) feet wide being thirty (30) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through Lot three (3) of Section twenty nine , [sic] in Township two North of Range ten West of the Willamette Meridian.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee and unto its successors and

> assigns forever. The grantors [sic] above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Maroney 11/513 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds that the Maroney 11/523 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Maroney 11/513 deed conveyed a fee to the railroad. The court disagrees. For the same

reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Maroney 11/513 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards/Bouche* factors weighed in favor of finding that the Maroney 11/513 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[29]

14. Noland 74/108 Deed

The **Noland 74/108 deed (Def.'s Ex. 79)** provides in pertinent part:

Know all Men by these Presents, *That*

Mrs Lena Noland

of Portland xxxxxxxx State of Oregon, *in consideration of* Seventy nine and twenty, one Hundredths ($79.20/100) DOLLARS, *to* me *paid by* Pacific Railway and Navigation Company
of Portland xxxxxx *State of Oregon*, * * *
* * * * * *has bargained and sold, and by these presents*

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[29] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Maroney 11/513 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

does grant, bargain, sell and convey unto said
Pacific Railway Navigation Company[,] is [sic] successors
* * * *and assigns, all the following bounded and described real property, situated in the County of Washington and State of Oregon*:

A strip of land 100 feet wide being 50 feet on each side of the center line of the Pacific Railway and Navigation Company's Railway, as surveyed, located and adopted across the south 1/2 of N W l of Sec. 30. [sic] T [sic] 3 N. R. 4 W- [sic] W. M. said center line being described as follows: * * *[Description] * * * and containing 7.89 acres.

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining and also all her estate, right, title and interest in and to the same, including dower and claim of dower.

TO HAVE AND TO HOLD the above described and granted premises unto the said

PACIFIC RAILWAY AND NAVIGATION COMPANY[,]its successors * * * *and assigns forever*. *And*

Mrs. Lena Noland[,]
grantor above named do es [sic] *covenant to and with* Pacific Railway and Navigation Company *the above named grantee*[,] is [sic] successors *and assigns that* she is lawfully seized *in fee simple of the above granted premises, that they are free from all incumbrances*
* * * * [Blank Space] * * *

and that she *will and* her *heirs, executors and*

administrators shall warrant and forever defend the above granted premises, and ever part and parcel thereof, against the lawful claims and demands of all persons whomsoever. (italics in original).

The court had found that the Noland 74/108 deed conveyed fee simple title because the consideration was substantial ($79.20), there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest

Plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing across the land, the court incorrectly concluded that the Noland 74/108 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and across in the Noland 74/108 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards*/*Bouche* factors weighed in favor of finding that the Noland 74/108 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

15. Petrzilka 72/203 Deed

The **Petrzilka 72/203 deed (Def.'s Ex. 83)** provides in pertinent part:

THIS INDENTURE, made this 1st day of August 1906, between Frank Petrzilka and Mary Petrzilka, his wife, of Washington County, parties of the dirst [sic] part, and the PACIFIC RAILWAY & NAVIGATION COMPANY, a Corporation, party of the second part, WITNESSETH:

That the said parties of the first part, for and in consideration of the sum of One Hundred Dollars ($100) to them in hand paid by the party of the second part, the receipt of which is hereby acknowledged, have granted, bargained and sold, conveyed and confirmed and by these presents do grant, bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns,[]forever, all that certain Lot, [sic] piece, parcel and track of land, lying, being and situate in Washington County, Oregon, and particularly described as follows, to- wit:- A strip of land 80 feet wide, being 40 feet on each side of the center line of the PACIFIC RAILWAY & NAVIGATION COMPANY'S railway as now surveyed, located, and established across the following described lands,;

> The North West quarter of the North West Quarter [sic] of Section 4 T.2.N.R.4 W. of the Will.Mer. [sic]
> and also the following described tract of land, to-wit;-Beginning at the south [sic] West corner of Section 33,

> T.3.N.R.4.W. and running thence East 14 rods; thence Northwesterly 42 rods to a point 4 rods East of the west line of said section [sic] 33; thence Northeasterly 42 rods to a point 14 rods East of the west line of said Section 33,;[]thence [sic] West 14 rods; thence South 80 rods to the place of beginning, said strip of land containing 4.31 acres.

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents,[]issues and profits thereof.

TO HAVE AND TO HOLD all and singular the said premises together with the appurtenances, unto the said party of the second part and unto its successors and assigns forever. And the said parties of the first part, for themselves, their heirs, executors and administrators do covenant to and with the party of the second part, its successors and assigns forever, that the parties of the first part are the owners in fee simple of the above described and granted premises; That [sic] said premises and t he [sic] whole thereof are fee from all incumbrances, and that said parties of the first part, their heirs, executors and administrators shall warrant and forever defend said premises and the whole thereof

against the lawful claims and demands of all persons whomsoever.

The court had found that the Petrzilka 72/203 deed conveyed fee simple because the consideration was substantial ($100), there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's land.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds that the Petrzilka 72/203 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing across the land, the court incorrectly concluded that the Petrzilka 72/203 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and across in the Petrzilka 72/203 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original

conclusion that the Bernards/Bouche factors weighed in favor of finding that the Petrzilka 72/203 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

16. Rockaway Beach 12/342 Deed

The **Rockaway Beach 12/342 deed (Def.'s Ex. 91)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One & 00/100 DOLLARS, the receipt whereof is hereby acknowledged, Rockaway Beach Company, a Corporation organized and existing under the laws of the State of Oregon and First Bank Trust Company, a corporation organized and existing under the laws of the State of Oregon, hereinafter called the grantors, [sic] do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:
>
> A strip of land sixty (60) feet wide being thirty (30) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through
>
> Lot four of Section thirty two in Township two North of Range ten West and a strip of land twenty feet wide off the North end of Lot one of

> Section five, Township One North of Range two West of Willamette Meridian.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.
>
> The grantors [sic] above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all incumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Rockaway Beach 12/342 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because there was no “right of way” language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor’s interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court’s analysis of the

Category I and II deeds the Rockaway Beach 12/342 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Rockaway Beach 12/342 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Rockaway Beach 12/342 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards/Bouche* factors weighed in favor of finding that the Rockaway Beach 12/342 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[30]

17. Rupp 13/245 Deed

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[30] The plaintiffs also argue that because the deed provide only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the DuBois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Rockaway Beach 12/342 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

The **Rupp 13/245 deed (Def.'s Ex. 94)** provides in pertinent part:

> Know all Men by These Presents: That for and in consideration of the sum of Ten Dollars ($10.00), the receipt whereof is hereby acknowledged, and other valuable considerations moving to them, John J. Rupp and Betty N. Rupp, of Saginaw, Michigan, hereinafter called the grantor, does bargain, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, a strip of land one hundred (100) feet in width, being fifty (50) feet on each side of the center line of the railway of the grantee, as the same is surveyed and located through the following described real property, situate in the County of Tillamook and State of Oregon, to wit:
>
> The South Half of the Southeast quarter (S1/2, SE1/4) and Lots Four (4), Five (5), Six (6), Eight (8), and Nine (9) of Section Ten (10), Township Three (3) Norht Range Eight (8) West, Willamette Meridian.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging, or in anywise appertaining.
>
> To Have and to Hold to the grantee and to its successors and assigns forever.
>
> The grantors covenant with the grantee that they will warrant and defend the premises

> herby granted against the lawful claims and demands of all persons whomsoever claiming the same by, through or under the grantor. [sic]

The court had found that the Rupp 13/245 deed conveyed fee simple title because the amount of consideration was substantial ($10), there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds the Rupp 13/245 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Rupp 13/245 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Rupp 13/245 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an

easement. Thus, the court finds that its original conclusion that the *Bernards*/*Bouch*e factors weighed in favor of finding that the Rupp 13/245 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

18. The Stanley 11/113 Deed

The **Stanley 11/113 deed (Def.'s Ex. 104)** provides in pertinent part:

F. S; [sic] Stanley et al Railway Deed.
to NO. 6844.
Pacific Railway and Navigation Co.

> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One DOLLARS, [sic] the receipt whereof is hereby acknowledged, F. S. Stanley and Ruth M. Stanley, his wife, Robert Smith, a single man; W. D. Wheelwright, a single man; - [sic] E. E. Lytle and Lizzie M Lytle, his wife, and May Enright, a single woman, hereinafter called the grantors, do herby bargain, sell, grant, convey and confirm, to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property, situate in the County of Tillamook and State of Oregon, to-wit:
>
> A strip of land one hundred (100) feet wide, being fifty (50) feet on each side of the center line of the railway of the grantee, as the same is surveyed and located through the East half of

> the South East [sic] quarter of Section Twenty [sic] (20) in Township Three [sic] (3) North, [sic] of Range Seven [sic] (7) West, W. M.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee and unto its successors and assigns forever.
>
> The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Stanley 11/113 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the

same reasons as explained in the court's analysis of the Category I and II deeds that the Stanley 11/113 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Stanley 11/113 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Stanley 11/113 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards/Bouche* factors weighed in favor of finding that the Stanley 11/113 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[31]

19. Thayer 11/355

The **Thayer 11/355 deed (Def.'s Ex. 107)**

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[31] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Stanley 11/113 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

provides in pertinent part:

Claude Thayer and wife Railway Deed.
to No. 7236.
Pacific Railway and Navigation Co.

KNOW ALL MEN By [sic] THESE PRESENTS; That for and in consideration of the sum of One & 00 DOLLARS, the receipt whereof is hereby acknowledged, we, Claude Thayer and Estelle Thayer, husband and wife, hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAy [sic] AND NAVIGATION COMPANy, [sic] hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:

A strip of land one hundred (100) [sic] feet wide being fifty (50) feet on each side of the center line of the railway of the grantee as the same is now surveyed and located through; [sic]

Tide Land fronting and abutting on Lot 1 of Sec. 21, T. 1 N. R. 10 W. except Town of Garibaldi.

Also beginning at a point at ordinary high water line South 84º West 24 links dist. from the meander corner between Sections 20 and 21, T. 1 N. R. 10 W. thence South 65º East on ordinary high water line 3.21 chains, thence North 17.89 chains, thence West 2.91 chains,

thence South 16.53 chains to point of beginning.

Also through an undivided one half interest in the following tracts;-

Beginning at a point on ordinary high water line 34 links South and 320 links West of the meander corner between Sections 20 and 21 T. 3 N. R. 10 W. thence N. 84º East 3.02 chains on ordinary high water line, thence North 16.53 chains, thence West 3.00 chains, thence South 16.84 chains to place of beginning; also through an undivided one half interest in Lots 5, 6, 7, and 8 in Block 3 and Lots 4, [sic] and 5 in Block 4, all in the Town of Garibaldi.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD unto the above named grantee and unto its successors and assigns forever.

The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all en[c]umbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Thayer 11/355 deed conveyed fee simple title even though the amount of

consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds that the Thayer 11/355 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Thayer 11/355 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Thayer 11/355 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards*/*Bouche* factors weighed in favor of finding that the Thayer 11/355 deed conveyed a fee was correct and therefore

the plaintiffs' motion for reconsideration is denied.[32]

20. The Thayer 18/39 Deed

The **Thayer 18/39 deed (Def.'s Ex. 108)** is entitled "1134 Railway Deed" and provides in pertinent part:

> Know All Men by These Presents: That for and in consideration of the sum of One & 00/100 Dollars, the receipt whereof is hereby acknowledged, We, Claude Thayer and Estelle Thayer[,] husband and wife, of Tillamook, Oregon, hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:
>
> A strip of land one hundred(100) [sic] feet wide being fifty (50) feet on each side of the center line of the railway of the grantee as the

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[32] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the DuBois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Thayer 11/355 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

> same is surveyed and located through Lot eight of Section twenty two, in Township one North of Range ten West of Willamette Meridian, save and except a certain one acre tract heretofore conveyed out of said Lot eight;
>
> Also through the tide lands fronting and abutting upon Lots seven and eight in said Section twenty two, in Township one North of Range ten West of Willamette Meridian.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> To have and to hold unto the above named grantee and unto its successors and assigns forever.
>
> The grantors above named do covenant that they are seized of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Thayer 18/39 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the

railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds that the Thayer 18/39 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Thayer 18/39 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Thayer 18/39 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the Bernards/Bouche factors weighed in favor of finding that the Thayer 18/39 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[33]

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[33] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the

21. Watt 12/343 Deed

The **Watt 12/343 deed (Def.'s Ex. 116)** is entitled "No. 8225. Railway Deed." and provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One and 00/100 DOLLARS , [sic] The [sic] receipt whereof is hereby acknowledged, we, George Watt and Helen Watt, his wife[,] and Robert Watt and Lois A. Watt, his wife, hereinafter called the grantors, do bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and * * * to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:
>
> A strip of land sixty (60) feet wide being thirty (30) feet on each side of the center line of the railway o f [sic] the grantee as the same is surveyed and located through Lots One, two and three of Section Seven and Lot one of Section eight, all in Township One North of Range ten Wes t [sic] of Willamette Meridian.
>
> Together with the appurtenances,

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phrase "strip of land" and used the word throughconveyed a fee. As such, the court finds that the fact that the Thayer 18/39 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

> tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.
>
> The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Watt 12/343 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds the Watt 12/343 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Watt 12/343 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Watt 12/343 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards*/*Bouche* factors weighed in favor of finding that the Watt 12/343 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[34]

22. The Watt 12/344 Deed

The **Watt 12/344 deed (Def.'s Ex. 117)** is entitled "No. 8226. Railway Deed." and provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One and 00/100 DOLLARS, the receipt whereof is

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[34] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Watt 12/343 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

hereby acknowledged, we, George Watt and Helen Watt, husband and wife, hereinafter called the grantors, do bargain, sell, grant, convey and confir, [sic] to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:

A strip of land one hundred (100) feet wide being fifty (50) feet on each side * * * of the center line of the railway of the grantee as the same in [sic] surveyed and located through Lot one of Section nine and also through the tide land fronting and abutting upon Lots One [sic] and Four [sic] of said Section nine; also through Lot one of Section sixteen and the tide fronting and abutting upon said Lot one of Section sixteen, all in Township two North of Range ten West of Willamette Meridian. Save and except a tract 105 feet by 210 feet in Lot 1 of Section 9, Township 2 North Range 10 West reserved by G. M. Lock.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.

The grantors above named do covenant that they are seised of the aforesaid premises in

> fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and[]unto its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Watt 12/344 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds the Watt 12/344 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Watt 12/344 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the

Watt 12/344 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards*/*Bouche* factors weighed in favor of finding that the Watt 12/344 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[35]

23. The Watt 12/345 Deed

The **Watt 12/345 deed (Def.'s Ex. 118**) is entitled "No. 8227. Railway Deed." and provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One and 00/100 DOLLARS, the receipt whereof is hereby acknowledged, we, John Watt and Sarah M. Watt[,] husband and wife, hereinafter called the grantors, do bargain, sell, grant, convey and confirm [sic] to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real

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[35] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Watt 12/344 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

property situate in the County of Tillamook and State of Oregon, to-wit:

A strip of land one hundred (100) feet wide being fifty (50) feet on each side of the center line of the railway of the grantee as the same in [sic] surveyed and located through Lots two, three and four of Section nine, in Township two North of Range ten West of Willamette Meridian[.]

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.

The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and[]unto its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Watt 12/345 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the

railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds that the Watt 12/345 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Watt 12/345 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Watt 12/345 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the Bernards/Bouche factors weighed in favor of finding that the Watt 12/345 deed conveyed a fee as correct and therefore the plaintiffs' motion for reconsideration is denied.[36]

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[36] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the DuBois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the

24. Westinghouse 85/39 Deed

The **Westinghouse 85/39 deed (Def.'s Ex. 121)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That I, John F. Westinghouse, a single man[,] for and in consi deration [sic] of the sum of One Dollars, [sic] to me in hand paid, the receipt whereof is hereby acknowledged, do hereby bargain, sell, grant,[]convey and confirm to Pacific Railway and Navigation Company, and to its successors and assigns forever, all of the following described real property situate in the County of Washington and State of Oregon, to-wit:
>
> A strip of land one hundred (100) feet in width, being fifty (50) feet on each side of and parallel with the center line of the track of the Pacific Railway and Navigation Company, as the same is surveyed and located through a strip of land more particularly described as the West one half of Southwest one quarter and the Southwest one quarter of Northwest one quarter of Northwest one quarter [of] Sec.[]26, T 3 N. R. 5 W., Willamette Meridian and containing four and forty two hundredths (4.42) acres more or less. Together with the

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phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Watt 12/345 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

> tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD to the said Pacific Railway and Navigation Company, and to its successors and assigns forever.
>
> The aforesaid grantor John F. Westinghouse does hereby he is the owner in fee simple of the ab[o]ve grante[d] premises, and that he will forever qarrant [sic] and defend the same unto the Pacific Railway and Navigation Company, its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Westinghouse 85/39 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds the Westinghouse 85/39 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the

original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Westinghouse 85/39 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Westinghouse 85/39 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards/Bouche* factors weighed in favor of finding that the Westinghouse 85/39 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[37]

25. Williams 6/607 Deed

The **Williams 6/607 deed (Def.'s Ex. 125)** provides in pertinent part:

George H. Willaims et ux RAILWAY DED

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[37] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Westinghouse 85/39 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

-to- No. 4113.
P. R. and N. Co.

KNOW ALL MEN BY THESE PRESENTS, That for and in consideration of the sum of Ten 00/100 DOLLARS[,] the receipt whereof is hereby acknowledged, and other valuable consideration moving to them[,] George H. Williams and Bessie Williams, his wife,, hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit:

A strip of land one hundred (100) feet wide being fifty (50) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through Lots Three, [sic] Four, [sic] Five [sic] and Six [sic] of Block Eleven [sic] in Cone and McCoy's Addition to Bay City, according to the plat thereof of record in Tillamook County, Oregon.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD unto the above named grantee and unto its successors and assigns forever.

> The grantors above named do covenant that they are seized of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Williams 6/607 deed conveyed fee simple title because the amount of consideration was substantial ($10), there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds the Williams 6/607 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Williams 6/607 deed conveyed a fee to the railroad. The court disagrees. For the same

reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Williams 6/607 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the Bernards/Bouche factors weighed in favor of finding that the Williams 6/607 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[38]

26. Wilson 75/244 Deed

The **Wilson 75/244 deed (Def.'s Ex. 126)** provides in pertinent part:

> NOW ALL MEN BY THESE PRESENTS: That we Brice Wilson and Sarah E. Wilson[,] husband and wife, for and in consideration of the sum[]of One Dollars, [sic] to them in hand paid, the receipt whereof is hereby acknowledged, do hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, and to its successors and assigns forever, all of the following described

[38] The plaintiffs also argue that because the deed provides for only nominal consideration ($10) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Williams 6/607 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

real property situate, in the County of Washington and State of Oregon, to- wit:

A strip of land one Hundred [sic] feet in width, being fifty feet on each side of and parallel with the center line of the track of the Pacific Railway and Navigation Company, as the same is surveyed and located through the East half of the Northeast quarter of Section twenty eight (28) in Township three (3) North Range five (5) West of the Willamette Meridian.

The said center line enters said land about 1185 feet south of the Northeast corner and runs southwesterly across the same to a point about 105 feet west of the South east [sic] corner thereof.

Together with the tenements, hereditaments and appurtenances, thereunto belon[g]ing or in anywise appertaining.

TO HAVE AND TO HOLD to the said Pacific Railway and Navigation Company, and to its successors and assigns forever.

The aforesaid Brice Wilson and Sarah E. Wilson do hereby covenant that they are the owners in fee simple of the above granted premises, and that they will forever warrant and defend the same unto the Pacific Railway Company, its successors and assigns, against the lawful claims of all persons whomsoever.

The court had found that the Wilson 75/244 deed conveyed fee simple title even though the amount of

consideration was nominal ($1) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds the Wilson 75/244 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Wilson 75/244 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Wilson 75/244 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards*/*Bouche* factors weighed in favor of finding that the Wilson 75/244 deed conveyed a fee esd correct and therefore the plaintiffs' motion for

reconsideration is denied.[39]

27. Woodbury 16/481 Deed

The **Woodbury 16/481 deed (Def.'s Ex. 127)** is entitled "No. 10888 Warranty Deed" and provides in pertinent part:

> Know All Men by These Presents: That for and in consideration of the sum of Ten ($10.00) Dollars, to them in hand paid, the receipt whereof is hereby acknowledged, and of other valuable considerations, E.D. Woodbury and Maude Woodbury, his wife,, hereinafter called the grantors, do bargain, sell[,] grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, the following described real property situate in the County of Tillamook and State of Oregon, to wit:
>
> A strip of land sixty (60) feet in width, being thirty (30) feet on each side of the center line of the grantee's railway as the same is surveyed and located through the following

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[39] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the Du Bois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Wilson 75/244 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

> described real property, to wit:
>
> * * * [Describing the property through which the strip conveyed runs] * * *
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining,
>
> To Have and to Hold to the grantee, and to its successors and assigns forever.
>
> The grantors covenant with the grantee that they will warrant and defend the premises herein granted against the lawful claims and demands of all persons whomsoever claiming by, through or under the grantors or either of them.

The court had found that the Woodbury 16/481 deed conveyed a fee simple title because the amount of consideration was substantial ($10), there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds the Woodbury 16/481 deed describes the location of the land being conveyed by the

grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Woodbury 16/481 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Woodbury 16/481 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards*/*Bouche* factors weighed in favor of finding that the Woodbury 16/481 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

28. The Woodbury 23/399 Deed

The **Woodbury 23/399 deed (Def.'s Ex. 128)** provides in pertinent part:

> Know All Men by These Presents: That we, E.E. Woodbury and Maude Woodbury, his wife, the grantors, in consideration of the sum ofTwo + 00/100 Dollars, paid by Pacific Railway and Navigation, the grantee herein, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do bargain, sell, transfer and convey unto said Pacific Railway and Navigation Company, an Oregon Corporation, and to its successors and assigns forever, a strip of land sixty (60) feet in

> width, being thirty (30) feet on each side of the center line of the railway of said Company as the same is now located, staked out, and operated through Section Twenty-Nine (29), Township Two (2) North, Range Ten (10) West of the Willamette Meridian. Which strip lies between the line between Sections 29 and 32 on the South and the North boundary of North Street of said Lake Lytle Tract, as the same is platted in and by Lake Lytle Plat and between Blks. [sic] 1, 7 and 3 of Lake Lytle on the East and Blks [sic] 4, 8 and 14 of Lake Lytle on the West.
>
> To Have and to Hold the above described premises unto the said Pacific Railway and Navigation Company and to its successors and assigns forever.

The court had found that the Woodbury 23/399 deed conveyed a fee simple title even though the amount of consideration was nominal ($2) because there was no "right of way" language in the title or body of the deed, no limitation on the use of the land for railroad purposes only, no right of reverter if the railroad discontinued railroad use, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, nor any revert language.

Plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the

Category I and II deeds the Woodbury 23/399 deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee.

Next, the plaintiffs argue that because the deed refers to the property as a "strip of land" and describes it as passing through the land, the court incorrectly concluded that the Woodbury 23/399 deed conveyed a fee to the railroad. The court disagrees. For the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Woodbury 23/399 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards/Bouche* factors weighed in favor of finding that the Woodbury 23/399 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.[40]

D. Category IV: Deeds that conveyed a "strip of land" "across", "through", or "over" a grantor's land and contained "right of

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[40] The plaintiffs also argue that because the deed provides for only nominal consideration ($1) the court should have found an easement. As explained in the footnote in the court's discussion of the DuBois 22/40 deed, the plaintiffs had stipulated that at least two deeds which had nominal consideration and contained the phrase "strip of land" and used the word through conveyed a fee. As such, the court finds that the fact that the Woodbury 23/399 deed contained only nominal consideration does not change the court's conclusion that it conveyed a fee rather than an easement.

way" language.

The nine deeds identified in Category IV, like the deeds in Category III above, conveyed a "strip of land" and used either the words "across", "through", or "over" in reference to that strip of land. Unlike the Category III deeds, however, the deeds in this category do use the term "right of way" either in the body or title of the deed. Again, however, as the United States has previously argued the significance of the term "right of way" in a deed conveying a property interest to a railroad is not *that* the term is used, but *how* it is used. Def's XMSJ 27-29, Def's Obj. Prelim. Findings 1-6, Oral Arg. Tr. 7-9. As the Oregon Supreme Court explained in Bouche, if a deed to a railroad grants "a use to be made of the property, usually, but not invariably, described . . . as a right of way *in the grant*," courts then have "little difficulty" in determining that the deed conveyed an easement. *Bouche*, 293 P. at 209. In *Bernards*, the deed the court determined conveyed an easement used "right of way" in the granting clause, stating that the grantors "do hereby grant, bargain, sell and convey unto the said grantee and … its successors, *for its use as a right of way, a strip of land* . . ." *Bernards*, 248 P.2d at 342 (emphasis added). The Category IV deeds use the term "right-of-way" within the bodies of the deeds, but not in the granting clauses. As the court has done in the previous three Categories, the court will examine the *Bernards*/*Bouche* factors again.

1. Beals Land Co. 18/41

The **Beals Land Co. 18/41 deed (Def.'s Ex. 8)** provides in pertinent part:

Beals Land Company
to 11136 Right of Way Deed
Pacific Railway + Navigation Co

Know All Men by These Presents: that for and in consideration of the sum of One [sic] + 00/100 Dollars, the receipt whereof is hereby acknowledged, Beals Land Company, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, hereinafter called the grantors, [sic] do [sic] hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit:

A strip of land sixty (60) feet wide being thirty (30) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through Lot two of Section thirty two in Township two North of Range ten West of the Willamette Meridian, save and except a certain tract heretofore conveyed by Beals Land Company to Security Savings and Trust Company.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

To Have and to Hold unto the above named grantee and to its successors and assigns

> forever.
>
> The grantors above named do covenant that they are seized of the aforesaid premises in fee simple, and that the same are free from all incumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Beals Land Co. 18/41 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because the "right of way" language in the title of the deed described the geographic location of the property and not the nature of the interest being conveyed, there was no limitation on the use of the land for railroad purposes only nor a right of reverter if the railroad discontinued railroad use, and there was no requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

The plaintiffs argue that the court was incorrect in determining that the Beals Land Co. 18/41 deed conveyed a fee to the railroad because in part this court improperly discounted the importance of the deed being entitled "Right of Way Deed". As support for their argument concerning this deed, the *Albright* plaintiffs cite on a case decided under Kansas law support that the title is an *indication* that the railroad received only an easement. *Albright* Mot. 13 n.5 (citing *Biery v. United States*, 753 F.3d 1279, 1289 (Fed. Cir. 2014)). The *Loveridge* plaintiffs make similar arguments and

they compare the Beals Land Company 18/41 deed to the Wilhelm deed in *Boyer* where this court found that a deed entitled right of way, that used the phrase "over and across" and strip of land, that requires the railroad to build and maintain fences and crossings, and the reflects only nominal consideration as paid conveyed an easement to the railroad and not a fee. Additionally, the plaintiffs argue that the consideration provided is nominal and the deed contains the phrases "strip of land" and "through", the property being conveyed is not described with precision, each of which is a factor that weighs into concluding that the Beals Land Co. 18/41 deed conveyed an easement and not a fee.

In response, the government argues that the standards set forth in Bernards and Bouche do not suggest that because the deed is entitled "Right of Way Deed" it must be construed as conveying an easement without other indicia to suggest that the original parties intended to convey an easement. The government maintains that because the deed does not mention any railroad purpose or contain any language limiting the use of the land to only railroad purposes the court was correct in determining that a fee was conveyed to the railroad.

The court agrees with the plaintiffs that the court was incorrect when it previously determined that the deed conveyed a fee to the railroad rather than an easement. Although the issue of the nature of the conveyance is a close call, the court agrees with the plaintiffs that the balance of the *Bernards*/*Bouche* factors indicate that the original parties intended to convey an easement to the railroad. The combination of

the use of "right of way" in the title of the deed as well as the nominal consideration indicate that the original parties intended to convey an easement to the railroad. Additionally, although as explained above, the singular use of the phrase "strip of land" and words such as through do not necessarily indicate in and of themselves an intent to convey an easement when read together with the title of the Beals Land Co. 18/41 deed, they do suggest an intent to convey an easement. Therefore, the plaintiffs' motion for reconsideration is granted on the Beals Land Co. 18/41 deed.

2. Bryden 74/273 Deed

The **Bryden 74/273 deed (Def.'s Ex. 12)** is a form deed that provides in pertinent part:

> Know all Men by these Presents, That
>
> James Bryden and Addie Bryden, [sic] his wife and John Stewart and Clara Stewart, his wife of xxxxxxxx *State of Oregon*, *in consideration of* Twenty Two [sic] and 05/100 ($22.05)DOLLARS, *to* them *paid* by Pacific Railway and Navigation Company *of* Portland, Multnomah [sic] *County* xx *State of Oregon* * * *
>
> * * * * * *have bargained and sold, and by these presents do grant, bargain, sell and convey unto said*
>
> Pacific Railway Navigation Company[,] its successors
>
> * * * *and assigns, all the following bounded and*

described real property, situated in the County of Washington and State of Oregon:

A strip of land one hundred (100) feet wide being fifty (50) feet on each side[]of the center line of the Pacific Railway and Navigation Company's Railway as surveyed, located and adopted across W 1/2 [sic] of N. W [sic] 1/4 Sec. 29, T. P. 3 N. R. 4 W. W. M. described as follows: Beginning at a point on the east line ofW 1/2 of NW 1/4 685 feet north of the Southeast corner thereof, said point being at the intersection of said east line with the west line of said Right of Way; running thence North 7 degrees and 59 minutes west along said west line of Right of Way 820 feet; thence by a spiral to the left 60 feet; thence * * * [describing property] * * *; containing four and 58/100 (4.58) acres.

* * * [Blank space] * * *

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining and also all their estate, right, title and interest in and to the same, including dower and claim of dower.

TO HAVE AND TO HOLD the above described and granted premises unto the said

PACIFIC RAILWAY AND NAVIGATION COMPANY[,]its successors xxx *and assigns forever. And*

James Bryden and Addie Bryden, his wife, and John Stewart and Clara Stewart[,] his wife, *grantors above named do covenant to and with*

Pacific Railway and Navigation Company

the above named grantee[,] its successors and assigns that[]it is lawfully seized in fee simple of the above granted premises, that the above granted premises are free from all incumbrances

* * *

and that they will and their heirs, executors and administrators shall warrant and forever defend the above granted premises, and ever part and parcel thereof, against the lawful claims and demands of all persons whomsoever. (italics in original).

The court had found that the Bryden 74/273 deed conveyed fee simple title because the amount of consideration was substantial ($22.05), the "right of way" language in the body of the deed described the geographic location of the property and not the nature of the interest being conveyed, there was no limitation on the use of the land for railroad purposes only nor a right of reverter if the railroad discontinued railroad use, and there was no requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

The plaintiffs argue that the court incorrectly determined that the phrase "right of way" did not indicate the original parties' intention to convey an

easement because it described the land being conveyed and not the nature of the property interest. Instead, plaintiffs argue the court should have determined that the use of the term "right of way" in this deed referenced the interest being conveyed and thus indicated an intention to convey an easement. Furthermore, the plaintiffs argue that because the deed contains the phrase "strip of land" and uses the word across, the court should have found that the deed conveyed an easement and not a fee. The court disagrees. First, the court finds that it was correct when it determined that the use of the phrase "right of way" in this deed described the geographic location of the property and not the property interest itself. Second, for the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and across in the Bryden 74/273 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards/Bouche* factors weighed in favor of finding that the Bryden 74/273 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

3. Friday 72/526 Deed

The **Friday 72/526 deed (Def.'s Ex. 37)** provides in pertinent part:

> THIS INDENTURE, made this 7th day of May 1906, between John W. Friday and Pearl Friday his wife, of Washington County, Oregon, parties of the first part, and the PACIFIC

RAILWAY & NAVIGATION COMPANY, a Corporation, party of the se[con]d part, WITNESSETH:

That the said parties of the first part, for and in consideration of the sum of Twenty Five Dollars ($25) to them in hand paid, by the party of the second [p]art, the receipt of which is hereby acknowledged , [sic] have granted, bargained and sold[,] conveyed and confirmed and by these presents do grant , [sic] bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns , [sic] all that certain lot, piece, parcel and track of land, lying,[]being and situate in Washington County, Oregon, and particularly described as a part of the South East Quarter of Sec. 25, T 2 N. R. 4 W., Will. Mer., to-wit:-

A strip of land 160 feet wide being 120 feet on the East side and 40 feet on the West side of the center line of the Pacific Railway & Navigation Company's railway as now surveyed and located on said lands, and described as follows:

Beginning at a point where the center line of said Railroad Survey intersects the c enter [sic] of Dairy Creek, * * * Thence down the center of said Creek South 22 degree and 40 minutes East 170 feet and thence South 13 degree and 15 minutes west 93 feet to the West line of Right of Way; Thence South 32 degree and 18 minutes East along said Right of Way 96

> feet to the center of Dairy Creek; thence North 80 degree and 22 minutes East 955 feet to the place of beginning and containing 0.96 acres.
>
> Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.
>
> TO HAVE AND TO HOLD, all and singular, the said premises together with the appurtenances unto the said[]party of the second part and unto its successors and assigns forever.

The court had found that the Friday 72/526 deed conveyed fee simple title because the amount of consideration was substantial ($25), the "right of way" language in the body of the deed described the geographic location of the property and not the nature of the interest being conveyed, there was no limitation on the use of the land for railroad purposes only nor a right of reverter if the railroad discontinued railroad use, and there was no requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

The plaintiffs argue that the court incorrectly determined that the phrase "right of way" did not indicate the original parties' intention to convey an easement because it described the land being conveyed and not the nature of the property interest. Instead, plaintiffs argue the court should have determined that

the use of the term "right of way" in this deed referenced the interest being conveyed and thus indicated an intention to convey an easement. Furthermore, the plaintiffs argue that because the deed contains the phrases "strip of land" and "located on" the court should have found that the deed conveyed an easement and not a fee. The court disagrees. First, the court finds that it was correct that the use of the phrase "right of way" was describing the geographic location of the property and not the property interest itself. Second, for the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Friday 72/526 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards* factors weighed in favor of finding that the Friday 72/526 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

4. Hannan 99/354 Deed

The **Hannan 99/354 deed (Def.'s Ex. 51)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That Ella Hannan widow, of the County of Washington State of Oregon, in consideration of the sum of Five Hundred ($500.00) Dollars to her paid by Pacific Railway and Navigation Company, a corporation, the receipt whereof is hereby acknowledged, has bargained and sold and by these[]presents does grant, bargain[,]

sell and convey unto said Pacific Railway and Navigation Company[,] its successors and assigns all of the following describe premises located in Washington County, Oregon. [sic] Beginning[]at a point on the east line of the right of way of said Pacific Railway and Navigation Company, 1020 feet south and 135 feet east of the northwest corner of the southwest quarter of Section 4, Township 2 North range [sic] 4, Willamette Meridian, said point being 100 feet distant from main line and 30 feet distant from the north leg of the wye track as now located; running thence easterly and 30 feet distant from said wye track on 18º 30' curve, 360 feet; thence easterly and 30 feet distant from wye track extended 260 feet; thence southerly at right angles, 60 feet; thence westerly[]at right angles and 30 feet distant from said wye track extend 275 feet; thence southerly and 30 feet distance from south leg of said wye track, 510 feet to the east of said right of way, which point is 40 feet from the main line[;] thence northerly along the said right of way on a 40º curve 400 feet; then north 62 feet; thence northerly along the right of way on a 4º curve parallel to the main line and 100 feet distant therefrom, 215 feet to the place of beginning containing[]1.9 acres, together with all and singular the tenements , [sic] hereditaments and appurtenances thereunto belonging or in anywise appertaining. The grantee herein agrees to fence said tract herein conveyed with a hog-tight fence. Grantor

> reserves the right to one private crossing at grade with gates[]over the tract above described at a point to be mutually agreed upon.
>
> TO HAVE AND TO HOLD[]said premises unto the said Pacific Railway and Navigation Company, its successors and assigns forever, and the grantor herein does covenant to and with the above named grantee that she is lawfully seised in fee simple of said granted premises that the same are free from all incumbrances and that she will warrant and forever defend the said premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever.

The court had found that the Hannan 99/354 deed conveyed fee simple title even though the grantee was required to build a hog-tied fence because the amount of consideration was substantial ($500), the "right of way" language in the body of the deed described the geographic location of the property and not the nature of the interest being conveyed, and there was no limitation on the use of the land for railroad purposes only nor a right of reverter if the railroad discontinued railroad use.

The plaintiffs argue that the court incorrectly determined that the phrase "right of way" did not indicate the original parties' intention to convey an easement because it described the land being conveyed and not the nature of the property interest. Instead, plaintiffs argue the court should have determined that the use of the term "right of way" in this deed

referenced the interest being conveyed and thus indicated an intention to convey an easement. Furthermore, the plaintiffs argue that because the deed contains the phrases "strip of land" and "across", the court should have found that the deed conveyed an easement and not a fee. The court disagrees. First, the court finds that it was correct that the use of the phrase "right of way" was describing the geographic location of the property and not the property interest itself. This is further supported by an inclusion of a specific amount of acreage that is being conveyed which indicates that the use of the term "right of way" was describing the geographic location of the interest being conveyed. Second, for the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Hannan 99/354 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards*/*Bouche* factors weighed in favor of finding that the Hannan 99/354 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

5. Hannan 72/549 Deed

The **Hannan 72/549 deed (Def.'s Ex. 50)**, which is very similar to the above analyzed Hannan deed, provides in pertinent part:

> THIS INDENTURE, made this 21st day of August 1906, between Henry Hannon and Ella Hannon, his wife, of Washington County,

Oregon, parties of the first part, and the Pacific Railway & Navigation Company, a Corporation, parties of the first part, WITNESSETH:

THAT the said parties of the first part, for and in consideration of the sum of $1.00, to them in hand paid, by the party of the second part, the receipt of which is hereby acknowledged, have granted, bargained and sold, conveyed and confirmed, and by these presents do grant, bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns, all that certain lot, piece, parcel and tract of land, lying, being and situate in Washington County, Oregon, and particularly described as a portion of Section 4, T. 2 N. R. 4 W., a strip of land 60 feet wide, and 680 feet long, adjoining the right of Way [sic] of the Pacific Railway & Navigation Company's Railway, on the Right , [sic] and described as follows:-

Beginning at a point 526 5/10 feet South of and 66 5/10 feet East of the North West corner of the South West quarter of the North West quarter of said Sec. 4; Running thence South 2 degrees and 38 minutes West along Right of Way, 242 5/10 feet; thence in a Southerly direction by a spiral to left, 90 feet; thence by a 4 degree curve to the left, 355 feet; thence East parallel to the North line of said Section 4, 61 5/10 feet; thence in a Northerly direction on a 4 degree curve to the Right 355 feet, thence by a spiral to right, 90 feet; thence North 2

> degrees and 30 minutes East, 264 3/10 to the North line of said Hannan's land; thence South 72 degrees and 40 minutes West, 61 1/10 feet to place of beginning and containing 0.96 acres.
>
> Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.
>
> TO HAVE AND HOLD, all and singular, the said premises together with the appurtenances unto the said[]party of the second part and unto its successors and assigns forever. And the parties of the * * * first part hereby covenant to and with the party of the second part[,] its successors and assigns forever, that the parties of the first part, [sic] are the owners in fee simple of the tract of land a bove [sic] described, and the whole thereof, that said premises are fee from all incumbrances, and that the parties of the first part, their heirs, executors and administrators shall warrant and forever defend the above described and granted premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever.

The court had found that the Hannan 72/549 deed conveyed fee simple title even though the amount of consideration was nominal ($1) because the "right of way" language in the body of the deed described the

geographic location of the property and not of the interest being conveyed, there was no limitation on the use of the land for railroad purposes only nor a right of reverter if the railroad discontinued railroad use, and there was no requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's land.

The plaintiffs argue that the court incorrectly determined that the phrase "right of way" did not indicate the original parties' intention to convey an easement because it described the land being conveyed and not the nature of the property interest. Instead, plaintiffs argue the court should have determined that the use of the term "right of way" in this deed referenced the interest being conveyed and thus indicated an intention to convey an easement. Furthermore, the plaintiffs argue that because the deed contains the phrases "strip of land" and "across" the court should have found that the deed conveyed an easement and not a fee. The court agrees with the plaintiffs that the court was incorrect when it previously determined that the deed conveyed a fee to the railroad rather than an easement. Although the issue of the nature of the conveyance is a close call, the court agrees with the plaintiffs that the balance of the *Bernards/Bouche* factors indicate that the original parties intended to convey an easement to the railroad. The combination of the use of "right of way" in the title of the deed as well as the nominal consideration indicate that the original parties intended to convey an easement to the railroad. Additionally, although as explained above, the singular use of the phrase "strip of

land" and words such as through do not necessarily indicate in and of themselves an intent to convey an easement when read together with the use "right of way" in the B Hannan 72/549 deed, they do suggest an intent to convey an easement. Therefore, the plaintiffs' motion for reconsideration is granted on the Hannan 72/549 deed.

6. Harter 29/115 Deed

The **Harter 29/115 deed (Def.'s Ex. 53)** is entitled "Warranty Deed. No. 21042." and provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS, That [sic] we John R. Harter, his wife, of the County of Tillamook in the State of Oregon, in consideration of the sum of Three Hundred Seventy-Five ($375.00) Dollars, paid by Pacific Railway and Navigation Company, a corporation duly organized under the laws of the State of Oregon, having its principal office at the City of Portland in said State, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said Pacific Railway and Navigation Company, its successors and assigns, the following described parcel of land, situate in Tillamook County, in the State of Oregon, to-wit:
>
> <u>Our undivided two-thirds (2/3) interest in and to that certain tract or parcel of land in Tillamook County, Oregon</u>, more particularly

described as follows:-

All of a strip of land one hundred feet in width, being fifty feet in width on each side of the center line of the P. R. & N. CO. as the same is now located and constructed across the Northeast quarter of the northeast quarter of section 13, Township 1 South Range 10 West, Willamette Mariden, [sic], and also across the north six rods (Ninety-nine feet of the southeast quarter of the Northeast quarter of said Section 13. [sic] Said center line being more particularly described as follows:-

* * * [Description] * * *

The above described strip of land containing 3.80 acres more or less.

It being the intention to convey our undivided two-thirds (2/3) interest in the right-of-way of said railroad Company [sic] as now used and which was acquired by us [the grantors] through deeds from Monta Davidson and Josie A. Deeter, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and also all our estate, right, title and interest in and to the same, including dower and claim of dower.

TO HAVE AND TO HOLD The [sic] above described and granted premises unto the said Pacific Railway and Navigation Company[,] its successors and assigns forever. And we the

> grantors above named do covenant to and with the above named grantee, its successors and assigns, that we are lawfully seized in fee simple of the above granted premises, that the above granted premises are free from all incumbrances, and that we will and our heirs, executors and administrators, shall warrant and defend the above granted[]premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever.

The court had found that the Harter 29/115 deed conveyed fee simple title because the amount of consideration was substantial ($375), the "right of way" language in body of the deed described the geographic location of the property and not the nature of the interest being conveyed, there was no limitation on the use of the land for railroad purposes only nor a right of reverter if the railroad discontinued railroad use, and there was no requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's interest.

The plaintiffs argue that the court incorrectly determined that the phrase "right of way" did not indicate the original parties' intention to convey an easement because it described the land being conveyed and not the nature of the property interest. Instead, plaintiffs argue the court should have determined that the use of the term "right of way" in this deed referenced the interest being conveyed and thus indicated an intention to convey an easement. Furthermore, the plaintiffs argue that because the deed

contains the phrases "strip of land" and across the court should have found that the deed conveyed an easement and not a fee. The court disagrees. First, the court finds that it was correct that the use of the phrase "right of way" was describing the geographic location of the property and not the property interest itself. This is further supported by an inclusion of a specific amount of acreage that is being conveyed which indicates that the use of the term "right of way" was describing the geographic location of the interest being conveyed. Second, for the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Harter 29/115 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the Bernards/Bouche factors weighed in favor of finding that the Harter 29/115 deed conveyed a fee were correct and therefore the plaintiff's motion for reconsideration is denied.

7. Stowell 75/32 Deed

The **Stowell 75/32 deed (Def.'s Ex. 105)** provides in pertinent part:

> THIS INDENTURE, made this 8th day of February A.D.1907, between S. H. Stowell and Josephine Stowell, his wife, of Washington County, Oregon, parties of the first part, and the PACIFIC RAILWAY & NAVIGATION COMPANY, party of the second part, WITNESSETH:

That the parties of the first part, for and in consideration of the sum of $50.00 and other good and valuable consideration to them in hand paid, by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, conveyed and confirmed and by these presents do grant, bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns all that certain lot, piece, parcel and tract of land, lying, being and situate in t[h]e County of Washington, State of Oregon and being more particularly described as follows:-

Being in the S. W. [1/4] of Sec.[]33 and in the N. E. [1/4] of Sec 32, all in[]T. 3 N R. 4. W. Will. Mer. a strip of land 100 feet wide being 50 feet on each side of the center line of the Pacific Railway and Navigation Company's Railway, as surveyed, located and adopted across said lands and described as follows:-

Beginning at a point where the East line of said Right of Way intersects the West line of said Stowells [sic] land, 475 feet North and 109 feet East of the Southwest corner of said Section 33; Running [sic] thence in a Northwesterly direction along said West line, 180 feet; thence in a North Easterly direction along said West line, 520 feet to its intersection with the West line of said Right of Way; thence in a Northeasterly dire[c]tion along said Right of way, [sic] on a spiral to the Right, 170 feet;

thence * * * *; Also Beginning [sic] at a point where the West line of said Right of Way intersects the East line of said N. E. l of said Sec. 32, 390 feet North of the Southeast corner thereof; Running * * * *, and containing 6.96 acres.

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular, the said premises together with the appurtenances unto the said Pacific Railway & Navigation Company, its successors and assigns forever,[]And [sic] We, [sic] S. H,. Stowell and Josephine Stowell, his wife, grantors above named, do covenant to and with the Pacific Railway & Navigation Company, the above n[a]med grantee, its successors and assigns, that the above granted premises are fee from all incumbrances, and that we will and our heirs, executors and administrators, shall warrant and forever defend the above granted premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever.

The court had found that the Stowell 75/32 deed conveyed fee simple title because the amount of consideration was substantial ($50), the “right of way”

language in the body of the deed described the geographic location of the property and not of the nature of the interest being conveyed, there was no limitation on the use of the land for railroad purposes only nor a right of reverter if the railroad discontinued railroad use, and there was no requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's land.

The plaintiffs argue that the court incorrectly determined that the phrase "right of way" did not indicate the original parties' intention to convey an easement because it described the land being conveyed and not the nature of the property interest. Instead, plaintiffs argue the court should have determined that the use of the term "right of way" in this deed referenced the interest being conveyed and thus indicated an intention to convey an easement. Furthermore, the plaintiffs argue that because the deed contains the phrases "strip of land" and across the court should have found that the deed conveyed an easement and not a fee. The court disagrees. First, the court finds that it was correct that the use of the phrase "right of way" was describing the geographic location of the property and not the property interest itself. This is further supported by an inclusion of a specific amount of acreage that is being conveyed which indicates that the use of the term "right of way" was describing the geographic location of the interest being conveyed. Second, for the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and across in the Stowell 75/32 deed are not made in reference to any language limiting the use of the land

and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards/Bouche* factors weighed in favor of finding that the Stowell 75/32 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

7. Smith, Lloyd 16/515 Deed

The **Smith, Loyd 16/515 deed (Def.'s Ex. 103)** provides in pertinent part:

> Know All Men by These Presents: That for and in consideration ofthe sum of One Hundred Fifty and 00/100 Dollars, the receipt whereof is hereby acknowledged, I, Lloyd C Smith a widower, of Garibaldi, Tillamook County[,] Oregon[,] hereinafter called the grantor, do hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit:
>
> A strip of land one hundred(100) [sic] feet wide being fifty (50) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through Lot 3 of Section 8, Lot 4 of Section 7, Lots 1, 2, 3, and 4 and North-West [sic] quarter of South-West[]quarter of Section 17, Lot 3 of Section 20 and Tide Land fronting and abutting upon Lots 3 and 4 of Section 20, all in

> Township 1 North of Range 10 West of Willamette Meridian; save and except that from Station No 651 to Station No. 677 said right of way hereby conveyed shall be only 65 feet wide being 50 feet on the Easterly side and 15 feet on the Westerly side of said center line.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> To Have and to Hold unto the above named grantee and unto its successors and assigns forever.
>
> The grantor above named does covenant that he is seised of the aforesaid premises in fee simple, and that the same are free from all incumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Smith, Lloyd 16/515 deed conveyed fee simple title because the amount of consideration was substantial ($150)[41], the "right of way" language in body of the deed described the geographic location of the property and not of the nature of the interest being conveyed, there was no limitation on the use of the land for railroad purposes

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41 As noted above, the court in its August 13, 2018 Opinion had incorrectly identified the consideration in the Smith/Lloyd deed as $1 rather than $150.

only nor a right of reverter if the railroad discontinued railroad use, and there was no requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's land.

The plaintiffs argue that the court incorrectly determined that the phrase "right of way" did not indicate the original parties' intention to convey an easement because it described the land being conveyed and not the nature of the property interest. Instead, plaintiffs argue the court should have determined that the use of the term "right of way" in this deed referenced the interest being conveyed and thus indicated an intention to convey an easement. Furthermore, the plaintiffs argue that because the deed contains the phrases "strip of land" and through this court should have found that the deed conveyed an easement and not a fee. The court disagrees. First, the court finds that it was correct that the use of the phrase "right of way" was describing the geographic location of the property and not the property interest itself. Second, for the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Smith, Lloyd 16/515 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Finally, plaintiffs argue that the description of the property conveyed by this deed is not precise and thus this court should have found that the deed conveyed an easement and not a fee. The court disagrees and finds for the same reasons as explained in the court's analysis of the Category I and II deeds that the Smith, Lloyd 16,515

deed describes the location of the land being conveyed by the grantor with sufficient precision to conclude that the original parties intended to convey a fee. Thus, the court finds that its original conclusion that the *Bernards/Bouche* factors weighed in favor of finding that the Smith, Lloyd 16/515 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

8. Wheeler 16/2 Deed

The **Wheeler 16/2 deed (Def.'s Ex. 122)** provides in pertinent part:

> Know All Men by These Presents: That Coleman H. Wheeler and Cora E. Wheeler, hereinafter called the grantors, for and in consideration of the sum of $1.00 to them in hand paid, the receipt whereof is hereby acknowledged, does [sic] hereby release, remit and forever quit claim [sic] unto Pacific Railway and Navigation Company, hereinafter called the grantee, its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit: A right of way 60 feet in width, being 30 feet on each side of and parallel with the center line of the grantee's railway as the same is surveyed, staked out, located and adopted through the following described real property, to-wit:
>
> All that tract or parcel of land in Lots Four (4) and Five (5) of Section Two (2), Township Two (2) North of Range Ten (10) West of the

Willamette Meridian

> Beginning at the Northeast corner of Charles Seaman's four acre tract on the meander line of the Nehalem River; thence Easterly along and up said River sixteen (16) rods; thence South twenty (20) rods parallel with Charles Seaman's line; thence West to Charles Seaman's East line; thence North to the Nehalem River to the place of beginning and containing two acres more or less.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> To Have and to Hold to the above named grantee and to its successors and assigns forever.

The court had found that the Wheeler 16/2 deed conveyed fee simple title although the amount of consideration was nominal ($1), the "right of way" language in the body of the deed described the geographic location of the property and not of the nature of the interest being conveyed, there was no limitation on the use of the land for railroad purposes only nor a right of reverter if the railroad discontinued railroad use, and there was no requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's land.

The plaintiffs argue that the court incorrectly determined that the phrase "right of way" did not indicate the original parties' intention to convey an

easement because it described the land being conveyed and not the nature of the property interest. Instead, plaintiffs argue the court should have determined that the use of the term "right of way" in this deed referenced the interest being conveyed and thus indicated an intention to convey an easement. Furthermore, the plaintiffs argue that because the deed contains the phrases "strip of land" and "across" at least three of the eight *Bernards/Bouche* factors are present and thus the court should have found that the deed conveyed an easement and not a fee.

The court agrees with the plaintiffs that the court was incorrect when it previously determined that the deed conveyed a fee to the railroad rather than an easement. Although the issue of nature of the conveyance is a close call, the court agrees with the plaintiffs that the balance of the Bernards/Bouche factors indicate that the original parties intended to only convey a fee to the railroad. The combination of the use of "right of way" in the granting clause of the deed as well as the nominal consideration indicate that the original parties intended to convey an easement to the railroad. Additionally, although as explained above, the singular use of the phrase "strip of land" and words such as through do not necessarily indicate in and of themselves an intent to convey an easement when read together with the use of "right of way" in the Wheeler 16/2 deed, they do suggest an intent to convey an easement to the railroad. Therefore, the plaintiffs' motion for reconsideration is granted on the Wheeler 16/2 deed.

E. Category V: Deeds which contain

"right of way" language in the body or the title

Category V deeds consist of five deeds which only the *Loveridge* plaintiffs are seeking reconsideration. The arguments for reconsideration are nearly identical to the arguments made concerning the Category IV except that the *Loveridge* plaintiffs' primary arguments as to why reconsideration is warranted is that the court misconstrued the use of the phrase "right of way" and should have found that "right of way" was describing the interest being conveyed and that the deeds conveyed an easement to the railroad rather than a fee. As the court has done in the previous four Categories, the court will examine the *Bernards*/*Bouche* factors again.

1. The Byrom 5/310 Deed

The **Byrom 5/310 deed (Def.'s Ex. 16)** provides in pertinent part:

Peter Byrom et ux	No. 2820
to	Right of Way
Pacific Railway and Navigation Co.	$5.00

> Know All Men by These Presents: That for and in consideration of the sum of $5.00, to them in hand paid, the receipt whereof is hereby acknowledged, Peter Bryom and Bergtha [sic] Byrom, his wife, do bargain, sell, grant and convey to the Pacific Railway and Navigation Company, and to its successors and assigns forever, a strip of land 100 ft. wide, being 50 ft. on each side of the center line of the

> railway of the Pacific Railway and Navigation[]Company, as now surveyed and located thru lands of the aforesaid Peter Byrom and Bergtha [sic] Byrom in Sections 21 and 22, in Township 1 North of Range 10 West of the Willamette Meridian, more particularly described as follows, to wit:
>
> All tide lands fronting and abutting on Lots 3[]and 4 in Section 21, and Lots 1, 2 and 3 in Section 22, in Township 22, in Township 1 North of Range 10 West of the Willamette Meridian; together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining. To Have and to Hold unto the said Pacific Railway and Navigation Company, and to its successors and assigns forever; together with the right to build, maintain and operate thereover a railway and telegraph line[.]

The court had found that the Byrom 5/310 deed conveyed fee simple title although the amount of consideration was nominal ($5), because the "right of way" language in the body of the deed described the geographic location of the property and not of the nature of the interest being conveyed, there was no limitation on the use of the land for railroad purposes only nor a right of reverter if the railroad discontinued railroad use, and there was no requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's land.

The plaintiffs argue that the court incorrectly

determined that the phrase "right of way" did not indicate the original parties' intention to convey an easement because it described the land being conveyed and not the nature of the property interest. Instead, plaintiffs argue the court should have determined that the use of the term "right of way" in this deed referenced the interest being conveyed and thus indicated an intention to convey an easement. Furthermore, the plaintiffs argue that because the deed contains only nominal consideration the court should have found that the deed conveyed an easement rather than a fee.

The court agrees with the plaintiffs that the court was incorrect when it previously determined that the deed conveyed a fee to the railroad rather than an easement. Although the issue of nature of the conveyance is a close call, the court agrees with the plaintiffs that the balance of the *Bernards*/*Bouche* factors indicate that the original parties intended to only convey an easement to the railroad. The combination of the use of "right of way" in the granting clause of the deed as well as the nominal consideration indicate that the original parties intended to convey an easement to the railroad. Additionally, although as explained above, the singular use of the phrase "strip of land" and words such as through do not necessarily indicate in and of themselves an intent to convey an easement when read together with the use of "right of way" in the Byrom 5/310 deed, they do suggest an intent to convey an easement. Therefore, the plaintiffs' motion for reconsideration is granted on the Byrom 5/310 deed.

2. The Goodspeed 16/487 Deed

The **Goodspeed 16/487 deed (Def.'s Ex. 41)** provides in pertinent part:

> Know All Men by These Presents: That for and in consideration of the sum of Thirty four Hundred and sixteen and 60/100 Dollars, the receipt whereof is hereby acknowledged, we, H. F. Goodspeed and Lillian A Goodspeed, husband and wife, of Tillamook City, Tillamook County, Oregon: [sic] hereinafter called the grantors, do bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit:
>
> A strip of land fifty[](50) feet wide being twenty five (25) [feet] on each side of the center line of the railway of the grantee as the same is surveyed and located through the South East quarter of the North West quarter and that part of Lot seven lying West of a certain right of way formerly conveyed by said Goodspeed to said Pacific Railway and Navigation Company, all lying in Section thirty, in Township one South of Range nine West of Willamette Meridian, the center line of the right of way hereby conveyed being more particularly described as follows, to wit: Beginning at a point which is identical with Station 18 plus

84.5 on the main line of said P.R.+N. Co., which point is located by beginning at Sta. 00 plus 00 on said main line, 4407.8 feet South and 281.5 East of the 1/4 Section corner between Secs [sic] 19 and 30, T 1 S R 9 W, and running thence N 1º 00' East 1884.5 feet to said Station 18 plus 84.5 which is the initial point of the right of way hereby intended to be described and conveyed, thence following a spiral to the left a distance of 120 feet and consuming 7º 30' of the angle, thence following a 12º 30' curve to the left a distance of 609.3 feet, thence following a spiral to the left a distance of 120 feet and consuming 7º 30' of angle, to Sta. 8 plus 49.3; thence South 89º 50' West 1142 feet more or less to the East line of Lot two in said Section 30.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

To have and to hold unto the above named grantee and unto its successors and assigns forever.

The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all incumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Goodspeed 16/487 deed conveyed fee simple title because the amount of consideration was substantial ($3416.60), the "right of way" language in body of the deed described the geographic location of the property and not of the nature of the interest being conveyed, there was no limitation on the use of the land for railroad purposes only nor a right of reverter if the railroad discontinued railroad use, and there was no requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's land.

The plaintiffs argue that the court incorrectly determined that the phrase "right of way" did not indicate the original parties' intention to convey an easement because it described the land being conveyed and not the nature of the property interest. Instead, plaintiffs argue the court should have determined that the use of the term "right of way" in this deed referenced the interest being conveyed and thus indicated an intention to convey an easement. Furthermore, the plaintiffs argue that because the deed contains the phrases "strip of land" and through this court should have found that the deed conveyed an easement and not a fee. The court disagrees. First, the court finds that it was correct that the use of the phrase "right of way" was describing the geographic location of the property and not the property interest itself. Second, for the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Goodspeed 16/487 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the

original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards/Bouche* factors weighed in favor of finding that the Goodspeed 16/487 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

3. Hobson 13/331 Deed

The **Hobson 13/331 deed (Def.'s Ex. 56)** provides in pertinent part:

> Know all Men by These Presents: That for and in consideration of the sum of Three Hundred and 00/100 Dollars, the receipt whereof is hereby acknowledged, We, Joanna Hobson and Frank P. Hobson, wife and husband, of Tillamook County, Oregon hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:
>
> A strip of land one hundred (100) feet wide being fifty (50) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through Lots three and that part of Lot two lying East of a certain tract in Lot two owned by Theodore Parks, all in Section twenty-two, Township one North of Range ten West of Willamette Meridian, on

> what is known and designated as the Coast Line Route.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining. It is hereby understood and agreed that this deed shall not convey to said Railway Company any right of way on any lands of the grantor lying East of the curve now staked out and located to connect said Coast Line Route with the right of way heretofore conveyed by the grantors herein to said Grantee.
>
> To Have and to Hold unto the above named grantee and unto its successors and assigns forever.
>
> The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Hobson 13/331 deed conveyed fee simple title because the amount of consideration was substantial ($300), the "right of way" language in body of the deed described the geographic location of the property and not of the nature of the interest being conveyed, z there was no requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's land.

The plaintiffs argue that the court incorrectly determined that the phrase "right of way" did not indicate the original parties' intention to convey an easement because it described the land being conveyed and not the nature of the property interest. Instead, plaintiffs argue the court should have determined that the use of the term "right of way" in this deed referenced the interest being conveyed and thus indicated an intention to convey an easement. Furthermore, the plaintiffs argue that because the deed contains the phrases "strip of land" and through this court should have found that the deed conveyed an easement and not a fee. The court disagrees. First, the court finds that it was correct that the use of the phrase "right of way" was describing the geographic location of the property and not the property interest itself. This is further supported by an inclusion of a specific amount of acreage that is being conveyed which indicates that the use of the term "right of way" was describing the geographic location of the interest being conveyed. Second, for the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Hobson 13/331 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards* factors weighed in favor of finding that the Hobson 13/331 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

4. The Johnson 9/610 Deed

The **Johnson 9/610 deed (Def.'s Ex. 61)** provides

in pertinent part:

Samuel Johnson RAILWAY DEED.
to NO. 6636.
Pacific Railway and Navigation Company.

* * * [EMPTY SPACE] * * *
------MAP------
-------Showing RightofWay [sic] across-------
-------A Tract of land 209½ ft sq.
Sec 22 T1N.R10W --------
--------Scale "1400ft"--------
* * * [Drawing or map] * * *

KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of Twenty five and 00/100 DOLLARS, the receipt whereof is hereby acknowledged, I, Samuel Johnson, widower, and sole heir at law of Annie Johnson, deceased, of Tillamook County, Oregon, hereinafter called the grantnrs [sic] do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:

A strip of land one hundred (100) feet wide being fifty (50) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through a certain tract of land in Lot eight of section twenty two, Township one North of Range ten West of

Willamette Meridian, more particularly described as follows;- [sic]

Commencing at a stake on the meander line marked with a cross, running thence in a Southerly direction 209l feet, thence Westerly 209 1/2 feet, thence Northerly 209 1/2 feet, thence Easterly 209 1/2 feet to the place of beginning.

Together with the appurtenances, tenements,[]and hereditaments thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD unto the above named grantee and unto its successors and assigns forever.

The grantors [sic] above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court had found that the Johnson 9/610 deed conveyed fee simple title because the amount of consideration was substantial ($25), the "right of way" language in body of the deed described the geographic location of the property and not of the nature of the interest being conveyed, there was no limitation on the use of the land for railroad purposes only nor a right of reverter if the railroad discontinued railroad use, and

there was no requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's land.

The plaintiffs argue that the court incorrectly determined that the phrase "right of way" did not indicate the original parties' intention to convey an easement because it described the land being conveyed and not the nature of the property interest. Instead, plaintiffs argue the court should have determined that the use of the term "right of way" in this deed referenced the interest being conveyed and thus indicated an intention to convey an easement. Furthermore, the plaintiffs argue that because the deed contains the phrases "strip of land" and through this court should have found that the deed conveyed an easement and not a fee. The court disagrees. First, the court finds that it was correct that the use of the phrase "right of way" was describing the geographic location of the property and not the property interest itself. Second, for the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of land" and through in the Johnson 9/610 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards*/*Bouche* factors weighed in favor of finding that the Johnson 9/610 deed conveyed a fee were correct and therefore the plaintiff's motion for reconsideration is denied.

5. The Paquet 5/316 Deed

The **Paquet 5/316 deed (Def.'s Ex. 81)** provides in pertinent part:

Fred Paquet	No. 2853
to	Right of Way
Pacific Railway + Navigation Company	$202.60

> Know All Men by These Presents: That for and in consideration of the sum of $202.60/100 to me in hand paid, the receipt whereof is hereby acknowledged, I, Fred Paquet, unmarried, do hereby grant, bargain, sell and convey to the Pacific Railway and Navigation Company, and to its successors and assigns forever, all those portions of the land owned by me, embraced in a strip of land 100 ft. wide, being 50 ft. on each side of the center line of the railway to the Pacific Railway and Navigation Company, as now surveyed, located and adopted thru the lands of the aforesaid Fred Paquet, in Lot 1, Sec. 22 T 1 N.R.10 W., W. M. said center line being more particularly described as follows: * * * [Description] * * *
>
> Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.
>
> To Have and to Hold unto the Pacific Railway and Navigation Company and to its successors and assigns forever, together with the right to build, maintain and operate thereover a railway and telegraph line.

The court had found that the Paquet 5/316 deed

conveyed fee simple title because the amount of consideration was substantial ($202.60), the "right of way" language in the body of the deed described the geographic location of the property and not of the nature of the interest being conveyed, there was no limitation on the use of the land for railroad purposes only nor a right of reverter if the railroad discontinued railroad use, and there was no requirement for the railroad to build structures such as crossings, cattle guards, or fences to protect the grantor's land.

The plaintiffs argue that the court incorrectly determined that the phrase "right of way" did not indicate the original parties' intention to convey an easement because it described the land being conveyed and not the nature of the property interest. Instead, plaintiffs argue the court should have determined that the use of the term "right of way" in this deed referenced the interest being conveyed and thus indicated an intention to convey an easement. Furthermore, the plaintiffs argue that because the deed contains the phrases "strip of land" and through this court should have found that the deed conveyed an easement and not a fee. The court disagrees. First, the court finds that it was correct that the use of the phrase "right of way" was describing the geographic location of the property and not the property interest itself. This is further supported by an inclusion of a specific amount of acreage that is being conveyed which indicates that the use of the term "right of way" was describing the geographic location of the interest being conveyed. Second, for the same reasons as explained in the court's analysis of the Category II deeds, the use of "strip of

land" and through in the Paquet 5/316 deed are not made in reference to any language limiting the use of the land and thus do not indicate an intent by the original parties to convey an easement. Thus, the court finds that its original conclusion that the *Bernards* factors weighed in favor of finding that the Paquet 5/316 deed conveyed a fee was correct and therefore the plaintiffs' motion for reconsideration is denied.

CONCLUSION

For the foregoing reasons, the Albright and Loveridge plaintiffs' motion for reconsideration is hereby **GRANTED-in-PART and DENIED-in-PART**. Reconsideration is granted for the Beals Land Co. 18/41 deed, Wheeler 16/2 deed, Byrom 5/310 deed and Hannan 72/549 deed. The parties shall have until **February 25, 2019** to file a proposed schedule for resolving the remaining issues in these cases. The court will thereafter schedule a status conference to finalize the parties' next steps.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Senior Judge

APPENDIX D

UNITED STATES COURT OF FEDERAL CLAIMS

PERRY LOVERIDGE, *et al*.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

ALBRIGHT, *et al*.,

Plaintiffs,

and

THE UNITED STATES,

Defendant.

No. 16-912L and 16-1565L and No. 18-375 Consolidated (FILED: August 13, 2018

Rails-to-Trails; Fifth Amendment Takings; Oregon Law; Easement; Fee Simple

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OPINION

FIRESTONE, *Senior Judge.*

I. Introduction

Pending before the court are cross-motions for partial summary judgment filed pursuant to Rule 56 of the Rules of the United States Court of Federal Claims ("RCFC") by the plaintiffs in *Loveridge v. United States*

("*Loveridge* plaintiffs"), the plaintiffs in *Albright v. United States* ("*Albright* plaintiffs"), and the United States ("the government").[1]

The *Loveridge* plaintiffs and the *Albright* plaintiffs claim in their motions that the government affected a taking of their reversionary interests in land within a dormant rail corridor when the government approved the conversion of an approximately eighty-one mile long portion of a dormant railroad line between Tillamook County and Washington County, Oregon to create a recreational trail pursuant to the National Trail System Act Amendments of 1983, 16 U.S.C. § 1247(d) ("Trails Act"). The plaintiffs contend in their motions that the deeds from their predecessors-in-interest granted only easements to the railroad which terminated when the railroad became dormant. If the deeds granted easements, plaintiffs argue that after the rail line became dormant the property within the corridor reverted back to plaintiffs and that conversion of the rail corridor gave rise to a taking of their reversionary interests in the rail corridor.

The government argues that the deeds at issue should be read to have conveyed the property within the rail corridor to the railroads in fee simple absolute. If

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1. *Loveridge v. United States* and *Albright v. United States* both involve the same rail corridor in Oregon and overlapping deeds but the cases involve different plaintiffs and there is different counsel in each case. For these reasons, the cases have not been consolidated. Nonetheless, because the cases concern the same segment of railroad line and involve many of the same deeds the court is issuing a single opinion.

the railroads received a fee interest in the corridor, the plaintiffs have no revisionary interest subject to a taking. In the alternative, the government contends that any easements granted to the railroad were broad enough to encompass trail use. In this opinion the court will only address whether the deeds in dispute conveyed an easement, as plaintiffs contend, or a fee, as the government contends.

II. The Rails to Trails Act

The statutory and legal backdrop to Rails-to-Trails cases was recently summarized by the Federal Circuit in *Chicago Coating Co., LLC v. United States*, 892 F.3d 1164, 1165-68 (Fed. Cir. 2018). As the Federal Circuit explains, under the Trails Act, the United States Surface Transportation Board ("STB") has issued regulations regarding the abandonment and discontinuance of service over railroad lines. *See* 49 C.F.R. §§ 1152.1–1152.60. A railroad, to abandon or discontinue service over a rail line, must file an application for abandonment or discontinuance with the STB under 49 U.S.C. § 10903 or a notice of exemption under 49 U.S.C. § 10502 and 49 C.F.R. § 1152.50. Under either procedure, the STB will not approve the abandonment of the railroad line under either procedure if a "qualified trail provider" ("a state, political subdivision, or qualified private organization") submits to the STB a request to use the rail corridor for interim trail use and railbanking under 16 U.S.C. § 1247(d) ("section 1247(d)"). *See* 49 U.S.C. § 1152.29. If the qualified trail provider submits a statement of willingness to assume financial and legal responsibility to the STB and the railroad carrier, the STB will, in

situations involving an operating railroad, issue a Certificate of Interim Trail Use or Abandonment ("CITU"), which preserves the STB's jurisdiction over the railroad corridor while the parties negotiate an interim trail use agreement. 49 U.S.C. § 1152.29(c). In situations involving the exemption procedure, the STB will issue a Notice of Interim Trail Use ("NITU"), which also preserves the STB's jurisdiction over the railroad corridor, allows the railroad to discontinue its operations, permits the railroad to remove equipment and railroad track, and provides the railroad and the qualified trail provider 180 days to negotiate an interim trail use agreement. 49 U.S.C. § 1152.29(d).

During this time, the railroad will also negotiate an agreement for the transfer of the rail corridor to the trail operator. If an agreement is reached, the CITU or NITU automatically authorizes the interim trail use. If the STB takes no further action, the trail sponsor may then assume management of the former railroad corridor, subject only to the right of a railroad to reassert control of the property for the restoration of rail service. If, on the other hand, an agreement is not reached, the railroad will be allowed to abandon the railroad line, at which time the STB's jurisdiction over the railroad corridor terminates. Section 1247(d) provides that interim trail 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." 16 U.S.C. § 1247(d). Thus, the property remains within the national rail system and available for reactivation of rail service for the duration of the interim trail use. *Chicago Coating*, at 1167. The Federal Circuit has

explained that section 1247(d) of the Trails Act "prevents the operation of state laws that would otherwise come into effect upon abandonment—property laws that would 'result in extinguishment of easements for railroad purposes and reversion of rights of way to abutting landowners.'" *Caldwell v. United States*, 391 F.3d 1226, 1229 (Fed. Cir. 2004) (quoting *Rail Abandonments—Use of Rights–of–Way as Trails*, Ex Parte No. 274 (Sub– No. 13), 2 I.C.C.2d 591, 1986 WL 68617 (1986)).

Under the Takings Clause of the Fifth Amendment, private property cannot "be taken for public use, without just compensation." U.S. Const. Amend. V. According to the Federal Circuit, "[i]t is settled law that a Fifth Amendment taking occurs in Rails–to– Trails cases when government action destroys state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement." *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010), *reh'g denied*, 646 F.3d 910 (Fed. Circ. 2011). *See also Chicago Coating*, at 1167, 1170. A Fifth Amendment taking occurs when "the issuance of the CITU or NITU authorizing recreational trail use effectively extinguishes the state property rights of reversion of the right-of-way to the fee owner." *Macy Elevator, Inc. v. United States*, 97 Fed. Cl. 708, 718 (2011). *See also Caldwell v. United States*, 391 F.3d 1226, 1228 (Fed. Cir. 2004) ("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."); *Chicago Coating*, 1169-70

at *4 ("In order to prove a compensable taking based on the issuance of a NITU, a claimant must prove that 'state law reversionary interests [in the property at issue] are effectively eliminated in connection with a conversion of a railroad right-of-way to trail use.'" (quoting *Caldwell*, 391 F.3d at 1228)). Determining whether taking liability arises in a Rails-to-Trails case involves addressing a three-part inquiry: "(1) who owns the strip of land involved, specifically, whether the railroad acquired only an easement or obtained a fee simple estate; (2) if the railroad acquired only an easement, were the terms of the easement limited to use for railroad purposes, or did they include future use as a public recreational trail (scope of the easement); and (3) even if the grant of the railroad's easement was broad enough to encompass a recreational trail, had this easement terminated prior to the alleged taking so that the property owner at the time held a fee simple unencumbered by the easement (abandonment of the easement)." *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009) (citing *Preseault v. United States*, 100 F.3d 1525, 1533 (Fed. Cir. 1996) ("*Preseault II*")). *See also Chicago Coating*, 1169 at *4. Thus, in Rails-to-Trails cases, "the threshold question is whether the claimant has a compensable property interest in the land allegedly taken, which is often answered by analyzing the original deeds that conveyed the property to the railroad." *Chicago Coating*, 1170 at *2.

III. Factual Background

At issue in these cases are 132 deeds that in the

early 1900s transferred property interests to railroad companies in order to create the above-referenced 81.07 mile long portion of the railroad line located between milepost 775.01 near Banks, Oregon and milepost 856.08 near Tillamook, Oregon. Specifically, the interests were deeded to the Pacific Railway and Navigation Company and the Southern Pacific Company. Eventually, the Port of Tillamook Bay Railroad ("POTB") obtained ownership of the relevant portion of the railroad line.

On May 26, 2016, the Port of Tillamook Bay Railroad filed a Notice of Intent to Partially Terminate (Abandon) Service for the railroad segment at issue here with the STB. On or about June 17, 2016, the Salmonberry Trail Intergovernmental Agency ("Salmonberry Trail") filed with the STB a Statement of Willingness to Assume Financial Responsibility ("Statement") regarding the relevant railroad segment at issue in this case. In its Statement, in addition to expressing its willingness to assume responsibility for the relevant railroad segment, the Salmonberry Trail stated that the relevant railroad segment "is suitable for railbanking" and requested that the STB find the railroad segment suitable for trail use and issue a Public Use Condition and a Certificate or Notice of Interim Trail Use under the National Trails System Act, 16 U.S.C. §1247(d).

On July 1, 2016, the POTB filed with the STB its response to the Salmonberry Trail's request and expressed its willingness to negotiate with the Salmonberry Trail regarding the acquisition of the relevant railroad segment. On July 26, 2016, the STB

issued a Notice of Interim Trail Use ("NITU") for the relevant railroad segment. On January 19, 2017, the STB granted the Salmonberry Trail's request for a 180-day extension of the NITU until July 21, 2017 for negotiating the trail use/railbanking agreement. Eventually, after another extension, the POTB and the Salmonberry Trail on October 27, 2017, notified the STB that they entered into a trail use/rail banking agreement regarding the relevant railroad segment.

IV. Procedural Posture

The present actions were filed by the *Loveridge* plaintiffs on August 1, 2016 and by the *Albright* plaintiffs on November 23, 2016. *See Loveridge v. United States*, No.1:16-cv-00912-NBF, ECF No. 1; *Albright v. United States*, No. 1:16-cv-01565-NBF, ECF No. 1.

On September 22, 2017, the government and the *Loveridge* plaintiffs filed Joint Stipulations Regarding Title Matters ("*Loveridge* Joint Stipulations"). *See Loveridge*, ECF No. 24. The *Loveridge* plaintiffs filed their motion for partial summary judgment and their memorandum in support of their motion for summary judgment on October 10, 2017. The *Albright* plaintiffs filed their motion for partial summary judgment and memorandum in support on November 2, 2017. On December 12, 2017, the government filed the same cross-motion and response for both cases.

Briefing on the motions was completed on April 9, 2018, and on April 19, 2018, the court, in an effort to help expedite resolution of the numerous legal issues

raised regarding the 132 deeds at issue, filed, under seal, a statement of preliminary conclusions and findings for the parties to consider and address before the scheduled oral argument. *See Loveridge*, ECF No. 46; *Albright*, ECF No. 48. The court received the parties' objections to the court's preliminary conclusions and findings on May 3, 2018 and on May 7, 2018, the court filed under seal an order setting forth the points of agreement and disagreement between the parties. *See Loveridge*, ECF No. 49; *Albright*, ECF No. 51.

As set forth in that order, the parties agree that the following 18 deeds[2] granted fee simple interests to the railroad: Alderman 11/614 (Def.'s Ex. 2); Bryden 74/274 (Def.'s Ex. 13); Coates 5/486 (Def.'s Ex. 22); Cone 7/339 (Def.'s Ex. 23); Edner 35/282 (Def.'s Ex. 34); Erickson 36/557 (Def.'s Ex. 36); Fry 74/243 (Def.'s Ex. 38); Handley 21/99 (Def.'s Ex. 47); Hauxhurst 11/330 (Def.'s Ex. 55); Hobson 7/39 (Def.'s Ex. 57); Illingworth 7/164 (Def.'s Ex. 58); Johnson 11/353 (Def.'s Ex. 60); Kunze & Gubser 13/15 (Def.'s Ex. 68); Murphy 11/283 (Def.'s Ex. 78); Parks 11/329 (Def.'s Ex. 82); Pike (Pacific Lodge) 7/81 (Def.'s Ex. 84); Provoost 7/21 (Def.'s Ex. 89); and Seamon 11/285 (Def.'s Ex. 99). Eventually, plaintiffs claiming a taking based on these deeds will have to be dismissed from the case.

The parties also agree that the following 12 deeds

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[2] Deeds are listed as Name Book/Page (Exhibit Number). Unless otherwise indicated, the exhibits are those attached to the Def.'s Brief.

conveyed only easements to the railroad: Alley 9/537 (Def.'s Ex. 4); Brighton Mills Co. 58/292 (Def.'s Ex. 10); Cummings 79/381 (Def.'s Ex. 26); Denni 75/372 (Def.'s Ex. 29); Hammond Lumber Co. 23/308 (Def.'s Ex. 46); Kilches River Co. 31/228 (Def.'s Ex. 64); Kinney 13/196 (Def.'s Ex. 65); Larsen 5/133 (Def.'s Ex. 70); Miami Lumber Co. 27/440 (Def.'s Ex. 77);[3] Smith, Alfred 13/313 (Def.'s Ex. 102); Tucker 12/331 (Def.'s Ex. 112); and Whitney Co. Ltd. 7/84 (Def.'s Ex. 124). *See* Def.'s Br. at 23–24; Pls.' *Loveridge* Br. at 37–38; Oregon Landowners' Reply in Supp. Cross-Mot. Partial Summ. J. ("Pls.' *Albright* Reply") at 6–7, *Albright*, ECF No. 46. *See also Loveridge* Joint Stipulations. The government additionally agrees that the easements conveyed by eleven of these twelve source deeds (all except the Brighton Mills Co. 58/292 deed) "are limited to railroad purposes" and therefore "railbanking and trail use are outside the scope of the easements" that these eleven deeds conveyed to the railroad. The plaintiffs claiming a taking based on these deeds will continue in the litigation.

Oral argument on the parties' cross-motions for partial summary judgment with regard to the 102 deeds remaining in contention was heard on May 9, 2018.

V. Summary Judgement Standards

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and that movant is entitled to judgment as a matter of law." RCFC 56(a). A genuine dispute is one that could

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3 The Parties do not address the deed in their motions.

permit a reasonable jury to enter a verdict in the non-moving party's favor, and a material fact is one that could affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party moving for summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact and can satisfy this burden by presenting evidence that negates an essential element of the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 331 (1986). To establish a genuine issue of material fact, a party '"must point to an evidentiary conflict created on the record; mere denials or conclusory statements are insufficient."' *Radar Indus., Inc. v. Cleveland Die & Mfg. Co.*, 424 Fed. App'x 931, 936 (Fed. Cir. 2011) (quoting *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985)). In evaluating motions for summary judgment, courts must draw any inferences from the underlying facts in the light most favorable to the non-moving party and may not engage in credibility determinations or weigh the evidence. *Anderson*, 477 U.S. at 255; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If no rational trier of fact could find for the non-moving party, a genuine issue of material fact does not exist and the motion for summary judgment may be granted. *Matsushita Elec. Indus.*, 475 U.S. at 587. With respect to cross-motions for summary judgment, courts must evaluate each motion on its own merits and resolve reasonable inferences against the party whose motion the court is considered. *Marriot Intern. Resorts, L.P. v. United States*, 586 F.3d 962, 968–69 (2009).

VI. Oregon Law

As discussed above, Rails-to-Trails takings cases arise from the application of section 8(d) of the National Trails System Act (the "Trails Act") as amended by the National Trails System Act Amendments of 1983 and codified at 16 U.S.C. § 1247(d) and liability for a taking occurs when "a claimant . . . prove[s] that 'state law reversionary interests [in the property at issue] are effectively eliminated in connection with a conversion of a railroad right-of-way to trail use.'" *Chicago Coating*, 1170 at *4 (quoting *Caldwell*, 391 F.3d at 1228)). To determine whether there has been a taking requires the court "to apply the law of the state where the property interest arises." *Id.* at

*5 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Preseault II*, 100 F.3d at 1536). In these cases, Oregon law applies.

Under Oregon law, the task of the court is to ascertain the intent of the original parties by considering the language of the deed in its entirety and the surrounding circumstances. *See, e.g.*, *Bouche v. Wagner*, 293 P.2d 203, 208 (Or. 1956) ("Whether an instrument conveys ownership of land or only an easement depends upon the intention of the parties." (quotation marks and citation omitted)); *Doyle v. Gilbert*, 469 P.2d 624, 626 (Or. 1970) ("It is [the court's] duty, therefore, to determine the intent of the parties from the language of the deed itself and from the surrounding circumstances."); *U.S. Nat. Bank of La Grande v. Miller*, 258 P. 205, 209 (Or. 1927) ("it is the duty of the court to give effect to the intention of the

parties in a deed as to other contracts. This intention must be gathered from the entire instrument. In order to determine the intention of the parties, it is the duty of the court to consider 'the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, * * * so that the judge be placed in the position of those whose language he is to interpret.'" (citations omitted)).

Oregon law provides that that "the intention to convey less than the full fee must be clearly expressed or necessarily implied from the words used in the conveyance." *Bouche v. Wagner*, 293 P.2d 203, 208 (Or. 1956) (citing *Weniger v. Ripley*, 293 P. 425 (Or. 1930)). In *Bernards v. Link*, 284 P.2d 341 (Or. 1952) and *Bouche v. Wagner*, 293 P.3d 203 (Or. 1956), the Oregon Supreme Court has identified eight factors to examine in determining whether a deed which does not expressly state the nature of the interest conveyed should be read to have conveyed an easement or a fee simple interest to a railroad. These factors are: (1) whether the deed is entitled "Right of Way Deed" or uses "right of way" in the title of the deed, which would imply that only a "right" or easement was granted to the railroad; (2) whether the phrase "right of way" is used in the body of the deed to describe the interest being conveyed, which would indicate only a "right" rather than a fee was conveyed; (3) whether the consideration paid for the interest was nominal, which if nominal would suggest that an easement was conveyed; (4) whether the deed contains a reverter clause; (5) whether the deed uses the phrase "over and across" (or "over and across and out") the lands of the grantors, which would indicate

that a right to cross the land or an easement was conveyed; (6) whether the property interest conveyed is described with without precision, which if described without precision would weigh in favor of construing the deed as an easement; (7) whether the deed contains a commitment by the railroad to build structures, such as fences, cattle guards, or crossings, which would favor finding an easement; and (8) whether the deed uses the phrase "strip of land" to describe the interest being conveyed, which would indicate that the deed conveyed an easement to the railroad. *See Bernards v. Link*, 248 P.2d 341, 343 (Or. 1952); *Bouche v. Wagner*, 293 P.2d 203, 209 (Or. 1956). This court has previously applied these criteria in another Rails-to-Trails case involving Oregon property owners. See *Boyer v. United States*, 123 Fed. Cl. 430, 437 (2015).

The government argues that two of the factors taken from the *Bernards* opinion regarding the construction of structures such as fences, crossings, or cattle guards and referencing the interest being conveyed as a "strip of land" may no longer be relevant to determining whether a fee or easement was granted because the Oregon Supreme Court in the later issued *Bouche* decision "failed to mention" those two factors, even though it "specifically reiterated" the other six factors identified in *Bernards*. The court has read *Bouche* and *Bernards* and concludes that *Bouche* cannot be read to have rejected the relevance of those two factors in all situations. Rather, the issue of fencing did not appear to be relevant in relation to the particular deeds examined in the *Bouche* case. As for use of the phrase "strip of land," the court agrees with

the government that the phrase standing alone will not be sufficient to establish the intent to convey only an easement, as the Oregon Supreme Court stated that "'[c]onveyances to railroads, which purport to grant and convey a strip, piece, parcel, or tract of land, and which do not contain additional language relating to the use or purpose to which the land is to be put or in other ways cutting down or limiting, directly or indirectly, the estate conveyed, are usually construed as passing an estate in fee.'" *Bouche*, 293 P.2d at 209 (quoting 132 A.L.R. 145).[4]

In examining the deeds remaining in dispute, the court recognized that virtually all of the 102 disputed deeds, like most of the ones agreed upon by the parties, used phrases like "strip of land" and "through the land" in the body of the deed and also described the property conveyed with similar degrees of specificity. As such, the court has determined that these factors are of limited value in discerning intent. Rather, as the *Bouche* court stated, the court has focused its analysis on whether the deed contains language that can be fairly read as limiting the railroad's use of the estate conveyed to only a "right." Thus, in deciding whether the deed conveyed only an easement for a right of way and not a fee, the court has focused on whether the deed

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[4] Indeed, the plaintiffs have agreed that 18 deeds with the phrase "strip of land" and use the words similar to "across" or "through" when describing property conveyed a fee interest in the rail corridor. The government has also agreed that deeds which describe the property with a degree of precision convey an easement.

uses the phrase "right of way" in the title or text to describe the estate granted, contains language limiting the railroad's use of the property for only a railroad purpose or requiring the property to be returned if no longer used for railroad purposes, provides for only nominal consideration, and requires the railroad to provide and maintain crossings, fences or other edifices which would also indicate that only an easement was conveyed.

VII. Deeds

1. The Alley 5/475 Deed

The **Alley 5/475 deed (Def.'s Ex. 3)** provides in pertinent part:

> Know all Men by These Presents : [sic] That for and in consideration of the sum of $15.00 to them in hand paid, the receipt whereof is hereby acknowledged[,] Olivia Alley and Lee M. Alley, her husband, do hereby grant, bargain, sell and convey to the Pacific Railway and Navigation Company, and to its successors and assigns forever, that portion, triangular in shape, of the lands owned by them in Lot 2, Sec. 21, T.1 N.R. 10 West W. M., included in a strip 100 ft. in width being 50 ft. on each side of the center line of the Pacific Railway and Navigation Company's Railway, as now surveyed and located thru the lands owned by them, and being that portion thereof north of the north line of the County Road, as said County Road is now situate and located, said

> center line of said Pacific Railway and Navigation Company's railway being more particularly described as follows:
>
> * * * [Description] * * *
>
> Together with the tenements, hereditaments and appurtenances thereunto belonging or in any way appertaining:
>
> To Have and to Hold unto the said Pacific Railway and Navigation Company and to its successors and assigns forever; together with the right to build, maintain and operate thereover a railway and telegraph line.

The plaintiffs contend that this deed conveyed only an easement on the grounds that the deed specifically references a purpose–"the right to build, maintain and operate thereover a railway and telegraph line" and because it references "thru the lands" owned by the grantor. The plaintiffs argue that under the *Bernards/Bouche* criteria these phrases establish that an easement for railroad purposes was granted.

The government argues that the deed should not be construed as granting an easement simply because it uses the phrase "thru the lands" and confirms the railroad's right to build a railroad on the property. The government argues that where, as here, the deed does not reference a right of way either in the title or body of the deed the phrase "thru the lands" simply describes the location of the property conveyed. The government further argues that the language authorizing the "right to build, maintain and operate thereover a railway. . .

line," does not limit the railroad's use of the conveyance but instead confirms the rights inherent in the fee conveyance. For these reasons, the government argues the court should read the deed as conveying a fee simple interest to the railroad.

First, the court finds that the phrase "together with the right to build, maintain and operate thereover a railway and telegraph line" while identifying a railroad purpose does not limit the railroad's use. As will be discussed *infra* in this opinion, there are deeds where the language "together with the right to build a railroad" is preceded with language clearly stating that a "fee simple absolute" interest was granted. Moreover, the quoted language does not limit the railroad's rights to only construction and operation a railway line. Rather, the subject language confirms the railroad's right to construct a rail line without limitation.

Therefore, based on the court's understanding of the language discussed above, and because the consideration payed was not nominal ($15), the court finds that without any mention of the phrase "right of way", nor any commitment by the railroad to build structures such as crossings, cattle guards, or fences, the **Alley 5/475 deed (Def.'s Ex. 3)** conveyed fee simple title to the railroad.[5]

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[5] Having concluded that the phrase "through the property" or "strip of land" are not helpful where all deeds include that language, the court will not address that language in connection with any of the disputed deeds unless the language is critical to its analysis. Similarly, the court will not address whether the property conveyed is described with precision, because all of the deeds

2. The Batterson 12/163 Deed

The **Batterson 12/163 deed (Def.'s Ex. 5)** provides in pertinent part:

> S. M. Batterson et al — Railway Deed.
> to — NO. 7948.
> Pacific Railway and Navigation Co.
>
> KNOWN ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of Eight [sic] Hundred & 00 DOLLARS, [sic] the receipt whereof is hereby acknowledged, we, S M. Batterson [sic] and Harriet E. McMaine, sole heirs at law of William Batterson, deceased, and Pauline O. Batterson wife of said S. M. Matterson, hereinafter called the grantors, do hereby bargain, sell, grant[,] convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:
>
> "A strip of land one hundred (100) feet wide being fifty (500 [sic] feet on each side of the center line of the railway of the grantee, as the same is surveyed and located through Lots 4, 6 and 7 and the North West quarter of South East quarter of Section 34 and LOt [sic] 6 of

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describe the property conveyed with some degree of precision.

> Section 35, in Township 3 North of Range nine West of Willamette Meridian.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.
>
> The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The *Albright* plaintiffs argue that this court should consider the **Batterson 12/163 deed** and similar deeds entitled "Railway Deeds" to have conveyed easements under *Bouche/Bernards* criteria because the title indicates that the property is to be used for a railway purpose. The plaintiffs also contend that the subject deed meets three other *Bouche/Bernards* criteria that suggest the conveyance of an easement. Specifically, the *Albright* plaintiffs argue that the language in the deeds stating "as surveyed and located [through/across/on the grantor's land]" language or similar language confirms that only an easement was granted to the railroad because this language indicates that the railroad had begun the condemnation process to acquire the property for the rail line. According to the plaintiffs,

since these deeds were executed under the "threat of condemnation[,]" the deeds do not represent "arms-length" transactions between the parties. In addition the plaintiffs argue that the deeds can only be for an "easement," because railroads could only obtain easements using their condemnation authority under Oregon law. Oregon law at the time, the *Albright* plaintiffs assert, "limited the interest the railroad could obtain by exercising [its eminent domain] power to an easement." Pls.' *Albright* Resp. at 21 (citing *Oregon Railway and Navigation Co. v. Oregon Real Estate Co.*, 10 Or. 444 (1882); Redfield on Railways § 61, ¶ 5, p. 221).

The government responds that there are no Oregon cases to suggest that a deed entitled "Railway Deed" cannot convey a fee or cases to suggest that only an easement was intended where the deed indicates that the railroad had likely begun condemnation proceedings by surveying the subject property. The government emphasizes that courts in Oregon have previously examined deeds that contained "surveyed" language and did not find that such language indicated that only an easement was conveyed. To the contrary, the Oregon Supreme Court determined that a deed which conveyed, for $650, property on which the railroad's track had already been "located and established" conveyed a fee simple title to the railroad, when the language of the deed as a whole indicated the parties' intent to convey a fee. *See Bouche*, 293 P.2d at 206, 210.

The court agrees with the government. In *Bouche,* the Supreme Court of Oregon determined that a railroad can acquire fee simple title to narrow strips of

land that had been surveyed by the railroad. The Oregon Supreme Court in *Bernards* examined a deed conveying a strip of land that stated that "'[s]aid strip of land shall be taken substantially along the line as now surveyed and staked as a line for a railroad by said grantee or its agents and servants, over and across said land"' and never suggested that this language meant that only an easement was intended. *Bernards*, 199 Or. at 248 P.2d at 342 (emphasis added). For all of these reasons the court finds that the term "Railway Deed" and the fact that the subject property was surveyed and staked does not indicate that an easement rather than a fee was conveyed.

The court finds with regard to this deed that that the absence of any "right of way" language or language indicating that the interest conveyed is limited to railroad purposes, the fact that the railroad is not required to build fencing or crossings, and that $800 in consideration was paid by the railroad all weigh in favor of finding that the parties intended to convey a fee interest to the railroad. The court thus holds that the **Batterson 12/163 deed (Def.'s Ex. 5)** granted fee simple title to the railroad.

3. The Bay City Land Co. 3/629 Deed

The **Bay City Land Co. 33/629 deed (Def.'s Ex. 6)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of $1.00 to it in hand paid, the receipt whereof is hereby acknowledged, and other valuable

consideration moving to it, Bay City Land Company, hereinafter called the grantor, does bargain, sell, grant and convey to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit:

Block 12 of First Water Front Addition to Bay City; also

A strip of land one hundred feet in width, being fifty feet on each side of and parallel with the center line of the grantee's railway running, or to run, from Hillsboro to Tillamook, as constructed through the following described real property in the County of Tillamook and State of Oregon, to wit:

* * * [Describing the property through which the strip conveyed runs] * * *

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD to the grantee and to its successors and assigns forever; confirming to the grantee likewise the right to build, maintain and operate a railroad over the property granted as aforesaid, and to construct a freight and passenger station on Block 12, of the First Water Front Addition to Bay City.

For the reasons previously discussed in connection

with the **Alley 5/475 deed**, the court finds that the language confirming the right to build a railroad does not limit the railroad's use to only railroad purposes. Even though the amount of consideration is nominal ($1.00), the deed does not contain the phrase "right of way" in the title or body of the deed nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds the language of the deed as a whole, the court finds that the **Bay City Land Co. 33/629 deed (Def.'s Ex. 6)** granted fee simple title to the railroad.

4. The Beals (Tr.) 18/40 Deed

The **Beals (Tr.) 18/40 deed (Def.'s Ex. 7)** provides in pertinent part:

> F.R. Beals, Trustee
> to 11135 Railway Deed
> Pacific Railway + Navigation Co
>
> Know All Men by These Presents: That for and in consideration of the sum of One and 00/100 Dollars, [sic] the receipt whereof is hereby acknowledged, F R. Beals, Trustee, hereinafter called the grantors, [sic] do [sic] bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit:
>
> "A strip of land sixty (60) feet wide being thirty (30) feet on each side of the center line of

> the railway of the grantee as the same is surveyed and located through Lot three of Section thirty two in Township two North of Range ten West of the Willamette Meridian.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> To have and to hold unto the above named grantee and unto its successors and assigns forever.

As discussed above in the court's analysis of the **Batterson 12/163 deed (Def.'s Ex. 5),** the court does not find that the term "Railway Deed" indicates an easement in the same way that a deed entitled "Right of Way Deed" does. Even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Beals (Tr.) 18/40 deed (Def.'s Ex. 7)**, conveyed fee simple title to the railroad.

5. The Beals Land Co. 18/41 Deed

The **Beals Land Co. 18/41 deed (Def.'s Ex. 8)** provides in pertinent part:

> Beals Land Company
> to 11136 Right of Way Deed
> Pacific Railway + Navigation Co
>
> Know All Men by These Presents: that for

and in consideration of the sum of One [sic] + $^{00}/_{100}$ Dollars, the receipt whereof is hereby acknowledged, Beals Land Company, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, hereinafter called the grantors, [sic] do [sic] hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit:

"A strip of land sixty (60) feet wide being thirty (30) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through Lot two of Section thirty two in Township two North of Range ten West of the Willamette Meridian, save and except a certain tract heretofore conveyed by Beals Land Company to Security Savings and Trust Company.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

To Have and to Hold unto the above named grantee and to its successors and assigns forever.

The grantors above named do covenant that they are seized of the aforesaid premises in fee simple, and that the same are free from all

> incumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

Although the language in the two Beals deeds are not identical, the parties make similar arguments. This deed, however, is labeled as a "Right of Way Deed" and in such circumstances it is treated differently under the *Bouche* and *Bernards* cases than if it was entitled "Railway Deed". The court recognizes that use of the phrase "Right of Way Deed" is not dispositive on discerning the parties' intention; however, it weighs in favor of finding an easement if other indicia are present in the deed. Here the only indicia is that there was only nominal consideration ($1) paid by the railroad. The deed does not mention any railroad purpose nor does it require the railroad to build structures such as crossings, cattle gaurds, or fences. Therefore, the court finds that the **Beals Land Co. 18/41 deed (Def.'s Ex. 8)** conveyed a fee to the railroad.

6. The Bigelow 13/321 Deed

The **Bigelow 13/312 deed (Def.'s Ex. 9**) provides in pertinent part:

> Know All Men by These Presents: That for and in consideration of the sum of $1.00 to them in hand paid, the receipt whereof is hereby acknowledged, Mary M. Bigelow and Jay W. Bigelow, her husband, hereinafter called the grantors, do bargain, sell, grant, convey and

> confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit:
>
> A strip of land 100 feet in width, being 50 feet on each side of and parallel with the center line of the grantee's railway as the same is surveyed, located and staked out through the Southeast quarter of the Southeast quarter of Section 32, in Township 3 North of Range 9 West of Willamette Meridian, and containing eighty-four hundredths of an acre[.]
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining
>
> To Have and to Hold to the grantee and to its successors and assigns forever.
>
> This deed is executed for the purpose of correcting an informality in a previous deed executed by the above named grantor, Mary M. Bigelow, without the joinder of her husband.

Even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Bigelow 13/312 deed (Def.'s Ex. 9**), conveyed fee simple title to the railroad.

7. The Brinn 6/328 Deed

The **Brinn 6/328 deed (Def.'s Ex. 11)** provides in pertinent part

> KNOW ALL MEN BY THESE PRESENTS: That foR [sic] and in consideration of the sum of $150.00 to them in hand paid, the receipt whereof is hereby acknowledged, G. A. Brinn and Annie Brinn, his wife, do hereby grant, bargain, sell and convey to the Pacific Railway and Navigation Company, and to its successors and assigns forever, all that portion of the land owned by them embraced in a strip of land 100 ft. wide, being 50 ft. on each side of the center line of the Pacific Railway and Navigation Company's Railway, as now surveyed, located and adopted thru the lands of the aforesaid G. A. and Annie Brinn, in Lots 1- 2- 3- 4- 5- 6- 7- and 8, [sic] Block "A", [sic] Plat of East Garibaldi, Sec. 21, T. 1 N. R. 10 W., W.M., said center line being more particularly described as follows:
>
> * * * [Description] * * *
>
> Together with the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining;
>
> TO HAVE AND TO HOLD unto the Pacific Railway and Navigation Company, and to its successoRs [sic] and assigns forever; together with the right to build, maintain and operate thereover a railway and telegraph line.

For the same reasons as discussed above regarding the **Alley 5/475 deed**, the court finds that the language confirming that the right to build a railroad does not limit the railroad's use to only railroad purposes. Here, the amount of consideration is not nominal ($250), there is no "right of way" language in the title or body of the deed, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds **Brinn 6/328 deed (Def.'s Ex. 11)**, conveyed fee simple title to the railroad.

8. The Bryden 74/273 Deed

The **Bryden 74/273 deed (Def.'s Ex. 12)** is a form deed that provides in pertinent part:

> Know all Men by these Presents, *That* James Bryden and Addie Bryden , [sic] his wife and John Stewart and Clara Stewart, his wife of xxxxxxxx *State of Oregon, in consideration of* Twenty Two [sic] and 05/100 ($22.05) DOLLARS, *to* them *paid by* Pacific Railway and Navigation Company *of* Portland, Multnomah [sic] *County* xx *State of Oreg*on * * ** * * * *have bargained and sold, and by these presents do grant, bargain, sell and convey unto said* Pacific Railway Navigation Company[,] its successors * * * *and assigns, all the following bounded and described real property, situated in the County of Washington and State of Oregon:*
>
> A strip of land one hundred (100) feet wide being fifty (50) feet on each side[ ]of the center

line of the Pacific Railway and Navigation Company's Railway as surveyed, located and adopted across W ½ [sic] of N. W [sic] ¼ Sec. 29, T. P. 3 N. R. 4 W. W. M. described as follows:

Beginning at a point on the east line of W½ of NW¼ 685 feet north of the Southeast corner thereof, said point being at the intersection of said east line with the west line of said Right of Way; running thence North 7 degrees and 59 minutes west along said west line of Right of Way 820 feet; thence by a spiral to the left 60 feet; thence * * * [describing property] * * *; containing four and 58/100 (4.58) acres.

* * * [Blank space] * * *

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining and also all their *estate, right, title and interest in and to the same, including dower and claim of dower*.

TO HAVE AND TO HOLD the above described and granted premises unto the said PACIFIC RAILWAY AND NAVIGATION COMPANY[,] its successors xxx *and assigns forever. And* James Bryden and Addie Bryden, his wife, and John Stewart and Clara Stewart[,] his wife, *grantors above named do covenant to and with* Pacific Railway and Navigation Company *the above named grantee*[,] its successors *and assigns that*[]it is lawfully

> seized *in fee simple of the above granted premises, that the* above granted premises *are free from all incumbrances* * * * *and that* they *will and* their *heirs, executors and administrators shall warrant and forever defend the above granted premises, and ever part and parcel thereof, against the lawful claims and demands of all persons whomsoever.* (italics in original).

The court finds that the language of this deed viewed as a whole weighs in favor of finding that a fee was granted. Here, the court finds that the deed's use of the phrase "right of way" is not meant to describe the property interest but provides a geographic location Furthermore, the consideration provided is not nominal ($22.05), there is no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds that the **Bryden 74/273 deed (Def.'s Ex. 12)** granted fee simple title to the railroad.

9. The Burgholzer 83/99 Deed

The **Burgholzer 83/99 deed (Def.'s Ex. 14)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That Joseph Burgholzer and Vina A. Burgholzer, his wife for and in consideration of the sum of One Dollar, to them in hand paid, the receipt whereof is hereby acknowledged, do hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company,

> and[]to its successors and assigns forever, all of the following described real property situate in the County of Washington and State of Oregon, to-wit:
>
> A strip of land one hundred feet in width, being fifty feet on each side of and parallel with the center line of the track of the Pacific Railway and Navigation Company, as the same is surveyed and located through the East one half of the Northeast quarter of Section thirty (30) in Township three (3) North of Range four (4) West W. M.
>
> Together with the tenements, hereditaments and appurtenances [,] thereunto belonging or in anywise appertaining. TO HAVE[]AND TO HOLD to the said Pacific Railway and Navigation Company, and to its successors and assigns forever.
>
> The aforesaid grantors Joseph Burgholzer and Vina A. Burgholzer do hereby covenant that they are the owners in fee simple of the aforesaid premises, and that they will forever warrant and defend the same unto the Pacific Railway and Navigation Company, its successors and assigns, against the lawful claims of all persons whomsoever.

Even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of railroad purposes, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences,

the court finds that the **Burgholzer 83/99 deed (Def.'s Ex. 14)** conveyed fee simple title to the railroad.

10. The Burgholzer 87/71 Deed

The **Burgholzer 87/71 deed (Def.'s Ex. 15)** in pertain part provides:

> KNOW ALL MEN BY THESE PRESENTS, That I, Max Burgholzer (unmarried) of Lane County, Oregon, in consideration of the sum of $1.00, to me paid by the Pacific Railway & Navigation Company, a Corporation, the receipt whereof is hereby acknowledged[,] do hereby remise, release and forever quitclaim unto the said Pacific Railway & Navigation Company, a Corporation, its successors and assigns, all my right, title and interest in and to the following described parcel of real estate situate in the County of Washington and State of Oregon, to-wit: A strip of land 100 ft. in width, being 50 ft. on each side of and parallel with the center line of the track of the Pacific Railway & Navigation Company, as the same is surveyed and located through the west half of the northwest quarter of Section 36, T 3 N. R. 5 W. of the Will. Mer., containing 2.84 acres[.] TO HAVE AND TO HOLD the same, together with all and singular the hereditaments and appurtenances thereunto belonging[]or in anywise appertaining, to the said Pacific Railway and Navigation Company, a Corporation, its successors and assigns forever. <u>This</u>

> Conveyance is made to confirm title to said right of way in the Pacific Railway & Navigation Company, a Corporation, its successors and[ ]assigns.

Even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Burgholzer 87/71 deed (Def.'s Ex. 15)** conveyed a fee to the railroad.

11. The Byrom 5/310 Deed

The **Byrom 5/310 deed (Def.'s Ex. 16)** provides in pertinent part:

> Peter Byrom et ux No. 2820
> to Right of Way
> Pacific Railway and Navigation Co. $5.00
>
> Know All Men by These Presents: That for and in consideration of the sum of $5.00, to them in hand paid, the receipt whereof is hereby acknowledged, Peter Bryom and Bergtha [sic] Byrom, his wife, do bargain, sell, grant and convey to the Pacific Railway and Navigation Company, and to its successors and assigns forever, a strip of land 100 ft. wide, being 50 ft. on each side of the center line of the railway of the Pacific Railway and Navigation[]Company, as now surveyed and located thru lands of the aforesaid Peter Byrom and Bergtha [sic] Byrom in Sections 21 and 22,

> in Township 1 North of Range 10 West of the Willamette Meridian, more particularly described as follows, to wit:
>
> All tide lands fronting and abutting on Lots 3[ ]and 4 in Section 21, and Lots 1, 2 and 3 in Section 22, in Township 22, in Township 1 North of Range 10 West of the Willamette Meridian; together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining. To Have and to Hold unto the said Pacific Railway and Navigation Company, and to its successors and assigns forever; together with the right to build, maintain and operate thereover a railway and telegraph line[.]

The court recognizes the fact that use of the phrase "Right of Way Deed" is not dispositive on discerning the parties' intention; however, it weighs in favor of finding an easement. Additionally, for the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes does not limit the railroad's use to only railroad purposes. The court notes that the deed does not use the term "right of way" in the body of the deed to suggest that the interest being conveyed was limited to an easement, consideration was not nominal ($5), nor does the deed contain any language requiring the railroad to build structure such as crossings, cattle guards, or fences. Therefore, based on review of the language of the deed as a whole, the court finds that the **Byrom 5/310 deed**

(Def.'s Ex.16) conveyed a fee to the railroad.

12. The Byrom 5/312 Deed

The **Byrom 5/312 deed (Def.'s Ex. 17)** provides in pertinent part:

Bergtha [sic] and Peter Byrom	No. 2821
to	Right of Way
Pacific Railway + Navigation Co.	$400.00

> Know All Men by These Presents: That for and in consideration of the sum of $400.00, to them in hand paid, the receipt whereof is hereby acknowledged, Bergtha [sic] Byrom and Peter Bryom, her husband, do bargain, sell, grant and convey to the Pacific Railway and Navigation Company, and to its successors and assigns forever, a strip of land 100 ft. wide, being 50 ft. on each side of the center line of the railway of the Pacific Railway and Navigation[]Company, as now surveyed and located thru <u>lands of the aforesaid Peter Byrom and Bergtha [sic] Byrom</u> in Sections 21 and 22, in Township 1 North of Range 10 West of the Willamette Meridian, more particularly described as follows, to wit:
>
> * * * * [Describing the property through which the strip conveyed runs]* * * *
>
> Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

> To Have and to Hold unto the Pacific Railway and Navigation Company and to its successors and assigns forever; together with the right to build, maintain and operate thereover a railway and telegraph line[.]

The court recognizes the fact that use of the phrase "Right of Way Deed" is not dispositive on discerning the parties' intention; however, it weighs in favor of finding an easement. Additionally, for the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes does not limit the railroad's use to only railroad purposes. Here, the consideration paid was not nominal ($400), there is no reference to the term "right of way" in the body of the deed to suggest that the interest being conveyed was limited to an easement, nor any language requiring the railroad to build structure such as crossings, cattle guards, or fences. Therefore, based on review of the language of the deed as a whole, the court finds that the **Byrom 5/312 deed (Def.'s Ex. 17)** conveyed a fee to the railroad.

13. The Campbell 85/208 Deed

The **Campbell 85/208 deed (Def.'s Ex. 18)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That D. F. Campbell and Cecily C. Campbell, his wife, for and in consideration[ ]of the sum of One Dollar ($1.00), to them in hand paid, the receipt whereof is hereby acknowledged, do

> hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, and to its successors and assigns forever, all of the following described real property situate in the County of Washington and State of Oregon, to-wit: A strip of land one hundred feEt [sic] in width, being fifty feet on each side of and parallel with the center line of the track of the Pacific Railway and Navigation Company, as the same is now surverye d[]and [sic] located through the West half of the Northwest quarter of Section Thirty six (36) Township Three [sic] (3) North Range Five West, containing 2.84 acres. Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining. TO HAVE AND TO HOLD to the sAid [sic] Pacific Railway and Navigation Company and to its successors and assigns forever. The aforesaid D. F. Campbell and Cecily C. Campbell, his wife, do hereby covenant that they are the owners in fee simple of the above granted premises, and that they will forever warrant and defend the same unto the Pacific Railway and Navigation Company, its successors and assigns, against the lawful claims of all persons whomsoever.

Even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Campbell 85/208 deed**

(Def.'s Ex. 18) conveyed a fee to the railroad.

14. The Carstens 72/527 Deed

The **Carstens 72/527 deed (Def.'s Ex. 19)** provides in pertinent part:

> THIS INDENTURE, made this 22nd day of August 1906, between A. C. Carstens, and Sarah E. Carstens, his wife, of Washington County, Oregon, parties of the first part, and the Pacific Railway & Navigation Company, a Corporation, party of the Second [sic] part, WITNESSETH:
>
> That the said parties of the first part, for and in consideration of the sum of $250.00 to them in hand paid, by the party of the second part, the receipt of which is hereby acknowledged[,] have granted, bargained and sold, conveyed and confirmed and by these presents do grant, bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns, all that certain lot, piece, parcel and tract of land, lying, being and situate in Washington County, Oregon, and particularly described as a portion of Section 25, T [sic] 2 N. R. 4 W., a strip of land 80 feet wide, being 40 feet on each on each side of the center line of the Pacific Railway & Navigation Company's Railway <u>as now surveyed and located</u> on said land and described as follows:
>
> * * * [Description] * * *

> Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders,[]rents, issues, and profits thereof.
>
> TO HAVE AND TO HOLD, all and singular, the said premises together with the appurtenances unto the said party of the second part and unto its successors and assigns forever. And the parties of the first part hereby covenant to and with the party of the second part, its successors and assigns, that the parties of the first part, [sic] are the owners in fee simple of the tract of land above described, and the whole thereof; That [sic] said premises are fee from all incumbrances, and that the parties of the first part, their heirs, executors and administrators, shall warrant and forever defend the above described and granted premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever.

Here, the amount of consideration paid was not nominal ($250), there is no reference to a "right of way" in the title or body of the deed, and no mention of a railroad purpose nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. The court thus finds that the **Carstens 72/527 deed (Def.'s Ex. 19)** granted fee simple title to the railroad.

15. The Carstens 72/530 Deed

The **Carstens 72/530 deed (Def.'s Ex. 20)** provides in pertinent part:

> THIS INDENTURE, made this 25th day of August 1906, between John F. Carstens and Netta Carstens, his wife, of Washington County, Oregon, parties of the first part, and the Pacific Railway & Navigation Company, a Corporation, party of the second part, WITNESSETH:
>
> That the said parties of the first part, for and in consideration of the sum of One Dollar ($1) and other valuable consideration, to them in hand paid by the party of the second part, the receipt of which is hereby acknowledged, have granted, bargained and sold, conveyed and confirmed and by these presents do grant, bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns, all that certain lot, piece, parcel and tract of land, lying, being and situate in Washington County, Oregon, and particularly described as a portion of Sec. 25, T. 2 N. R. 4 W., a strip of land 80 feet wide, being 40 feet on each side of the center line of the[ ]Pacific Railway and Navigation Company's Railway, as now surveyed and located on said lands and described as follows:-
>
> * * * [Description] * * *

A strip of land 60 feet wide, being 30 feet on each side of the center line of the Pacific Railway & Navigation Company's Railway, as now surveyed and located on said[]land and described as follows:-

* * * [Description] * * *

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular, the said premises together with the appurtenances unto the said party of the second part and unto its successors and assigns as long as used and operated for railway and transportation purposes. And the parties of the first part hereby covenant to and with the party of the second part, its successors and assigns, that the parties of the first part, [sic] are the owners in fee simple of the tract of land above described, and the whole thereof, [and] that said premises are free from all incumbrances, [sic]

This deed contains the following language "as long as used and operated for railway and transportation purposes." The *Albright* plaintiffs argue that this language establishes an easement because it directly limits the estate being conveyed. *See* Pls.' *Albright* Resp. at 29. *See also* Transcript of Oral Argument

("Arg. Tr.") 53:7-18, May 9, 2018. The government argues that the deed conveys a fee simple determinable interest under Oregon law, citing *State By & Through Dep't of Transp., Highway Div. v. Tolke*, 586 P.2d 791, 795 (Or. Ct. App. 1978) and *Kilpatrick v. Snow Mountain Pine Co*., 80 P.2d 137, 139 n.2 (Or. Ct. App. 1991). Arg. Tr. 49:20-50:21. *See also* Def.'s Br. at 21–22. In *Tolke,* the Oregon Court of Appeals determined that a deed that had, for substantial consideration ($1098.70), granted a strip of land to a railroad '"so long as said property herein granted shall be possessed, used and occupied as a railroad right of way and be used and occupied for the purposes of construction, maintenance and operation thereon and thereover, railroads and railroad trains,"' conveyed a "fee simple determinable estate" to the railroad. *Tolke*, 586 P.2d at 794, 796. The *Tolke* court also stated that the deed further provided that the land conveyed under the terms of the deed if the property is no longer used for a railroad it "shall immediately revert to the grantors." *Tolke,* 586 P.2d at 795.

The court finds that this case is different from *Tolke* because (1) this deed involves only $1 in consideration and (2) it does not contain the revisionary language the Oregon Court of Appeals found to be significant. Tolke at 586 P.2d at 793 n.3. In such circumstances, the court finds that the language is more consistent with language the Oregon courts have found to have granted only an easement. *Bernards*, 248 P.2d 342, 352. Accordingly, the court finds that the **Carstens 72/530 deed (Def.'s Ex. 20)** conveyed an easement to the railroad.

16. The Chance 5/449 Deed

The **Chance 5/449 deed (Def.'s Ex. 21)** provides in pertinent part

> Know all Men by These Presents: That for and in consideration of the sum of $50 to them in hand paid, the receipt whereof is hereby acknowledged, Marion T. Chance and Laura I. Chance, his wife, do hereby grant, bargain, sell, and convey to the Pacific Railway and Navigation Company, and to its successors and assigns forever, all that portion of the land owned by them, embraced in a strip of land 100 feet wide, being 50 ft. on each side of the center line of the Pacific Railway and Navigation Company's Railway, as surveyed, located and adopted thru <u>the lands of the</u> <u>aforesaid Marion T. Chance</u>, in Lots 1- 2- 3- 4- 5- and six, [sic] Block 10, original Townsite of Garibaldi, Sec. 21, T. 1[]N. R. 10 W., W.M. said center line being more particularly described as follows:
>
> * * * [Description] * * *
>
> Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.
>
> To Have and to Hold unto the Pacific Railway and Navigation Company and to its successors and assigns forever, together with the right to build, maintain and operate thereover a railway and telegraph line.

For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes is not dispositive on the question of whether an easement was granted. Here, the amount of consideration is not nominal ($50), there is no "right of way" language in the title or body of the deed, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds that **Chance 5/449 deed (Def.'s Ex. 21),** conveyed fee simple title to the railroad.

17. The Cook 15/83 Deed

The **Cook 15/83 deed (Def.'s Ex. 24)** pertains in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That Vincent Cook and Martha G. Cook, his wife, hereinafter called the grantors, in consideration of the sum of Ten ($10.00) Dollars, to them in hand paid, the receipt whereof is hereby acknowledged, and other valuable considerations moving to them, do * * * bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns[]forever, <u>a one half interest in the following described real property</u> situate in the County of Tillamook and State of Oregon, to-wit:
>
> A strip of land one hundred (100) feet in width, being fifty (50) feet on each side of and

> parallel with the center line of the tract of the Pacific Railway and Navigation Company's railway as the same is now located, adopted, and constructed across the Northwest quarter[]of the Southwest quarter and the Southwest quarter of the Northwest quarter of Section eighteen (18) in Township one (1) South of Range nine (9) West of the Willamette Meridian, containing 5.07 acres,
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining,
>
> TO HAVE AND TO HOLD to the above named grantee and to its successors and assigns forever.

The court finds that this deed's conveyance of "a one half interest in the following described real property" is indicative of the original parties' intent to have conveyed a fee interest to the railroad. Here, the amount of consideration paid was not nominal ($10), there is no reference to a "right of way" in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds that the **Cook 15/83 deed (Def.'s Ex. 24)**, granted fee simple title to the railroad.

18. The Cummings 77/262 Deed

The **Cummings 77/262 deed (Def.'s Ex. 25)** provides in pertinent part:

KNOW ALL MEN BY THESE PRESENTS, That for and in consideration of the sum of $217.00 to them in hand paid, the receipt whereof is hereby acknowledged, James Cummings and Ann Cummings[,] his wife, hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Washington and State of Oregon, to-wit:-

A strip of land one hundred feet in width, being fifty feet on each side of and parallel with the center line of the track of the grantee as the same is surveyed and located through the West half of the Southeast quarter of Section 29 in Township 3 North of Range 4 West of the Willamette Meridian, containing 7.70 acres more or less.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD to the above named grantee and to its successors and assigns forever.

The grantors do further covenant that the grantee may operate a railway line over the properties above described and also do all things convenient or useful to be done in

> connection therewith. The grantors do covenant that they are seised of the aforesaid premises in fee simple; that their estate therein is free from all liens and encumbrances, and that they will and their heirs, executors and administrators shall forever warrant and defend the above granted premises unto the grantee herein and unto its successors and assigns forever against the lawful claims and demands of all persons.

For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes does not limit the railroad's use to only railroad purposes. Here, the amount of consideration is not nominal ($217), there is no "right of way" language in the title or body of the deed, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds that the **Cummings 77/262 deed (Def.'s Ex. 25),** conveyed fee simple title to the railroad.

19. The Davidson 11/509 Deed

The **Davidson 11/509 deed (Def.'s Ex. 27)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One and $^{00}/_{100}$ Dollars, the receipt whereof is hereby acknowledged, we F. M. Davidson and Alvie Davidson, husband and wife[,] hereinafter

called the grantors, do hereby bargain, sell, grant[,] convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:

"A strip of land one hundred (100) Feet [sic] wide being fifty (50) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through <u>our undivided one third interest</u> in the North East quarter of North East quarter of Section thirteen Township one South of Range ten West of Willamette Meridian; also a strip of land six rods wide off of the North side of South East quarter of North East quarter of Section thirteen, Township one South of Range ten West of Willamette Meridian.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD unto the above named grantee and unto its successors and assigns forever.

And * * * grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its

successors and assigns against the lawful claims of all persons whomsoever.

Even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Davidson 11/509 deed (Def.'s Ex. 27)**, conveyed fee simple title to the railroad.

20. The Davis 72/546 Deed

The **Davis 72/546 deed (Def.'s Ex. 28)** provides in pertinent part:

> THIS INDENTURE, made this 21st day of August 1906, between A. B. Davis and Eva Davis, his wife, F. M. Davis and B. J. Davis, of Washington County, Oregon, parties of the first part,[]and the Pacific Railway & Navigation Company, a Corporation, party of the second part, WITNESSETH:
>
> That the said parties of the first part, for and in consideration of the sum of One Dollar ($1) and other valuable considerations, to them in hand paid, by the party of the second part, the receipt of which is hereby acknowledged, have granted, bargained and sold, conveyed and confirmed and by these presents do grant, bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns, all that certain lot, piece, parcel

and tract of land, lying, being and situate in Washington County, Oregon, and particularly described as a portion of Section 4, T. 2. N. R. 4.W. [sic] a strip of land 80 feet wide, being 40 feet on each side of the center line of the Pacific Railway & Navigation Company's Railway, as now surveyed and located on said lands and described as follows:-

* * * [Description] * * *

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular, the said premises together with the appurtenances unto the said party of the second part and unto its successors and assigns forever. And the parties of the first part hereby covenant to and with the party of the second part, its successors and assigns, that the parties of the first part, [sic] are the owners in fee simple of the tract of land above described, and the whole thereof, that said premises are fee from all incumbrances, and that the parties of the first part, their heirs, executors and administrators, shall warrant and forever defend the above described and granted premises and every part and parcel thereof

> against the lawful claims and demands of all persons whomsoever.

Even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Davis 72/546 deed (Def.'s Ex. 28)**, conveyed fee simple title to the railroad.

21. The Detroit Trust 77/44 Deed

The **Detroit Trust 77/44 deed (Def.'s Ex. 30)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS, That Detroit Trust Company, a corporation organized and existing under the laws of the State of Michigan, for and in consideration of the sum of Fifty [sic] ($50.00) Dollars, to it paid,[]the receipt whereof is hereby acknowledged, does hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, a corporation and to its successors and assigns forever, all of the following described real property situate in the County of Washington, State of Oregon, to-wit:-
>
> "A strip of land one hundred feet in width being fifty feet on each side of and parallel with the center line of[]the track of the Pacific Railway and Navigation ComPany [sic] as the same is surveyed, located and adopted through

> the southeast quarter of section twenty eight (28), Township Three (3) North, Range five (5) West of the Willamette Meridian, said center line being describe[d] as follows:
>
> * * * [Description] * * *
>
> Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the said Pacific Railway and Navigation Company, and to its successors and assigns forever.

Here, the amount of consideration paid was not nominal ($50), there is no reference to a "right of way" in the title or body of the deed, and no mention of a railroad purpose nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Detroit Trust 77/44 deed (Def.'s Ex. 30)**, granted fee simple title to the railroad.

22. The Du Bois Lumber Co. 23/298 Deed

The **Du Bois Lumber Co. 23/298 deed (Def.'s Ex. 31)** provides in pertinent part:

> Know All Men by These Presents: That for and in consideration of the sum of Ten ($10.00) Dollars, the receipt whereof is hereby acknowledged, and other valuable considerations moving to it, Du Bois Lumber Co., a corporation organized and existing under the laws of Oregon, hereinafter called the

grantor, <u>subject to the conditions and reservations hereinafter made</u>, does bargain, sell, grant,[]and convey to Pacific Railway and Navigation Company, a corporation, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit:

A strip of land 100 feet in width, being 50 feet on each side of the center line of the grantee's railway as the same is now surveyed and located through the following described real property, to wit:

The north half of the northwest quarter of Section 14, Township 3 North, Range 8 West; The northwest quarter of Section 28, Township 3 North, Range 7 West; The north half of the southwest quarter of Section 13 and the northeast quarter of the southeast quarter of Section 14, Township 3 North, Range 8 West; Also Lots one, two, three, four and six of Section 22, Township 3 North, Range 9 West; Also the southeast quarter of the southeast quarter and the southwest quarter of the southwest quarter of Section 18; the north half of Section 19; the northwest quarter of Section 20 and the northwest quarter of the southeast quarter of Section 20 in Township 3 North, Range 7 West of the Willamette Meridian, in said county and state.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining; giving and granting unto the grantee also the right to operate a railway line thereover.

This deed is made subject to the following conditions and reservations:

The grantor reserves the right to construct across the land above conveyed and across the railway track of the grantee to be constructed thereon, a logging railroad at some suitable point, the point of crossing and the manner of crossing to be subject to the approval of the chief engineer of the Pacific Railway and Navigation Company and of an engineer to be selected by Du Bois Lumber Co.; the operation of said logging road, however, at no time to interfere with the operation by the grantee of its railway over the above described lands.

The grantor also reserves the right to lay water pipes of any size and kind under the right of way of the grantee, either across or along the same, in any part of Section 22, in Township 3 North, Range 9 West of the Willamette Meridian in said County and State, provided that where said pipes cross under the track of the grantee, the manner of laying the same shall be subject to the approval of two engineers, one to be selected by the grantor and one by the grantee, and the grantor reserves the right to go upon said right of way of the

> grantee, at any time, in order to lay and repair said water pipes, or to examine the condition thereof.
>
> In consideration of the rights and easements and grants herein contained, the grantee agrees that the grantor shall not be held responsible for injury to the railroad and property of the grantee, its successors and assigns, or to the structures standing thereon, by falling or sliding timber or logs, provided the grantor uses due care to prevent such injury, and the grantor agrees that at all times when it is cutting timber on its lands adjoining said right of way of the grantee, which is in danger of falling or sliding on the railway track of the grantee, it will keep a man employed for the purpose of flagging the trains of the grantee, to the end that accidents shall be prevented.
>
> To Have and to Hold unto the grantee[,] its successors and assigns forever. And the grantor does hereby covenant to and with the grantee, its successors and assigns, that it is seized in fee simple of the above described premises, and that it will warrant and defend the same unto the grantee, its successors and assigns against the lawful claims and demands of all persons whomsoever.

The court finds that the language of this deed viewed as a whole weighs in favor of finding that only an easement was granted. The deed uses the phrase "right of way"in the body of the deed to refer to the interest

being conveyed repeatedly. Indeed, the deed itself uses the world "easement" ("In consideration of the rights and easements and grants herein contained, . . ."). Although the deed contains language similar to that in the **Alley 5/475 deed**, because the deed expressly uses the word "easement" and uses the phrase "right of way" to refer to the interest being conveyed, the court finds that the **Du Bois Lumber Co. 23/298 deed (Def.'s Ex. 31)**, conveyed an easement to the railroad.

23. The Du Bois 24/40 Deed

The **DuBois 24/40 deed (Def.'s Ex. 32)** provides in pertinent part:

> Know All Men by These Presents: That for and in consideration of the sum of One Dollar[]($1.00), the receipt whereof is hereby acknowledged, Willie G. Du Bois and John E. Du Bois, her husband, hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situated in the county of Tillamook and state of Oregon, to-wit:
>
> A strip of land sixty feet in width being thirty feet on each side of the center line of grantee's railway as the same is last located, staked out, surveyed and being constructed through the following described tract, to- wit:

> * * * [Describing the tract through which the strip being conveyed runs] * * *
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> To Have and to Hold to the above named grantee and to its successors and assigns forever; the grantors confirming also to the grantee, its successors and assigns, the right to build, maintain and operate a line of railway thereover.
>
> The aforesaid grantors do hereby covenant that they are the owners in fee simple of the above granted premises and that they will forever Warrant and Defend the same unto the said grantee, and unto its successors and assigns against the lawful claims of all persons whomsoever.

For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes does not limit the railroad's use to only railroad purposes. Here, although the amount of consideration is nominal ($1), there is no "right of way" language in the title or body of the deed, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds that the **Du Bois 24/40 deed (Def.'s Ex. 32)**, conveyed fee simple title to the railroad.

24. The Easom 11/515 Deed

The **Easom 11/515 deed (Def.'s Ex. 33)** provides in pertinent part:

Elnora [sic] F. Easement et vir.	Railway Deed.
to	No. 7463.
Pacific Railway and Navigation Co.	

KNOW ALL MEN BY THESE[]PRESENTS : [sic] That for and in consideration of the sum of Eight Hundred & $^{00}/_{100}$ DOLLARS, the receipt whereof is hereby acknowledged, we, Elnora [sic] F. Easom and Chas. E. Easom, wife and husband[,] do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:

"A strip of land one hundred (100) feet wide being fifty (50) feet on each side of the center line of the railway of the grantee <u>as the same is surveyed and located</u> through Lots One, two, six and seven in Section thirty six, in Township three North of Range ten West of Willamette Meridian, except a certain three acre tract in said Lot One [sic] heretofore sold to Felix Roy.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

> TO HAVE AND TO HOLD unto the above named grantee and unto its successors and assigns forever.
>
> The grantors above named do covenant that they are seized of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

As discussed above in the court's analysis of the **Batterson 12/163 deed (Def.'s Ex. 5),** the court does not find that the term "Railway Deed" indicates an easement in the same way that a deed entitled "Right of Way Deed" does. Here, the amount of consideration paid was not nominal ($800), there is no reference to a "right of way" in the title or body of the deed, and no mention of a railroad purpose nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds the **Easom 11/515 deed (Def.'s Ex. 33)**, granted fee simple title to the railroad.

25. The Edwards 5/453 Deed

The **Edwards 5/453 deed (Def.'s Ex. 35)** provides in pertinent part:

> Know all men by these Presents: that we, John D. Edwards and Celana [sic] C. Edwards, his wife, of Multnomah County, Oregon, in consideration of one dollar to us paid by The

> Pacific Railway and Navigation Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon, do hereby bargain, sell and quitclaim unto the said corporation all that portion of the lands owned by said John D. Edwards in lot one (1) of Sec. 22 of T. 1 N. of R. 10 W. of the Willamette Meridian in Tillamook County, Oregon embraced in a strip of land 100 feet in width, being fifty feet on each side of the center line of the said corporation's line of railway as now surveyed and located through all the land owned by said John D. Edwards in lot one aforesaid, being described as follows:
>
> * * * [Description] * * *
>
> To have and to hold unto the said corporation and its successors in interest in fee simple forever. Conveying hereby also a right to construct, operate and maintain a railway line along and upon said land.

By its express terms this deed conveyed the property "in fee simple forever." The court therefore finds that the original parties' intent is clear and that the **Edwards 5/453 deed (Def.'s Ex. 35)**, granted fee simple title to the railroad.[6]

26. The Friday 72/526 Deed

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[6] As discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted "includes" the right to construct a railway does not limit the railroad use of the property to only railroad purposes.

The **Friday 72/526 deed (Def.'s Ex. 37)** provides in pertinent part:

> THIS INDENTURE, made this 7th day of May 1906, between John W. Friday and Pearl Friday his wife, of Washington County, Oregon, parties of the first part, and the PACIFIC RAILWAY & NAVIGATION COMPANY, a Corporation, party of the se[con]d part, WITNESSETH:
>
> That the said parties of the first part, for and in consideration of the sum of Twenty Five Dollars ($25) to them in hand paid, by the party of the second [p]art, the receipt of which is hereby acknowledged , [sic] have granted, bargained and sold[,] conveyed and confirmed and by these presents do grant , [sic] bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns , [sic] all that certain lot, piece, parcel and track of land, lying,[]being and situate in Washington County, Oregon, and particularly described as a part of the South East Quarter of Sec. 25, T 2 N. R. 4 W., Will. Mer., to-wit:-
>
> A strip of land 160 feet wide being 120 feet on the East side and 40 feet on the West side of the center line of the Pacific Railway & Navigation Company's railway as now surveyed and located on said lands, and described as follows:
>
> Beginning at a point where the center line of said Railroad Survey intersects the c enter

> [sic] of Dairy Creek, * * * Thence down the center of said Creek South 22 degree and 40 minutes East 170 feet and thence South 13 degree and 15 minutes west 93 feet to the West line of Right of Way; Thence South 32 degree and 18 minutes East along said Right of Way 96 feet to the center of Dairy Creek; thence North 80 degree and 22 minutes East 955 feet to the place of beginning and containing 0.96 acres.
>
> Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.
>
> TO HAVE AND TO HOLD, all and singular, the said premises together with the appurtenances unto the said[]party of the second part and unto its successors and assigns forever.

Although this deed, has "incidental" uses of the phrase "right of way," the court finds that the phrase "right of way" is not used to refer to the interest being conveyed, but only to describe the geographic location of the rail line. The deed also provides more than nominal consideration ($25), lacks any railroad purpose language, and does not contain any commitment by the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Friday 72/526 deed (Def.'s Ex. 37),** conveyed fee simple title to the railroad.

27. The Galvani 77/37 Deed

The **Galvani 77/37 deed (Def.'s Ex. 39)** provides in pertinent part:

> THIS INDENTURE made this 11th day of April A. D. 1907, between W. H. Galvani, a single man[]of Portland, Multnomah, Oregon, party of the first part, and the Pacific Railway & Navigation Company, a Corporation, party of the second part[,] WITNESSETH:
>
> That the said party of the first part for and in consideration of the sum of $1 to him in hand paid by the party of the second part, the receipt of which is hereby acknowledged[,] has granted, bargained and sold, conveyed and confirmed and by these presents does grant, bargain, sell [sic] convey and confirm unto the said party of the second part and its successors and assigns, all that certain lot, piece, parcel and tract of land, lying, being and situate in Washington County, Oregon, and being a portion of the Southwest quarter of Section 30, T. 3 N. R. 4 W. of the Will. Mer., being a strip of land 100 feet wide, being 50 feet on each side of the center line of the Pacific Railway & Navigation Company's railway as now surveyed, located and adopted across said lands, said center line being described as follows,[]to-wit
>
> * * * [Description] * * * and containing 11.31 acres, reserving grade farm crossings at two points to be selected by the party of the first part.

> Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.
>
> TO HAVE AND TO HOLD all and singular, the said premises, together with the appurtenances unto the said party of the second part and unto its successors and assigns forever. And the party of the first part does hereby covenant to and with the party of the second part, its successors and assigns, forever, that the party of the first part is the owner in fee simple of the tract of land hereinbefore described; That [sic] said tract of land is free from all incumbrances and that the party of the first part shall warrant and forever defend said tract of land against the lawful claims and demands of all persons whomsoever.

This deed provided nominal consideration ($1) and the grantor reserved farm crossings. These are factors that weigh in favor of construing the deed as granting an easement. However, this deed precisely describes the land being conveyed with an express reference to the amount of acreage, does not contain any "right of way" language or any railroad purpose language. Thus, when viewing the deed as a whole, the court finds that the grantor reserved certain crossing rights but granted a fee to the railroad. Therefore, this court finds that the **Galvani 77/37 deed (Def.'s Ex. 39)**, conveyed fee simple title to the railroad.

28. The Gattrell 13/311 Deed

The **Gattrell 13/311 deed (Def.'s Ex. 40)** provides in pertinent part:

> Know all Men by These Presents: That for and in consideration of the sum of One ($1.00), to him in hand paid, the receipt whereof is hereby acknowledged, F.J. Gattrell an unmarried man, hereinafter called the grantor, does bargain, sell, grant[,] convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, a strip of land sixty (60) feet in width, being thirty (30) feet on each side of and parallel with the center line of the railway of the grantee as the same is now located, surveyed and staked out through lot two (2) of section twenty nine (29) in township two (2) North of range ten (10) West of the Willamette Meridian, in the County of Tillamook and State of Oregon.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> To have and to hold unto the [above named] grantee and to its successors and assigns forever, confirming to the grantee likewise the right to build, maintain and operate a railway line thereover.

For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the

language confirming that the land granted can be used for railroad purposes does not limit the railroad's use to only railroad purposes.. Even though the amount of consideration is nominal ($1.00), without any "right of way" language in the title or body of the deed nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Gattrell 13/311 deed (Def.'s Ex. 40)**, conveyed fee simple title to the railroad.

29. The Goodspeed 16/487 Deed

The **Goodspeed 16/487 deed (Def.'s Ex. 41)** provides in pertinent part:

> D. R. Goodspeed and wife RAILWAY DEED.
> to NO. 5802.
> Pacific Railway and Navigation Co.
>
> KNOWN ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One & $^{00}/_{100}$ DOLLARS[,] the receipt whereof is hereby acknowledged, We, [sic] D. E. Goodspeed and M. J. Goodspeed, husband and wife, of Tillamook County, Oregon, hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to Pacific RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit; [sic]
>
> "A strip of land one hundred (100) feet wide being fifty (50) feet on each side of the

> center line of the railway of the grantee as the same is now surveyed and located through
>
> The [sic] South East quarter of the North East quarter of Section thirteen in Township one South of Range ten West of Willamette Meridian[.]
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.
>
> The grantors above named do covenant that they are seised of the aforesaid premises in fee simple and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

As discussed above in the court's analysis of the **Batterson 12/163 deed (Def.'s Ex. 5),** the court does not find that the term "Railway Deed" indicates an easement in the same way that a deed entitled "Right of Way Deed" does. Even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Goodspeed**

16/487 deed (Def.'s Ex. 41), conveyed fee simple title to the railroad.

30. The Goodspeed 9/200 Deed

The **Goodspeed 9/200 deed (Def.'s Ex. 42)** and provides in pertinent part:

> Know All Men by These Presents: That for and in consideration of the sum of Thirty four Hundred and sixteen and 60/100 Dollars, the receipt whereof is hereby acknowledged, we, H. F. Goodspeed and Lillian A Goodspeed, husband and wife, of Tillamook City, Tillamook County, Oregon: [sic] hereinafter called the grantors, do bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit:
>
> A strip of land fifty[](50) feet wide being twenty five (25) [feet] on each side of the center line of the railway of the grantee as the same is surveyed and located through the South East quarter of the North West quarter and that part of Lot seven lying West of a certain right of way formerly conveyed by said Goodspeed to said Pacific Railway and Navigation Company, all lying in Section thirty, in Township one South of Range nine West of Willamette Meridian, the center line of the right of way hereby conveyed being more particularly

described as follows, to wit: Beginning at a point which is identical with Station 18 plus 84.5 on the main line of said P.R.+N. Co., which point is located by beginning at Sta.00 plus 00 on said main line, 4407.8 feet South and 281.5 East of the ¼ Section corner between Secs [sic] 19 and 30, T 1 S R 9 W, and running thence N 1º 00' East 1884.5 feet to said Station 18 plus 84.5 which is the initial point of the right of way hereby intended to be described and conveyed, thence following a spiral to the left a distance of 120 feet and consuming 7º 30' of the angle, thence following a 12º 30' curve to the left a distance of 609.3 feet, thence following a spiral to the left a distance of 120 feet and consuming 7º 30' of angle, to Sta. 8 plus 49.3; thence South 89º 50' West 1142 feet more or less to the East line of Lot two in said Section 30.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

To have and to hold unto the above named grantee and unto its successors and assigns forever.

The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all incumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and

> assigns against the lawful claims of all persons whomsoever.

The court finds that the language of this deed viewed as a whole weighs in favor of finding that a fee was granted. This deed uses the phrase "right of way" three different times. As explained above, the use of the phrase "right of way" to describe the interest conveyed and not the geographic location of the land conveyed is an indication of intent to convey an easement. The deed first uses the phrase "right of way" when describing the strip of land being conveyed as being "located through . . . that part of Lot seven lying West of a certain right of way formerly conveyed by said Goodspeed to said Pacific Railway and Navigation Company." This use of the phrase "right of way" is clearly referencing an interest other than the interest being conveyed and thus the deed's first use of the phrase "right of way" is "incidental." However, this deed uses the phrase "right of way" twice more. The deed grants and conveys to the railroad "[a] strip of land [of a certain width] . . . , <u>the center line of the</u> **right of way** <u>hereby conveyed</u> being more particularly described as follows, to wit: . . ." (emphasis added). As used here, the language "the right of way hereby conveyed" supports a finding that the phrase "right of way" is being used to describe the interest being conveyed. The deed's final use of the phrase "right of way" occurs in the context of its precise description of the land conveyed, when the deed refers to "Station 18 plus 84.5" as being "the initial point of the **right of way** *hereby intended to be described and conveyed* " (emphasis added). Here too this language

is using the phrase "right of way" to describe the interest being conveyed by the deed.

However, the amount of consideration paid was not nominal ($3,416.60), there is no mention of a railroad purpose nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Based on these factors read in combination with the mixed use of the term "right of way," the court finds that the **Goodspeed 9/200 deed (Def.'s Ex. 42)**, granted fee simple title to the railroad.

31. The Goodwin 81/147 Deed

The **Goodwin 81/147 deed (Def.'s Ex. 43)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of Three Hundred and [Fifty] Dollars, to them in hand paid, the receipt whereof is hereby acknowledged, Nathan J. Goodwin and M. M. Goodwin his wife, hereinafter called the grantors, do bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property, situate in the County of Washington and State of Oregon, to-wit: A strip of land One hundred feet in width, being fifty feet on each side of the center line of the track of the grantee, as the same is surveyed and located through the east half of the southwest quarter of section twenty seven

> in township three north of range five west, together with the appurtenances[,] tenements and hereditaments thereunto belonging or in anywise appertaining, together also with the right to maintain and operate a railroad thereover. TO HAVE AND TO HOLD to the grantee, and to its successors and assigns forever. The grantors, above named, do covenant with the grantee, and with its successors and assigns, that they are seized of the said premises in fee simple, and that they will, and their heirs, executors and administrators shall, warrant and defend the same against the lawful claims and demands of all persons whomsoever.

For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad does not limit the railroad's use to only railroad purposes. Here, the consideration is not nominal ($350), there is no reference to a "right of way" in the title or body of the deed, nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Goodwin 81/147 deed (Def.'s Ex. 43)**, conveyed fee simple title to the railroad.

32. The Hagen 75/279 Deed

The **Hagen 75/279 deed (Def.'s Ex. 44)** provides in pertinent part:

THIS INDENTURE, made this 22 day of April, 1907, between Bridget Hagen (a [sic] single woman) of Portland Multnomah County, Oregon, party of the first part, and the Pacific Railway & Navigation Company, a Corporation, party of the second part, WITNESSETH:

That the said party[]of the first part, for and in consideration of the sum of One Dollar ($1) and other good and valuable considerations, to her in hand paid by the party of the second part, the receipt of which is hereby acknowledged, h[]ave [sic] granted, bargained and sold, conveyed and confirmed, and by these presents do grant, bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns, all that certain lot, piece, parcel and tract of land, lying, being and situate in Washington County,[]Oregon, to-wit:

Being a portion of Section 30, T. 3 N. R. 4 W. of the Will. Mer. described as follows:

A strip of land 100 feet wide being 50 feet on each side of the center line of the Pacific Railway and Navigation Company's railway, <u>as surveyed, located and adopted</u> across <u>said lands</u>, said center line being described as follows:

* * * [Description] * * *

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise

> appertaining, and the reversion and reversions, remainder and remainders[,] rents, issues and profits thereof.
>
> TO HAVE AND TO HOLD, all and singular, the said premises together with the appurtenances unto the said party of the[]second part and unto its successors and assigns forever. And the party of the first part does hereby covenant to and with the party of the second part, its successors and assigns forever, that the party of the first part is the owner in fee simple of the tract of land hereinbefore described; that said tract of land is free from all incumbrances and that the party of the first part shall warrant and forever defend said tract of land against the lawful claims and demands of all persons whomsoever.

Even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Hagen 75/279 deed (Def.'s Ex. 44),** conveyed fee simple title to the railroad.

33. The Hamblin 85/284 Deed

The **Hamblin 85/284 deed (Def.'s Ex. 45)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That J.M. Hamblin, an unmarried man for and

in consideration of the[]sum of One Dollars, to him in hand[]paid, the receipt whereof is hereby acknowledged[,] does bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company and to its successors and assigns forever, all of the following described real property situate in the County of Washington and State of Oregon, to-wit: A strip of land one hundred feet in width, being fifty feet on each side of and parallel with the center line of the track of the Pacific Railway and[]NavigaTion [sic] Company, as the same is surveyed and located through the Northwest quarter of the Northeast quarter of Section thirty two (32) Township Three(3) [sic] North range [sic] five (5) West Willamette Meridian.

Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD to the said Pacific Railway and Navigation Company, and to successors and assigns forever.

The aforesaid grantor J. M. Hamblin does hereby covenant that he is the owner in fee simple of[]the above granted premises, and that he will forever warrant and defend the same unto the Pacific Railway and Navigation Company, its successors and assigns, against the lawful claims of all parties whomsoever.

Even though the amount of consideration is nominal ($1), without any "right of way" language in

the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Hamblin 85/284 deed (Def.'s Ex. 45)**, conveyed fee simple title to the railroad.

34. The Handley 13/34 Deed

The **Handley 13/34 deed (Def.'s Ex. 48)** provides in pertinent part:

> Know all Men by these Presents That for and in consideration of the sum of Four Hundred and $^{00}/_{100}$ Dollars, the receipt whereof is hereby acknowledged, I, Lola L. Handley, a widow, of Tillamook, Tillamook County, Oregon, hereinafter called the grantor, do bargain, sell, grant and convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit:
>
> A strip of land one hundred (100) feet wide being fifty (50) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through a certain tract of land lying between the lands of Maire Murphy and the meander line of Tillamook Bay in Lot four of Section 21 Township 1 North Range 10 West. also [sic] through Block '21' in the Town

> of East Garibaldi and the Tide land fronting and abutting upon that portion of said Town of East Garibaldi which lies in Lot 2 of said Section 21. Also through the Tide land fronting and abutting upon that certain tract in said Section 21 known as the Ralston five acre tract [sic] also through a certain four acre tract in Lot four of Section twenty all in Township one North of Range ten West of Willamette Meridian [sic] the intention being to convey unto the said grantee[,] its successors and assigns all that portion of any and all lands now owned by me in said Sections[]twenty and twenty one Township one North of Range ten West of Willamette Meridian which lies within the right of way limits of the railway of the grantee, as the same is now surveyed and located through my said lands.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> To have and to hold unto the above named grantee and unto its successors and assigns forever.

The court finds that the language of this deed viewed as a whole weighs in favor of finding that a fee was granted. Although the deed uses the phrase "right of way," the court finds that the phrase is used in this deed to describe the location of the property and not the property interest being conveyed. Additionally, the amount of consideration paid was not nominal ($400),

there is no mention of railroad purposes and the deed does not contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Handley 13/34 deed (Def.'s Ex. 48)**, granted fee simple title to the railroad.

35. The Hannan 72/548 Deed

The **Hannan 72/548 deed (Def.'s Ex. 49)** provides in pertinent part:

> THIS INDENTURE, made this 21st day of August 1906, between Henry Hannon and Ella Hannon, his wife, of Washington County, Oregon, parties of the first part, and the Pacific Railway & Navigation Company, a Corporation, party of the first part, WITNESSETH:
>
> That said parties of the first part, for and in consideration of the sum of One Dollar ($1) and other good and valuable considerations to them in hand paid, the receipt of which is hereby acknowledged, have granted, bargained and sold, conveyed and confirmed and by these presents do grant, bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns, all that certain lot, piece, parcel and tract of land, lying, being and situate in Washington County, Oregon, and particularly described as a portion of Sec. 4 and 5, T 2 N. R. 4 W., a strip of land 80 feet wide, being 40 feet on each side of the center line of the Pacific Railway & Navigation Company's

> Railway, as now surveyed and located on said land and described as follows:-
>
> * * * [Description] * * *
>
> Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.
>
> TO HAVE AND TO HOLD, all and singular, the said premises together with the appurtenances unto the said[]party of the second part and unto its successors and assigns forever. And the parties of the first part hereby covenant to and with the party of the second part, its successors and assigns forever, that the parties of the first part, [sic] are the owners in fee simple of the tract of land above described, and the whole thereof, that said premises are free from all incumbrances, and that the parties of the first part, their heirs, executors and administrators, shall warrant and forever defend the above described and granted premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever.

Even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or

fences, the court finds that the **Hannan 72/548 deed (Def.'s Ex. 49)**, conveyed fee simple title to the railroad.

36. The Hannan 72/549 Deed

The **Hannan 72/549 deed (Def.'s Ex. 50),** which is very similar to the above analyzed Hannan deed, provides in pertinent part:

> THIS INDENTURE, made this 21st day of August 1906, between Henry Hannon and Ella Hannon, his wife, of Washington County, Oregon, parties of the first part, and the Pacific Railway & Navigation Company, a Corporation, parties of the first part, WITNESSETH:
>
> THAT the said parties of the first part, for and in consideration of the sum of $1.00, to them in hand paid, by the party of the second part, the receipt of which is hereby acknowledged, have granted, bargained and sold, conveyed and confirmed, and by these presents do grant, bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns, all that certain lot, piece, parcel and tract of land, lying, being and situate in Washington County, Oregon, and particularly described as a portion of Section 4, T. 2 N. R. 4 W., a strip of land 60 feet wide, and 680 feet long, adjoining the right of Way [sic] of the Pacific Railway & Navigation Company's Railway, on the Right , [sic] and described as follows:-

Beginning at a point 526 5/10 feet South of and 66 5/10 feet East of the North West corner of the South West quarter of the North West quarter of said Sec. 4; Running thence South 2 degrees and 38 minutes West along Right of Way, 242 5/10 feet; thence in a Southerly direction by a spiral to left, 90 feet; thence by a 4 degree curve to the left, 355 feet; thence East parallel to the North line of said Section 4, 61 5/10 feet; thence in a Northerly direction on a 4 degree curve to the Right 355 feet, thence by a spiral to right, 90 feet; thence North 2 degrees and 30 minutes East, 264 3/10 to the North line of said Hannan's land; thence South 72 degrees and 40 minutes West, 61 1/10 feet to place of beginning and containing 0.96 acres.

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular, the said premises together with the appurtenances unto the said[]party of the second part and unto its successors and assigns forever. And the parties of the * * * first part hereby covenant to and with the party of the second part[,] its successors and assigns forever, that the parties of the first part, [sic] are the owners in fee simple of the tract of land a bove [sic] described, and the whole thereof,

> that said premises are fee from all incumbrances, and that the parties of the first part, their heirs, executors and administrators shall warrant and forever defend the above described and granted premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever.

Even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Hannan 72/549 deed (Def.'s Ex. 50)**, conveyed fee simple title to the railroad.

37. The Hannan 99/354 Deed

The **Hannan 99/354 deed (Def.'s Ex. 51)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That Ella Hannan widow, of the County of Washington State of Oregon, in consideration of the sum of Five Hundred ($500.00) Dollars to her paid by Pacific Railway and Navigation Company, a corporation, the receipt whereof is hereby acknowledged, has bargained and sold and by these[]presents does grant, bargain[,] sell and convey unto said Pacific Railway and Navigation Company[,] its successors and assigns all of the following describe premises located in Washington County, Oregon. [sic]

Beginning[]at a point on the east line of the right of way of said Pacific Railway and Navigation Company, 1020 feet south and 135 feet east of the northwest corner of the southwest quarter of Section 4, Township 2 North range [sic] 4, Willamette Meridian, said point being 100 feet distant from main line and 30 feet distant from the north leg of the wye track as now located; running thence easterly and 30 feet distant from said wye track on 18º 30' curve, 360 feet; thence easterly and 30 feet distant from wye track extended 260 feet; thence southerly at right angles, 60 feet; thence westerly[]at right angles and 30 feet distant from said wye track extend 275 feet; thence southerly and 30 feet distance from south leg of said wye track, 510 feet to the east of said right of way, which point is 40 feet from the main line[;] thence northerly along the said right of way on a 40º curve 400 feet; then north 62 feet; thence northerly along the right of way on a 4º curve parallel to the main line and 100 feet distant therefrom, 215 feet to the place of beginning containing[]1.9 acres, together with all and singular the tenements , [sic] hereditaments and appurtenances thereunto belonging or in anywise appertaining. The grantee herein agrees to fence said tract herein conveyed with a hog-tight fence. Grantor reserves the right to one private crossing at grade with gates[]over the tract above described at a point to be mutually agreed upon.

> TO HAVE AND TO HOLD[]said premises unto the said Pacific Railway and Navigation Company, its successors and assigns forever, and the grantor herein does covenant to and with the above named grantee that she is lawfully seised in fee simple of said granted premises that the same are free from all incumbrances and that she will warrant and forever defend the said premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever.

The court finds that the language of this deed viewed as a whole weighs in favor of finding that a fee was granted. First, the court has examined the "right of way" language in this deed which is used throughout the deed four times. In each instance, the phrase "right of way" is not being used to describe the property interest being conveyed but to describe a location. Thus, as explained above, this deed's use of the phrase "right of way" does not indicate that an easement was conveyed. Although this deed contains a commitment by the railroad to build fences, the deed provides for substantial consideration ($500) and has no mention of railroad purposes. Accordingly for all of these reasons this court finds that the **Hannan 99/354 deed (Def.'s Ex. 51)**, granted fee simple title to the railroad.

38. The Hardman 5/451 Deed

The **Hardman 5/451 deed (Def.'s Ex. 52)** provides in pertinent part:

> Know all Men by These Presents[:] That for and in consideration of the sum of $250 to me in hand paid, the receipt whereof is hereby acknowledged, I[,] Florence A. Hardman, do hereby grant, sell and convey to the Pacific Railway and Navigation Company and to its successors and assigns forever: all that portion of the land owned by me embraced in a strip of land 100 ft. wide, being 50 ft. on each side of the center line of the Pacific Railway and Navigation Company's railway, as now surveyed, located and adopted thru the lands of the aforesaid Florence Hardman, in Lot 2, Sec. 21., T. 1 N. R. 10 W., W. M. said center line being more particularly described as follows:
>
> * * * [Description] * * *
>
> Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.
>
> To Have and to Hold unto the Pacific Railway and Navigation Company and its successors and assigns forever; together with the right to build to build, maintain and operate thereover a railway and telegraph line.

For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes does not limit the railroad's use to only railroad purposes. Here, the amount of consideration is not nominal ($250), there is no "right of way" language in the title or body of the deed, nor

any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds that **Hardman 5/451 deed (Def.'s Ex. 52),** conveyed fee simple title to the railroad.

39. The Harter 29/115 Deed

The **Harter 29/115 deed (Def.'s Ex. 53)** is entitled "Warranty Deed. No. 21042." and provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS, That [sic] we John R. Harter, his wife, of the County of Tillamook in the State of Oregon, in consideration of the sum of Three Hundred Seventy-Five ($375.00) Dollars, paid by Pacific Railway and Navigation Company, a corporation duly organized under the laws of the State of Oregon, having its principal office at the City of Portland in said State, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said Pacific Railway and Navigation Company, its successors and assigns, the following described parcel of land, situate in Tillamook County, in the State of Oregon, to-wit:
>
> Our undivided two-thirds (2/3) interest in and to that certain tract or parcel of land in Tillamook County, Oregon, more particularly described as follows:-

All of a strip of land one hundred feet in width, being fifty feet in width on each side of the center line of the P. R. & N. CO. as the same is now located and constructed across the Northeast quarter of the northeast quarter of section 13, Township 1 South Range 10 West, Willamette Mariden, [sic], and also across the north six rods (Ninety-nine feet of the southeast quarter of the Northeast quarter of said Section 13. [sic] Said center line being more particularly described as follows:-

* * * [Description] * * *

The above described strip of land containing 3.80 acres more or less.

It being the intention to convey our undivided two-thirds (2/3) interest in the right-of-way of said railroad Company [sic] as now used and which was acquired by us [the grantors] through deeds from Monta Davidson and Josie A. Deeter, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and also all our estate, right, title and interest in and to the same, including dower and claim of dower.

TO HAVE AND TO HOLD The [sic] above described and granted premises unto the said Pacific Railway and Navigation Company[,] its successors and assigns forever. And we the grantors above named do covenant to and with the above named grantee, its successors and

> assigns, that we are lawfully seized in fee simple of the above granted premises, that the above granted premises are free from all incumbrances, and that we will and our heirs, executors and administrators, shall warrant and defend the above granted[]premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever.

The court finds that the language of this deed viewed as a whole weighs in favor of finding that a fee was granted. Although the deed uses the phrase "right of way" in the body of the deed, from context, it is clear that this deed's "right-of-way" language does not refer to a property interest but is being used to describe the geographic location of the land being conveyed. Here, the amount of consideration paid was not nominal ($375), there is no mention of a railroad purpose, nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Harter 29/115 deed (Def.'s Ex. 53)**, granted fee simple title to the railroad.

40. The Haugen 9/204 Deed

The **Haugen 9/204 deed (Def.'s Ex. 54)** provides in pertinent part:

> Thore [sic] Hagen. RAILWAY DEED
> to NO. 5806.
> Pacific Railway and Navigation Co.

KNOWN ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One & $^{00}/_{100}$ DOLLARS[,] the receipt whereof is hereby acknowledged, we, Thore [sic] Hagen and Evia Jane Hagen, husband and wife, of Tillamook County, Oregon, hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:

"A strip of land one hundred (100) feet wide being fifty (50) feet on each side of the center line of the railway of the grantee, as the same is surveyed and located through the following described tract, to-wit:

* * * [Describing the tract through which the strip being conveyed runs] * * *

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.

The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all

> encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

As discussed above in the court's analysis of the **Batterson 12/163 deed (Def.'s Ex. 5),** the court does not find that the term "Railway Deed" indicates an easement in the same way that a deed entitled "Right of Way Deed" does. Even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Haugen 9/204 deed (Def.'s Ex. 54)**, conveyed fee simple title to the railroad.

41. The Hobson 13/331 Deed

The **Hobson 13/331 deed (Def.'s Ex. 56)** provides in pertinent part:

> Know all Men by These Presents: That for and in consideration of the sum of Three Hundred and $^{00}/_{100}$ Dollars, the receipt whereof is hereby acknowledged, We, Joanna Hobson and Frank P. Hobson, wife and husband, of Tillamook County, Oregon hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns

forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:

"A strip of land one hundred (100) feet wide being fifty (50) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through Lots three and that part of Lot two lying East of a certain tract in Lot two owned by Theodore Parks, all in Section twenty-two, Township one North of Range ten West of Willamette Meridian, on what is known and designated as the Coast Line Route.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining. It is hereby understood and agreed that this deed shall not convey to said Railway Company any right of way on any lands of the grantor lying East of the curve now staked out and located to connect said Coast Line Route with the right of way heretofore conveyed by the grantors herein to said Grantee.

To Have and to Hold unto the above named grantee and unto its successors and assigns forever.

The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the

> grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court finds that the language of this deed viewed as a whole weighs in favor of finding that a fee was granted. Here the use of the term "right of way" is used twice in the body of the deed. In both instances the term "right of way" is used to describe a property interest being conveyed. However, the amount of consideration paid was not nominal ($300), there is no mention of a railroad purpose, nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds that the **Hobson 13/331 deed (Def.'s Ex. 56)**, granted fee simple title to the railroad.

42. The Jeffries 85/70 Deed

The **Jeffries 85/70 deed (Def.'s Ex. 59)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That Minnie Jeffries and George H.[]Jeffries her husband for and in consideration of the sum of One Dollar to them in hand paid, the receipt whereof is hereby acknowledged, do hereby bargain, sell[,] grant, convey and confirm to Pacific Railway and Navigation Company, and to its successors and assigns forever, all of the following described real property situate in the County of Washington and State of Oregon, to-wit: A strip of land one

> hundred feet in width, being fifty feet on each side of and parallel with the center line of the track of the Pacific Railway and Navigation Company, as the same is surveyed and located through the North half of the Northwest quarter of Section Thirty (30) Township three (3) North, Range Four (4) West of W.M.
>
> Together with the tenements, hereditaments and appurtenances, thereunto belonging or in anywise appertaining. TO HAVE AND TO HOLD to the said Pacific Railway and Navigation Company, and to its successors and assigns forever.
>
> The aforesaid grantors Minnie Jeffries and George H. Jeffries do hereby covenant that they are the owners in fee simple of the above granted premises, and that they will forever warrant and defend the same unto the Pacific Railway and[]Navigation Company, its successors and assigns, against the lawful claims of all persons whomsoever.

Even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Jeffries 85/70 deed (Def.'s Ex. 59)**, conveyed fee simple title to the railroad.

43. The Johnson 9/610 Deed

The **Johnson 9/610 deed (Def.'s Ex. 61)** provides in pertinent part:

Samuel Johnson RAILWAY DEED.
to NO. 6636.
Pacific Railway and Navigation Company.

* * * [EMPTY SPACE] * * *

--------MAP--------

-------Showing RightofWay [sic] across-------

--A Tract of land 209½ ft sq. Sec 22 T1N.R10W --

--------Scale "1400ft"--------

* * * [Drawing or map] * * *

KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of Twenty five and $^{00}/_{100}$ DOLLARS, the receipt whereof is hereby acknowledged, I, Samuel Johnson, widower, and sole heir at law of Annie Johnson, deceased, of Tillamook County, Oregon, hereinafter called the grantnrs [sic] do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:

"A strip of land one hundred (100) feet wide being fifty (50) feet on each side of the center line of the railway of the grantee as the

> same is surveyed and located through a certain tract of land in Lot eight of section twenty two, Township one North of Range ten West of Willamette Meridian, more particularly described as follows;- [sic] Commencing at a stake on the meander line marked with a cross, running thence in a Southerly direction 209½ feet, thence Westerly 209½ feet, thence Northerly 209½ feet, thence Easterly 209½ feet to the place of beginning. Together with the appurtenances, tenements,[]and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee and unto its successors and assigns forever.
>
> The grantors [sic] above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court finds that the language of this deed viewed as a whole weighs in favor of finding that a fee was granted. Here, although the deed at the outset uses the phrase "right of way" it is unclear if it is in reference to the interest being conveyed or is a referencing the geographic description of the drawing that was included which is labeled "MAP Showing

Right[]of[]Way[]across A Tract of land 209 ½ ft. sq. Sec. 22 T1N.R.10W[.]" Additionally, as discussed above in the court's analysis of the **Batterson 12/163 deed (Def.'s Ex. 5),** the court does not find that the term" Railway Deed" indicates an easement in the same way that a deed entitled "Right of Way Deed" does. Furthermore, the amount of consideration is not nominal ($25), there is no mention of a railroad purpose, nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Looking at the whole of the deed, the court finds that the **Johnson 9/610 deed (Def.'s Ex. 61)**, conveyed a fee to the railroad.

44. The Jones 105/456 Deed

The **Jones 105/456 deed (Def.'s Ex. 62)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That B.H. Jones and Angie C. Jones,[]his wife, of Forest Grove, Oreg. [sic] in consideration of One Dollars, [sic] to them paid by Southern Pacific Company, a corporation duly organized & existing under & by virtue of the[]laws of the State of Kentucky[,] do hereby remise, release and forever QUITCLAIM unto the said Southern Pacific Company and unto its successors and assigns all their right , [sic] title and interest in and to the following describes parcel of real estate, situate in County of Washington[,] State of Oregon,[]to-wit:

> A strip of land 17 feet in width, being 8.5 feet on each side of that portion of the center line of a spur track now constructed at Wolcott in Sec.[]36,[]T. 3 North ,[]R. [sic] 5 West. W.M., which lies outside the[]100 foot right of way of the Southern Pacific Company's Tillamook branch as constructed through said Sec. 36,[]said center line being more particularly described as follows: Beginning at the[]intersection of the West line of Sec 36, Township 3 North, Range 5 West, W.M., with the center line[]of Southern Pacific Company's main track as now constructed: thence North 88º 31' East on said center line 419.3; thence * * *; thence southwesterly on a 15º curve to the left 109 feet to a point in Southern Pacific Company's Southerly line of 100 foot right of way, which point is the point of beginning of description of center line of 17 foot strip; thence continuing * * * : said strip of land containing 0.071 acres, more or less, all in Washington County , [sic] Oregon. T O HAVE AND TO HOLD, the same, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said Southern Pacific Company and to its successors and assigns forever.

The court finds that the language of this deed viewed as a whole weighs in favor of finding that a fee was granted. Here, the court finds that the deed's use of the phrase "right of way" is not a description of the

interest being conveyed but provides a geographic location. Even though the amount of consideration is nominal ($1), without any mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Jones 105/456 deed (Def.'s Ex. 62)**, granted fee simple title to the railroad.

45. The Jones 94/225 Deed

The **Jones 94/225 deed (Def.'s Ex. 63)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS, That we , B. H. Jones & Angie C. Jones, his wife, of the County of Washington, in the State of Oregon, in consideration of the sum of One Dollar paid by Pacific Railway and Navigation Company, a corporation duly organized under the laws of the State of Oregon, having its principal office at the City of Portland, in said state, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed and by these presents do grant, bargain, sell and convey unto the said Pacific Railway and Navigation Company, its successors and assigns, the following described parcel of land, situate in Washington County, State of Oregon, to-wit: Commencing at a point in Section thirty-six (36) Township three (3) North Range five (5) West of Willamette Meridian, on the southerly right of way line of Pacific Railway and Navigation Company, said point being fifty (50) feet distant [sic] at right

> angles from Engineer Station 1275+38 of the said railroad, which point is 740 feet, more or less, east of and 295 feet, more or less, south of the northwest corner of said Section thirty six (36) and the initial point of the following described land; thence in a southwesterly direction along said right of way line a distance of 88 feet, more or less, to a point fifty (50) feet distant at right angles to Engineer Station 1276+20; thence * * * * . Said described land contains an area of 0.2 o[f] [sic] an acre, more or less. TO HAVE AND TO HOLD the said descri bed [sic] premises unto the said Pacific Railway and Navigation Company, its successors and assigns forever, for the purpose of constructing and maintaining a spur track thereon, and if the said spur track shall be taken up or abandoned, then the above described and granted premises shall revert to and become the property of the grantors, their successors and assigns.

The court finds that the language of this deed viewed as a whole weighs in favor of finding that only an easement was granted. First, the deed makes clear that the purpose of the deed is to grant an easement for the purposes of allowing the railroad to build spur track and that if that track is taken up or abandoned the property shall revert to the grantors. Specifically, the deed provides that "TO HAVE AND TO HOLD the said descri bed [sic] premises unto the said Pacific Railway and Navigation Company, its successors and assigns forever, for the purpose of constructing and

maintaining a spur track thereon, and if the said spur track shall be taken up or abandoned, then the above described and granted premises shall revert to and become the property of the grantors, their successors and assigns."[7] This language, together with the nominal consideration paid ($1), indicates that only an easement was granted. Additionally, the deed uses the phrase "right of way" twice to describe the interest that is being conveyed to the railroad. Therefore, the court finds that the **Jones 94/225 deed (Def.'s Ex. 63)**, conveyed an easement to the railroad.

46. The Kostur 72/458 Deed

The **Kostur 72/458 deed (Def.'s Ex. 66)** provides in pertinent part:

> THIS INDENTURE, made this 1st day of December 1906, between A. Kostur and Anna Kostur, his wife, of Washington County, Oregon, parties of the first part, and the Pacific Railway & Navigation Company, a Corporation, party of the second part,
>
> WITNESSETH: That the said parties of the first part, for and in consideration of the sum of $20.00 to them in hand paid, by the party of the second part, the receipt of which is hereby acknowledged, have granted, bargained and sold, conveyed and confirmed and by these

---

[7] At oral argument, the government itself "concede[d]" that this language "that imposes and suggests a limitation on the use of the property means that [the deed] likely conveyed an easement." Arg. Tr. 52; 4-10.

presents do grant, bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns, all that certain lot, piece, parcel and tract of land, lying,[]being and situate in Washington County, Oregon, and particularly described as a portion of Section 4, T 2 N. R. 4 W., a strip of land 60 feet wide, by 526 5/10 feet long, adjoining the right of Way [sic] of the Pacific Railway + Navigation Railway, on the right, and described as follows:-

* * * [Description] * * *

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof- [sic]

TO HAVE AND TO HOLD, all and singular, the said premises together with the appurtenances unto the said party of the second part[]and unto its successors and assigns forever. And the parties of the first part, hereby covenant to and with the party of the second part, its successors and assigns, that the parties of the first part, [sic] are the owners in fee simple of the tract of land above described, and the whole thereof, That [sic] said premises are free from all incumbrances, and that the parties of the first part, their heirs, executors and administrators, shall warrant and forever defend the above described and

> granted premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever.

The court finds that the language of this deed viewed as a whole weighs in favor of finding that a fee was granted. Here, the court finds that the deed's use of the phrase "right of way" is not a description of the interest being conveyed but provides a geographic location. Additionally, the amount of consideration is not nominal ($20), there is no mention of a railroad purpose, and there is not any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds that the **Kostur 72/458 deed (Def.'s Ex. 66)**, granted fee simple title to the railroad.

47. The Kostur 72/459 Deed

The **Kostur 72/459 deed (Def.'s Ex. 67)** is practically identical to the above analyzed Kostur deed and provides in pertinent part:

> THIS INDENTURE, made this 1st day of December 1906, between A. Kostur, and Anna Kostur, his wife, of Washington County, Oregon, parties of the first part, and the Pacific Railway & Navigation Company, a Corporation, party of the second part,
>
> WITNESSETH: That the said parties of the first part, for and in consideration of the sum of $30.00 to them in hand paid by the party of the second part, the receipt of which is hereby acknowledged, have granted, bargained and

sold, conveyed and confirmed and by these presents do grant, bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns, all that certain lot, piece, parcel and track of land, lying, being and situate in Washington County, Oregon, and particularly described as a portion of Section 4 and 5, T. 2 N. R. 4 W., a strip of land 80 feet wide, being 40 feet on each side of the center line of the Pacific Railway & Navigation Company's Railway, as now surveyed and located on said lands and described as follows:-

* * * [Description] * * *

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, [sic] and the reversion[ ]and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular, the said premises together with the appurtenances unto the said party of the second part[]and unto its successors and assigns forever. And the parties of the first part, hereby covenant to and with the party of the se[c]ond part, its successors and assigns, that the parties of the first part, [sic] are the owners in fee simple of the tract of land above described, and the whole thereof, That said premises are fee from all incumbrances, and that the parties of the first part, their heirs,

> executors and administrators, shall warrant and forever defend the above described and granted premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever.

Here, the amount of consideration paid was not nominal ($30), there is no reference to a "right of way" in the title or body of the deed, and no mention of a railroad purpose nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Kostur 72/459 deed (Def.'s Ex. 67)**, granted fee simple title to the railroad.

48. The Large 5/536 Deed

The **Large 5/536 deed (Def.'s Ex. 69)** provides in pertinent part: Know All Men By These Presents:

> That for and in consideration of the sum of $250.00 to her in hand paid, the receipt whereof is hereby acknowledged, Mrs. J. Large does hereby grant, bargain, sell and convey to the Pacific Railway and Navigation Company, and to its successors and assigns forever: a strip of land 100 ft. wide, being 50 ft. on each side of the center line of the railway of the Pacific Railway and Navigation Company, as now surveyed and located thru <u>this land of the aforesaid Mrs. J. Larg</u>e in Lots 3 and 4, Sec. 21, T. 1 N. R. 10 W., W.M. said center line being more particularly described as follows, to wit:
>
> * * * [Description] * * *

> Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining;
>
> To Have and to Hold unto the Pacific Railway and Navigation Company and to its successors and assigns forever; together with the right to build, maintain and operate thereover a railway and telegraph line.
>
> For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes does not limit the railroad's use to only railroad purposes.. Here, the amount of consideration is not nominal ($250), there is no "right of way" language in the title or body of the deed, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds the **Large 5/536 deed (Def.'s Ex. 69)**, conveyed fee simple title to the railroad.
>
> 49. The Latimer 6/429 Deed

The **Latimer 6/429 deed (Def.'s Ex. 71)** provides in pertinent part:

> KNOWN ALL MEN BY THESE PRESENTS, That I, Permelia [sic] A. Latimer, widow, of Tillamook County, Oregon, in consideration of Six Hundred and Forty (640.00) Dollars to me paid by the Pacific Railway and Navigation Company, a

> corporation organized and doing business within the State of Oregon, have and do hereby grant, bargain, sell and convey unto the said corporation, its successors and assigns, a strip of land across my farm now occupied by my son, William Latimer, being parts of Section Eighteen (18) and Nineteen (19) in Township One (1) South Range Nine (9) [sic] West of the Willamette Meridian, Tillamook County, Oregon, said strip being One Hundred feet wide and lying fifty feet wide on each side of the center line of the railway of the grantee, which center line is described so far as it affects our land, as follows:
>
> * * * [Description] * * *
>
> TO HAVE AND TO HOLD unto the said Pacific Railway and Navigation Company, its successors and assigns forever, also hereby granting to such corporation and its assigns the right to build, maintain and operate over said lands a rail way [sic] and telegraph line.

For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes does not limit the railroad's use to only railroad purposes. Here, the amount of consideration is not nominal ($250), there is no "right of way" language in the title or body of the deed, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore,

the court finds the **Latimer 6/429 deed (Def.'s Ex. 71)**, conveyed fee simple title to the railroad.

50. The Marey 5/477 Deed

The **Marey 5/477 deed (Def.'s Ex. 72)** provides in pertinent part:

> Know all Men by These Presents: That I, Frank Marey, unmarried, of Garibaldi, Tillamook County, State of Oregon, in consideration of the sum of $100.00, to me in hand paid, the receipt whereof is hereby acknowledged, do grant, bargain, sell and convey unto the Pacific Railway and Navigation Company, and to its successors and assigns forever, all that portion owned by me of the Ralston track, in Sec. 21, T. 1 N. R.10 W., W. M. embraced in a **strip of land** 76 ft. wide, being 50 ft[.] on the south side of the center line of the Pacific Railwayand Navigation Company's railway, as now surveyed and located **thru** my premises, and 26 ft. on the north side of said center line, said center line being more particularly described as follows:
>
> * * * [Description] * * *
>
> Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.
>
> To Have and to Hold the above described and granted premises unto the said Pacific Railway and Navigation Company, and to its

> successors and assigns forever; together with the right to build, maintain and operate thereover a railway and telegraph line, and I Frank Marey, the grantor above named, do covenant to and with the Pacific Railway and Navigation Company, the above named grantee, its successors and assigns that the above granted premises are free from all incumbrances, and that I will, and my heirs, executors and administrators, shall warrant and forever defend the above granted premises, and every part and parcel thereof against the lawful claims and demands of all persons whomsoever.

For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes does not limit the railroad's use to only railroad purposes. Here, the amount of consideration is not nominal ($100), there is no "right of way" language in the title or body of the deed, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds that the **Marey 5/477deed (Def.'s Ex. 72),** conveyed fee simple title to the railroad.

51. The Maroney 11/513 Deed

The **Maroney 11/513 deed (Def.'s Ex. 73)** provides in pertinent part:

> Matt Maroney RAILWAY DEED.
> to NO. 7461

Pacific Railway and Navigation Co.

KNOWN ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One & $^{00}/_{100}$ DOLLARS, [sic] the receipt whereof is hereby acknowledged, I Matt Maroney, unmarried, of Garibaldi, in Tillamook County, Oregon, hereinafter called the grantors, [sic] do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:

"A strip of land sixty (60) feet wide being thirty (30) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through Lot three (3) of Section twenty nine , [sic] in Township two North of Range ten West of the Willamette Meridian. Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD unto the above named grantee and unto its successors and assigns forever. The grantors [sic] above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and

> unto its successors and assigns against the lawful claims of all persons whomsoever.

As discussed above in the court's analysis of the **Batterson 12/163 deed (Def.'s Ex. 5),** the court does not find that the term "Railway Deed" indicates an easement in the same way that a deed entitled "Right of Way Deed" does. Even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Maroney 11/513 deed (Def.'s Ex. 73)**, conveyed fee simple title to the railroad.

52. The McDonald 5/473 Deed

The **McDonald 5/473 deed (Def.'s Ex. 74)** provides in pertinent part:

> Know all Men by These Presents : [sic] That for and in consideration of the sum of $50.00 to him in hand paid, the receipt whereof is hereby acknowledged, J.S. McDonald unmarried, does grant, bargain, sell, and convey to the Pacific Railway and Navigation Company, and to its successors and assigns forever, a strip of land 100 ft. wide, being 50 ft. on each side of the center line of the railway of the Pacific Railway and Navigation Company, as now surveyed and located thru the lands of the aforesaid J.S. McDonald, in Lot 2, Sec. 22,

> T. 1 N.R. 10 W., W. M., said center line being more particularly described as follows, to wit:
>
> * * * [Description] * * *
>
> Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining;
>
> To Have and to Hold unto the Pacific Railway and Navigation Company and to its successors and assigns forever : [sic] together with the right to build, maintain and operate thereover a railway and telegraph line[.]

For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes does not limit the railroad's use to only railroad purposes. Here, the amount of consideration is not nominal ($50), there is no "right of way" language in the title or body of the deed, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds that the **McDonald 5/473 deed (Def.'s Ex. 74)**, conveyed fee simple title to the railroad.

53. The McMillan 11/328 Deed

The **McMillan 11/328 deed (Def.'s Ex. 75)** provides in pertinent part:

> Nillus McMillan and wife Railway Deed.
> to No. 7181.
> Pacific Railway and Navigation Co.

KNOW ALL MEN BY THESE PRESENTS, That for and in consideration of the sum of Three Hundred & $^{00}/_{100}$ DOLLARS , the receipt whereof is hereby acknowledged, We, Nillus McMillan and Sarah McMillan, husband and wife, hereinafter called the grantors, do hereby bargain, sell[,] grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property, situate in the County of Tillamook and State of Oregon, to-wit:

"A strip of land Sixty [sic] (60) feet wide, being thirty (30) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through

Beginning at the mouth of a certain water ditch in Lot three of Section twenty Township two North of Range ten west, running hence in a South easterly direction following said ditch to its intersection with a small lake, thence out South across said lake to its South Bank, thence in an Easterly direction following the foot of the hill to the East line of said Lot three, thence North on said line to the Nehalem Riven, thence Southerly on line of ordinary high water mark to point of beginning, containing 10 acres more or less, all in Sec. 20, T. 2 N. R. 10 W. Also the north half of South East quarter and West half of North East quarter of Section 20,

> T. 2 N. R. 10 W. all being situated in Tillamook County, Oregon.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee and unto its successors and assigns forever. The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

As discussed above in the court's analysis of the **Batterson 12/163 deed (Def.'s Ex. 5),** the court does not find that the term "Railway Deed" indicates an easement in the same way that a deed entitled "Right of Way Deed" does. Here, the amount of consideration is not nominal ($300), there is no mention of "right of way" in the title or body of the deed, no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds that the **McMillan 11/328 deed (Def.'s Ex. 75)**, conveyed fee simple title to the railroad.

54. The McMillan 11/83 Deed

The **McMillan 11/83 deed (Def.'s Ex. 76)** provides in pertinent part:

KNOW ALL MEN BY THESE PRESENTS:

That for and in consideration of the sum of Three Hundred no/100 Dollars to them in hand paid, the receipt whereof is hereby acknowledged, Nillus McMillan and Sarah McMillan, his wife, hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:

Beginning at Stone "A" the initial point in the survey of the Townsite of Garibaldi in Section Twenty-one, [sic], Township One [sic] North of Range Ten [sic] West of the Willamette Meridian and running thence north sixteen degrees 0' West twenty-five feet; thence East <u>along the</u> right-of-way <u>line</u> on a curve to the left with a radius of 714.5 feet a distance of 62.5 feet; thence on a spiral to the left 57.5 feet; thence North sixty-four degrees thirty minute east seventy feet to the east line of said McMillan's land; thence South sixteen degrees 0' east 46.5 feet to the southeast corner of said McMillan's land; thence South seventy-four degrees 0'west[]along said McMillian's south line 187 feet to the place of beginning and containing 14/100ths. acres.

> Together with all the appurtenances, hereditaments, and tenements thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD to the above named grantee, and to its successors and assigns forever, together with the right to build, maintain and operate a railway line thereover. The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever, except only the Astoria & Columbia River Railroad Company under a certain contract or option given by the grantors to said last named corporation.

For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes does not limit the railroad's use to only railroad purposes. Additionally, the court finds that the use of the phrase "right of way" in this deed is not describing the interest conveyed but rather the geographic location. Additionally, the amount of consideration is not nominal ($300), and there is no requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds that the **McMillan 11/83 deed (Def.'s Ex. 76),** conveyed fee simple title to the railroad.

55. The Mendenhall 72/550 Deed

The **Mendenhall 72/550 deed (*Albright,* Def.'s Ex. 78)** provides in pertinent part:

Exhibit A
[Map or drawing]
Plat of Right of Way across Lands of
C. J. Mendenhall
* * * *

KNOW ALL MEN BY THESE PRESENTS, That We, C. J.Mendenhall, unmarried of Washington County, Oregon, and Edward [M]endenhall, of Portland, Multnomah County, Oregon, in consideration of the sum of One Hundred and Thirty Dollars ($130) to us paid, and in consideration of the conditions hereinafter imposed, do hereby bargain, sell, and convey unto the Pacific Railway and Navigation Company, a Corporation, and unto its successors and assigns forever, all of the following described real property, lying, being and situate in Washington County, Oregon, and described as follows: to-wit:- [sic]

A part of Section 4, T 2 N. R. 4 W., a strip of land 80 feet wide being 40 feet on each side of the center line of the Pacific Railway & Navigation Company, as now surveyed and located on said lands,[]and described as follows:-

* * * [Description] * * *

A plat of which Right of Way is hereto attached, marked "A" and made a part hereof.

TO HAVE AND TO HOLD said land unto the said Pacific Railway & Navigation Company, and unto unto [sic] its successors and assigns, as a Right of Way for it and its successors, with the agreement and providing that said Grantee, [sic] its successors a[n]d assigns , [sic] shall perpetually maintain lawful fences on each side of the said Right of Way hereinbefore described, and one cattle guard crossing at such point upon said Right of Way as the Grantors or their heirs or assigns shall designate, within thirty (30) days from the date of the delivery of this deed. And the Grantee , [sic] C. J. Mendenhall does for himself[,] his heirs and assigns, covenant to and with said Pacific Railway & Navigation Company, its sucesso[r]s and assigns, that said tract of land hereinbefore described is free from all incumbrances, save and except a lease in favor of one A. B. Davis, for whom said Davis cleirs [sic] the lands hereby conveyed but which if it does cover such land is to that extend and in some other respects is at least the result of carelessness on part of lessee and mistake and from which lease the grantee must secure a release at its own expense and that C. J. Mendenhall will forever warrant and defend the title to said premises unto the said Pacific Railway & Navigation Company, it successors and assigns forever.

The court finds that the language of this deed viewed as a whole weighs in favor of finding that only an easement was granted. This deed uses the phrase "right of way" several different times. The deed includes a drawing which it labels "Exhibit A" and describes as "Plat of Right of Way across Lands of C. J. Mendenhall." In this context, this deed, like the **Johnson 9/610 deed (Def.'s Ex. 61)** previously discussed, is using the label "Right of Way" in a way that is akin to the way in which a deed entitled "Right of Way" deed uses the phrase "Right of Way" in its title to indicate an interest in property. This is further confirmed when the deed states "A plat of which Right of Way is hereto attached, marked 'A' and made a part hereof."

The deed also contains the following language "TO HAVE AND TO HOLD said land unto the said Pacific Railway & Navigation Company, and unto unto [sic] its successors and assigns, as a Right of Way for it and its successors, " The government agrees that this "deed's use of the phrase 'right of way' in the habendum clause, rather than as part of the geographic description of the land conveyed, makes clear that it is imposing a limitation on the use of the land." Def.'s Objs. at 4 n.1 (quoting *Bouche*, 293 P.2d at 209). This deed grants the estate to the railroad "as a Right of Way." This language indicates the purpose for which the land is to be used and limits the estate being conveyed. The deed also contains the phrases "said Right of Way hereinbefore described" and "upon said Right of Way[,]" both of which are using the phrase "Right of Way" to refer to the interest being conveyed.

Furthermore, the deed contains a commitment by the railroad to build and maintain fences and a cattle guard crossing.

Although this deed has substantial consideration ($130), viewed in light of the deed as a whole, the factors weighs in favor of construing this deed to have conveyed only an easement. Therefore, the court finds that the **Mendenhall 72/550 deed (Def.'s, Ex. 78)**, conveyed an easement to the railroad.[8]

56. The Noland 74/108 Deed

The **Noland 74/108 deed (Def.'s Ex. 79)** provides in pertinent part:

> Know all Men by these Presents, *That* Mrs Lena Noland of Portland xxxxxxxx *State of Oregon, in consideration of* Seventy nine and twenty, one Hundredths ($79.20/100) DOLLARS,*to* me *paid by* Pacific Railway and Navigation Company *of* Portland xxxxxx *State of Oreg*on, * * * * * * * *has bargained and sold, and by these presents does grant, bargain, sell and convey unto said* Pacific Railway Navigation Company[,] is [sic] successors * * *and assigns, all the following bounded and described real property, situated in the County of Washington and State of Oregon:*
>
> A strip of land 100 feet wide being 50 feet on each side of the center line of the Pacific

[8] The government also later agreed this deed conveyed an easement to the railroad. *See* Def,'s Objs. at 4 n.1.

> Railway and Navigation Company's Railway, as surveyed, located and adopted across the south 1/2 of N W¼ of Sec. 30. [sic] T [sic] 3 N. R. 4 W- [sic] W. M. said center line being described as follows: * * *[Description] * * * and containing 7.89 acres. *Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining and also all* her *estate, right, title and interest in and to the same, including dower and claim of dower.*
>
> *TO HAVE AND TO HOLD the above described and granted premises unto the said* PACIFIC RAILWAY AND NAVIGATION COMPANY[,] its successors * * * *and assigns forever. And* Mrs. Lena Noland[,] *grantor above named do* es [sic] *covenant to and with* Pacific Railway and Navigation Company *the above named grantee*[,] is [sic] successors *and assigns that* she is lawfully seized *in fee simple of the above granted premises, that they are free from all incumbrances* * * * [Blank Space] * * * *and that* she *will and* her *heirs, executors and administrators shall warrant and forever defend the above granted premises, and ever part and parcel thereof, against the lawful claims and demands of all persons whomsoever.* (italics in original).

Here, the amount of consideration paid was not nominal ($79.20), there is no reference to a "right of way" in the title or body of the deed, and no mention of a railroad purpose nor does the deed contain any requirement for the railroad to build structures such

as crossings, cattle guards, or fences. As such, the court finds that the **Noland 74/108 deed (Def.'s Ex. 79),** granted fee simple title to the railroad.

57. The Ostrander 9/205 Deed

The **Ostrander 9/205 deed (Def.'s Ex. 80)** provides in pertinent part:

> Chas. [sic] Ostrander and wife Railway Deed.
> to No. 5807.
> Pacific Railway and Navigation Co.
>
> KNOW ALL MEN BY THESE PRESENTS, That for and in consideration of the sum of Five Hundred Fifty & $^{00}/_{100}$ DOLLARS[,] the receipt whereof is hereby acknowledged, we, Charles R. Ostrander and Frances A. Ostrander, husband and wife, of Bay City, in the County of Tillamook and State of Oregon, hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property, situate in the County of Tillamook and State of Oregon, to-wit:
>
> "A strip of land one hundred (100) feet wide, being fifty (50) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through that certain tract of land described as follows:- * * * [Describing the tract through which the strip being conveyed runs] * * *

> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee and unto its successors and assigns forever.
>
> The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

As discussed above in the court's analysis of the **Batterson 12/163 deed (Def.'s Ex. 5),** the court does not find that the term "Railway Deed" indicates an easement in the same way that a deed entitled "Right of Way Deed" does. Here, the amount of consideration is not nominal ($550), there is not any "right of way" language in the title or body of the deed, there is no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds that the **Ostrander 9/205 deed (Def.'s Ex. 80**), conveyed fee simple title to the railroad.

58. The Paquet 5/316 Deed

The **Paquet 5/316 deed (Def.'s Ex. 81)** provides in pertinent part:

Fred Paquet No. 2853
to Right of Way
Pacific Railway + Navigation Company $202.60

Know All Men by These Presents: That for and in consideration of the sum of $202.60/100 to me in hand paid, the receipt whereof is hereby acknowledged, I, Fred Paquet, unmarried, do hereby grant, bargain, sell and convey to the Pacific Railway and Navigation Company, and to its successors and assigns forever, all those portions of the land owned by me, embraced in a strip of land 100 ft. wide, being 50 ft. on each side of the center line of the railway to the Pacific Railway and Navigation Company, as now surveyed, located and adopted thru the lands of the aforesaid Fred Paquet, in Lot 1, Sec. 22 T 1 N.R.10 W., W. M. said center line being more particularly described as follows: * * * [Description] * * *

Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

To Have and to Hold unto the Pacific Railway and Navigation Company and to its successors and assigns forever, together with the right to build, maintain and operate thereover a railway and telegraph line.

For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes does not limit the railroad's use to only railroad purposes. The deed does use the

term “Right of Way” in its title but not in the text of the deed. In addition, the deed provides for substantial consideration ($202.60) and does not contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Taken all of these factors into consideration, the court finds that the **Paquet 5/316 deed (Def.’s Ex.81)**, conveyed fee simple title to the railroad.

59. The Petrzilka 72/203 Deed

The **Petrzilka 72/203 deed (Def.’s Ex. 83)** provides in pertinent part:

> THIS INDENTURE, made this 1st day of August 1906, between Frank Petrzilka and Mary Petrzilka, his wife, of Washington County, parties of the dirst [sic] part, and the PACIFIC RAILWAY & NAVIGATION COMPANY, a Corporation, party of the second part, WITNESSETH:
>
> That the said parties of the first part, for and in consideration of the sum of One Hundred Dollars ($100) to them in hand paid by the party of the second part, the receipt of which is hereby acknowledged, have granted, bargained and sold, conveyed and confirmed and by these presents do grant, bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns,[]forever, all that certain Lot, [sic] piece, parcel and track of land, lying, being and situate in Washington County, Oregon, and particularly described as follows, to-wit:- A strip of land 80 feet wide, being 40 feet on

each side of the center line of the PACIFIC RAILWAY & NAVIGATION COMPANY'S railway as now surveyed, located, and established across the following described lands,; The North West quarter of the North West Quar ter [sic] of Section 4 T.2.N.R.4 W. of the Will.Mer. [sic] and also the following described tract of land, to-wit;-Beginning at the south [sic] West corner of Section 33, T.3.N.R.4.W. and running thence East 14 rods; thence Northwesterly 42 rods to a point 4 rods East of the west line of said section [sic] 33; thence Northeasterly 42 rods to a point 14 rods East of the west line of said Section 33,;[]thence [sic] West 14 rods; thence South 80 rods to the place of beginning, said strip of land containing 4.31 acres.

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents,[]issues and profits thereof.

TO HAVE AND TO HOLD all and singular the said premises together with the appurtenances, unto the said party of the second part and unto its successors and assigns forever. And the said parties of the first part, for themselves, their heirs, executors and administrators do covenant to and with the party of the second part, its successors and assigns forever, that the parties of the first part are the owners in fee simple of the above described and granted premises; That [sic]

> said premises and t he [sic] whole thereof are fee from all incumbrances, and that said parties of the first part, their heirs, executors and administrators shall warrant and forever defend said premises and the whole thereof against the lawful claims and demands of all persons whomsoever.

Here, the amount of consideration paid was not nominal ($100), there is no reference to a "right of way" in the title or body of the deed, and no mention of a railroad purpose nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Petrzilka 72/203 deed (Def.'s Ex. 83)**, granted fee simple title to the railroad.

60. The Pongratz 72/547 Deed

The **Pongratz 72/547 deed (Def.'s Ex. 85)** provides in pertinent part:

> THIS INDENTURE, made this 30 [sic] day of June 1906, between Joseph Pongratz and Monika Pongratz, his wife, of Washington County, Oregon, parties of the first part, and the Pacific Railway & Navigation Company, a Corporation, party of the second part, WITNESSETH:
>
> That the said parties of the first part, for and in consideration of the sum of $85.00 to them in hand paid by the party of the second part, the receipt of which is hereby acknowledged, have granted, bargained and sold, conveyed and confirmed, and by these presents do grant, bargain and sell, convey

and confirm unto the said party of the second part, and its successors and assigns, all that certain lot, piece, parcel and tract of land, lying, being and situate in Washington County, Oregon, and particularly described as a part of Sec. 4, T. 2 N. R. 4 W.,[]to-wit:

A strip of land 80 feet wide, being 40 feet on each side of the center line of the Pacific Railway and Navigation Company as now surveyed and located on said lands, and described as follows

* * * [Description] * * *

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD all and singular, the said premises together with the appurtenances unto the said party of the second part and unto its successors and assigns forever. And the parties of the first part do hereby covenant that they are the owners in fee simple of the tract of land above described; That [sic] tract of land is free from all incumbrances and that they will and their heirs, executors and ad ministrators [sic] shall warrant and forever defend said tract of land and every part and parcel thereof against the lawful claims and demands of all persons whomsoever.

Here, the amount of consideration paid was not nominal ($85), there is no reference to a “right of way” in the title or body of the deed, and no mention of a railroad purpose nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Pongratz 72/547 deed (Def.’s Ex. 85)**, granted fee simple title to the railroad.

61. The Portland Timber Co. 107/610 Deed

The **Portland Timber Co. 107/610 deed (Def.’s Ex. 86)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of Ten Dollars to it in hand paid, the receipt whereof is hereby acknowledged, and other valuable considerations moving to it, PORTLAND TIMBER COMPANY, hereinafter calleD [sic] the grantor, does bargain, grant, convey and confirm to Pacific Railway And [sic] Navigation Company, hereinafter called the GRANTEE, and to its successors and assigns forever, all of the following described real property situate in the County of Washington and State of Oregon, to wit: A strip of land one hundred feet in width, being fifty feet on each side of the center line of the grantee’s railway as the same is surveyed, staked out and located through the northwest quarter of section 34; the west half of the northwest quarter; the northeast quarter[]of the northwest quarter, and the northwest quarter of the northeast quarter of section 32; also the north half of the north half of section

> 31, all in township three north of range six west of the Willamette Meridian.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging, or in any wise [sic] appertaining, with the right to construct, maintain and operate a railway thereover.
>
> TO HAVE AND TO HOLD to the grantee and to its successors and assigns forever. And the grAntor [sic] does covenant with the grantee that it will warrant and defend the premises above granted unto the grantee, and to its successors and assigns against the lawful claims and demands of all persons whomsoever claiming or to claim under the grantor.

For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes does not limit the railroad's use to only railroad purposes. Here, the amount of consideration is not nominal ($10.00), there is no "right of way" language in the title or body of the deed nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds that the **Portland Timber Co. 107/610 deed (Def.'s Ex. 86)**, conveyed fee simple title to the railroad.

62. The Portland Timber Co. 90/50 Deed

The **Portland Timber Co. 90/50 deed (Def.'s Ex. 87)** provides in pertinent part:

Know All Men by These Presents, That the Portland Timber Company, an Oregon corporation, in consideration of the sum of Nine Hundred and Four Dollars and twenty cents ($904.20) ,[]paid [sic] by the Pacific Railway and Navigation Company, the grantee herein, receipt whereof is hereby acknowledged, does grant, bargain, sell, convey and confirm to the grantee herein, Pacific Railway and Navigation [C]ompany, its successors and assigns forever, all of the following described real estate, situate in the County of Tillamook, State of Oregon, to-wit:

Beginning at a point where the East line of Section 3, Township 3 North, Range 6 West W. M., [sic] interests the center line of Pacific Railway and Navigation Company's railroad, said point being 756 feet south of the northeast corner of said Section 35, and being identical with Station 1749+65 of said company's railway survey numbers, running thence along said center line in a southwesterly direction * * * [description] * * * * thence north along said east line, a distance of 50 feet to the place of beginning, saving and excepting a right of way 100 feet in width through the above des[c]ribed land granted by deed of the grantor herein to Pacific Railway and Navigation Company, dated June 30, 1909, and containing exclusive of said right of way,[]6 acres.

Same being hereby granted for all proper railroad, depot and station ground purposes, the intent of this provision to prevent the

> grantee herein from platting a townsite on the said land. TO HAVE AND TO HOLD the above described premises unto said Pacific Railway and Navigation Company, and to its successors and assigns forever. It is understood,[]however, that the grantor herein reserves to itself all of the line trees situate upon the exterior lines of the above described premises.

This deed specifically states that the land being conveyed in the deed is "hereby granted for all proper railroad, depot and station ground purposes, the intention of this provision to prevent the grantee herein from platting a townsite on said land." This language specifies the purpose for which the land is being granted and for which the land is to be used and thus indicates that only an easement was granted. The deed also provides that "the grantor herein reserves to itself all of the line trees situate upon the exterior lines of the above described premises[,]" which further indicates that an easement was granted. *See First Nat'l Bank v. Townsend,* 555 P.2d 477 (Or. App. 1976) These express provisions establish the original parties' intent to convey an easement. As such, although the deed provides for substantial consideration ($904.20), the court finds that the **Portland Timber Co. 90/50 deed (Def.'s Ex. 87)**, conveyed an easement to the railroad.

63. Prickett 72/538 Deed

The **Prickett 72/538 deed (Def.'s Ex. 88)** provides in pertinent part:

THIS INDENTURE, made this 18th day of May 1906, between J. L. Prickett and Belle Prickett his wife, of Washington County, Oregon, parties of the first part, and the Pacific Railway & Navigation Company, a Corporation, party of the second part, WITNESSETH:

That the parties of the first part for and in consideration of the sum of Two Hundred Dollars ($200) to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, conveyed and confirmed, and by these presents do grant, bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns, all that certain lot, piece, parcel and tract of land, lying, being and situate in Washington County, Oregon , [sic] and particularly described as a portion of Section 25, T. 2 N. R. 4 W. Will. Mer., to-wit:-

A strip of land 80 feet wide, being 40 feet on each side of the center line of the Pacific Railway and Navigation Company's Railroad, <u>as now</u> <u>surveyed and located</u> on said land, and described as follows:-

* * * [Description] * * *

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and

> reversions, remainder and remainders, rents, issues and profits thereof.
>
> TO HAVE AND TO HOLD aLL [sic] and singular, the said premises together with the appurtenances unto the said party of the second part and u[n]to its successors and assigns forever.

Here, the amount of consideration paid was not nominal ($200), there is no reference to a "right of way" in the title or body of the deed, and no mention of a railroad purpose nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Prickett 72/538 deed (Def.'s Ex. 88)**, granted fee simple title to the railroad.

64. The Rinck 77/454 Deed

The **Rinck 77/454 deed (Def.'s Ex. 90)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One Dollar to him in hand paid, the receipt whereof is hereby acknowledged, and other valuable considerations moving to him, J. H. Rinck, an unmarried man, hereinafter called the grantor, does hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forevEr, [sic] all of the following described real property situate in the County of Washington and State of Oregon, to wit:

> "A strip of land 100 feet wide, being 50 feet on each side of the centereline [sic] of the track of the Pacific Railway and Navigation Company as the same is constructed through the North half of the northeast quarter of Section 32, in township 3 North of range 4 west of the Willamette Meridian containing 3.17 acres."
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining, granting also the grantee the right to operate a railway line thereover *as well as the fee of the aforesaid premises*. The grantor does covenant that he is seased [sic] of the aforesaid premises in fee simple and that the same are free from all liens and encumbrances, and that he will and his heirs, executors and administrators shall forever warrant and defend the same against the lawful claims and demands of all persons whomsoever.

For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes does not limit the railroad's use to only railroad purposes. Additionally, the deed provides that it grants "the right to operate a railway line thereover as well as the fee of the aforesaid premises." Clearly the parties intended to convey fee simple, even though the amount of consideration is nominal ($1.00), the deed does not contain the phrase "right of way" in the title or body of the deed nor any requirement for the railroad to build structures such

as crossings, cattle guards, or fences. Therefore, the court finds that the **Rinck 77/454 deed (Def.'s Ex. 90)**, granted a fee to the railroad.

65. The Rockaway Beach 12/342 Deed

The **Rockaway Beach 12/342 deed (Def.'s Ex. 91)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One & $^{00}/_{100}$ DOLLARS, the receipt whereof is hereby acknowledged, Rockaway Beach Company, a Corporation organized and existing under the laws of the State of Oregon and First Bank Trust Company, a corporation organized and existing under the laws of the State of Oregon, hereinafter called the grantors, [sic] do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:
>
> "A strip of land sixty (60) feet wide being thirty (30) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through
>
> Lot four of Section thirty two in Township two North of Range ten West and a strip of land twenty feet wide off the North end of Lot one of Section five, Township One North of Range two West of Willamette Meridian.

> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.
>
> The grantors [sic] above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all incumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

Even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Rockaway Beach 12/342 deed (Def.'s Ex. 91)**, conveyed fee simple title to the railroad.

66. The Rowntree 11/618 Deed; The Sampson 11/617 Deed; The Sampson 11/619 Deed; and The Sampson 11/620 Deed

The **Rowntree 11/618 deed (Def.'s Ex. 92);** the **Sampson 11/617 deed (Def.'s Ex. 95);** the **Sampson 11/619 deed (Def.'s Ex. 96);** the **Sampson 11/620 deed (Def.'s Ex. No. 97**) are virtually identically and thus the court will analyze these deeds together. Each of these four deeds contains, with minor variations, the following language:

[Name of grantor(s)]
to Deed.
Pacific Railway and Navigation Co. No. ####.

Know All Men By these Presents, That Whereas [name of grantor] is the owner in fee simple of the following described real proper, situated in the County of Tillamook and State of Oregon, to-wit:

* * * [Description of grantor's *entire* property, not just strip being conveyed] * * *

NOw [sic] Therefore, in consideration of the sum of Seventy five and $^{00}/_{100}$ Dollars, to [pronoun] in hand paid by the Pacific Railway and Navigation Company, the receipt whereof is hereby acknowledged, [pronoun], the said [name of grantor(s)], do hereby grant, bargain, sell and convey unto said Pacific Railway and Navigation Company, its successors and assigns, so much of said above described tract of land as lies within the right of way limits of said Pacific Railway and Navigation Company, said right of way being a strip of land sixty feet wide, to-wit: thirty feet on each side of the center line of the railway of the grantee, as the same is surveyed, staked out and located through said tract, and said center line running on a tangent North six degrees and fifty eight minutes East from a point which is fifty four feet West of the corner common to Section 5, 6, 7 and 8 in TOwnship [sic] one North of Range ten West, through and beyond the land described herein.

> To have and to hold the above described and granted premises unto the said Pacific Railway and Navigation Company, its successors and assigns forever.
>
> And [pronoun], the said [name of grantors] The grantors above named do covenant to and with said Pacific Railway Company, its successors and assigns, that [pronoun] [is] the owner in fee simple of said premises, that they are free from all incumbrances, and that [pronoun] will and [possessive pronoun] heirs, executors, administrators and assigns shall warrant and forever the same against the lawful claims and demands of all persons whomsoever.

The court finds that the language of these deeds viewed as a whole weighs in favor of finding that the parties intended to grant a fee to the railroad. These deeds use the phrase "right of way" twice. It is clear from the context of these deeds that the phrase "right of way" is not intended to describe the interest granted but rather the geographic location of the land. Additionally, the amount of consideration paid was not nominal ($75), there is no mention of a railroad purpose, and the deed does not contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Rowntree 11/618 deed (Def.'s Ex. 92),** the **Sampson 11/617 deed (Def.'s Ex. 95)**, the **Sampson 11/619 deed (Def.'s Ex. 96)**, and the **Sampson 11/620 deed (Def.'s Ex. No. 97**), all granted fee simple title to the railroad.

67. The Roy 11/516 Deed

The **Roy 11/516 deed (Def.'s Ex. 93)** provides in pertinent part:

> Felix Roy   Railway Deed.
> to   No. 7464.
> Pacific Railway and Navigation Co.
>
> KNOWN ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One Thousand & $^{00}/_{100}$ DOLLARS, the receipt whereof is hereby acknowledged, I Felix Roy, a bachelor of Tillamook County, Oregon, hereinafter called the grantors, [sic] do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:
>
> "A strip of land one hundred (100) feet wide, being fifty (50) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through Lot three of Section 36 Township 3 North of Range 9 West of W. M. Lots two, three and thirteen of Section 31, Township 3 North of Range 9 West of W. M. Also through a certain tract described as follows:- Beginning at the meander post on the North bank of Nehalem River on the line between Section 31 Tp. 3 N. Range 9 West and Section 36 Tp. 3 North Range 10 West, running thence North 30 rods, thence West 208 feet, thence South to Nehalem River, thence in an Easterly direction following the

> North bank of Nehalem River to place of beginning in Sec. 36 Tp. 3 N. R. 10 W. of W.M.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.
>
> The grantors [sic] above named do covenant that they are seised of the aforesaid premises in fee simple and that the same are free from all encumbrances, and that they [sic] will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

As discussed above in the court's analysis of the **Batterson 12/163 deed (Def.'s Ex. 5),** the court does not find that the term "Railway Deed" indicates an easement in the same way that a deed entitled "Right of Way Deed" does. Here, the amount of consideration is not nominal ($1,000), there is no use of the "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Roy 11/516 deed (Def.'s Ex. 93)**, conveyed fee simple title to the railroad.

68. The Rupp 13/245 Deed

The **Rupp 13/245 deed (Def.'s Ex. 94)** provides in pertinent part:

Know all Men by These Presents: That for and in consideration of the sum of Ten Dollars ($10.00), the receipt whereof is hereby acknowledged, and other valuable considerations moving to them, John J. Rupp and Betty N. Rupp, of Saginaw, Michigan, hereinafter called the grantor, does bargain, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, a strip of land one hundred (100) feet in width, being fifty (50) feet on each side of the center line of the railway of the grantee, as the same is surveyed and located through the following described real property, situate in the County of Tillamook and State of Oregon, to wit:

* * * [Describing the property through which the strip conveyed runs] * * *

Together with the appurtenances, tenements and hereditaments thereunto belonging, or in anywise appertaining.

To Have and to Hold to the grantee and to its successors and assigns forever.

The grantors covenant with the grantee that they will warrant and defend the premises herby granted against the lawful claims and demands of all persons whomsoever claiming the same by, through or under the grantor. [sic]

Here, the amount of consideration is not nominal ($10), there is no reference to a "right of way" in the title or body of the deed, and no mention of a railroad

purpose nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Rupp 13/245 deed (Def.'s Ex. 94)**, conveyed fee simple title to the railroad.

69. The Schrader & Groat 11/354 Deed

The **Schrader & Groat 11/354 deed (Def.'s Ex. 98)** provides in pertinent part:

> Paul Schrader et ux
> & John Groat et ux — Railway Deed.
> to — No. 7235.
> Pacific Railway and Navigation Co.
>
> KNOWN ALL MEN BY THESE PRESENTS, That for and in consideration of Two Hundred & 00 DOLLARS, the receipt whereof is hereby acknowledged, we, Paul Schrader and Lillie R. Schrader[,] husband and wife, and John Groat and Lillian A. Groat , [sic] husband and wife, hereinafter called the grantors[,] do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee[,] and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:
>
> "A strip of land sixty feet wide being thirty feet on each side of the center line of railway of the grantee <u>as the same is surveyed and located </u>through Lot one of Section five, in Township One North of range ten West of Willamette Meridian, save and except seven

> acres off the South[]and a strip of land twenty feet wide off the North end of said Lot one.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.
>
> The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

As discussed above in the court's analysis of the **Batterson 12/163 deed (Def.'s Ex. 5),** the court does not find the term "Railway Deed" indicates an easement in the same way that a deed entitled "Right of Way Deed" does. Here, the deed provides for consideration that is not nominal ($200), does not use the phrase "right of way" in the title or body of the deed, and does not mention a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Schrader & Groat 11/354 deed (Def.'s Ex. 96)**, conveyed fee simple title to the railroad.

70. The Sibley 23/301 Deed

The **Sibley 23/301 deed (Def.'s Ex. 100)** is entitled "14999 Warranty Deed" and provides in pertinent part:

Know all Men by These Presents: That for and in consideration of the sum of Four Hundred Ninety Four ($495.00) Dollars, the receipt whereof is hereby acknowledged, Hiram W. Sibley and Margaret D. Sibley, his wife, hereinafter called the grantors, do bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit:

A strip of land one hundred feet wide, being fifty feet on each side of the center line of the Pacific Railway and Navigation Company's railway as located and staked out over the south half of the southeast quarter and lot 2 of section 9, lot 1 of section 15 and lots 1 and 2 of section 16, all of Township 3 North, range 8 West, Willamette Meridian, containing nine and seventeen one hundredths (9.17) acres, said center line being more particularly described as follows:-

* * * [Description] * * *

Also a strip of land one hundred feet wide, being fifty feet on each side of the center line of the Pacific Railway and Navigation Company's railway as located and staked out over the northeast quarter of section 14, township 3 North range 8 West, Willamette Meridian, containing four and seventy six one

> hundredths (4.76) acres, said center line being more particularly described as follows:-
>
> * * * [Description] * * *
>
> Also a strip of land one hundred feet wide, being fifty feet on each side of the center line of the Pacific Railway and Navigation Company's railway as located and staked out over lot 1 of section 8 and lots 1 and 2 of section 17, all of township 3 North, range 8 West, Willamette Meridian, containing seven and seventy eight one hundredths (7.78) acres, said center line being more particularly described as follows:-
>
> * * * [Description] * * *
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining, confirming to the grantee specifically the right to build, maintain and operate a railway line thereover.
>
> To Have and to Hold unto the above named grantee and unto its successors and assigns forever.
>
> The grantors do warrant with the grantee that they will warrant and defend the premises hereby granted against the lawful claims and demands of all persons claiming under the grantors.

For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes is not dispositive on the

question of whether an easement was granted. Here, the amount of consideration is not nominal ($495), there is no "right of way" language in the title or body of the deed, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds that **Sibley 23/301 deed (Def.'s Ex. 100)**, conveyed fee simple title to the railroad.

71. The Slattery 94/161 Deed

The **Slattery 94/161 deed (Def.'s Ex. 101)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of Ten Dollars to them in hand paid, the receipt whereof is hereby acknowledged, and other valuable considerations moving to them, W. C. Slattery and Delia Slattery, his wife, hereinafter called the grantors , do bargain, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Washington and State[]of Oregon, to-wit: A strip of land one hundred feet in width, being fifty feet on each side of the center line of the grantee's railway as the same is surveyed, staked out and located through the northwest quArter [sic] of Section 32 in Township 3 North of Range 5 West of the Willamette Meridian. Together with the appurtenances, tenements and hereditaments thereunto belonging, or in any wise [sic] appertaining,

> with the right to construct, maintain and operate a railway thereover. TO HAVE AND TO HOLD to the grantee and to its successors and assigns forever. And the grantors do covenant with the grantee that they will warrant and defend the premises above granted unto the grantee, and to its successors and assigns against the lawful claims and demands of all persons whomsoever claiming or to claim under the grantors.

For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes does not limit the railroad's use to only railroad purposes. Here, the amount of consideration is not nominal ($10), there is no "right of way" language in the title or body of the deed, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds that **Slattery 94/161 deed (Def.'s Ex. 101),** conveyed fee simple title to the railroad.

72. The Smith, Loyd 16/515 Deed

The **Smith, Loyd 16/515 deed (Def.'s Ex. 103)** provides in pertinent part:

> Know All Men by These Presents: That for and in consideration of the sum of One Hundred Fifty and $^{00}/_{100.}$ Dollars, the receipt whereof is hereby acknowledged, I, Lloyd C Smith a widower, of Garibaldi, Tillamook County[,] Oregon[,] hereinafter called the grantor, do hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and

to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit:

A strip of land one hundred(100) [sic] feet wide being fifty (50) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through Lot 3 of Section 8, Lot 4 of Section 7, Lots 1, 2, 3, and 4 and North-West [sic] quarter of South-West[]quarter of Section 17, Lot 3 of Section 20 and Tide Land fronting and abutting upon Lots 3 and 4 of Section 20, all in Township 1 North of Range 10 West of Willamette Meridian; save and except that from Station No 651 to Station No. 677 said right of way hereby conveyed shall be only 65 feet wide being 50 feet on the Easterly side and 15 feet on the Westerly side of said center line.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

To Have and to Hold unto the above named grantee and unto its successors and assigns forever.

The grantor above named does covenant that he is seised of the aforesaid premises in fee simple, and that the same are free from all incumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

The court finds that the language of this deed viewed as a whole weighs in favor of finding that a fee was granted. Here, the court finds that the deed's use of the phrase "right of way" is not a description of the interest being conveyed but provides a geographic location. Even though the amount of consideration is nominal ($1), without any mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Smith, Loyd 16/515 deed (Def.'s Ex. 103),** granted fee simple title to the railroad.

73. The Stanley 11/113 Deed

The **Stanley 11/113 deed (Def.'s Ex. 104)** provides in pertinent part:

> F. S; [sic] Stanley et al — Railway Deed.
> to — NO. 6844.
> Pacific Railway and Navigation Co.
>
> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One DOLLARS, [sic] the receipt whereof is hereby acknowledged, F. S. Stanley and Ruth M. Stanley, his wife, Robert Smith, a single man; W. D. Wheelwright, a single man; - [sic] E. E. Lytle and Lizzie M Lytle, his wife, and May Enright, a single woman, hereinafter called the grantors, do herby bargain, sell, grant, convey and confirm, to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property, situate

> in the County of Tillamook and State of Oregon, to-wit:
>
> "A strip of land one hundred (100) feet wide, being fifty (50) feet on each side of the center line of the railway of the grantee, as the same is surveyed and located through the East half of the South East [sic] quarter of Section Twenty [sic] (20) in Township Three [sic] (3) North, [sic] of Range Seven [sic] (7) West, W. M.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee and unto its successors and assigns forever.
>
> The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

As discussed above in the court's analysis of the **Batterson 12/163 deed (Def.'s Ex. 5),** the court does not find that the term "Railway Deed" indicates an easement in the same way that a deed entitled "Right of Way Deed" does. Here, even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for

the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Stanley 11/113 deed (Def.'s Ex. 104),** conveyed fee simple title to the railroad.

74. The State of Oregon 70/76 Deed

The **State of Oregon 70/76 deed (*Loveridge*, ECF No. 28, Ex. J-54)** provides in pertinent part:

> State of Oregon, by and through
the State Highway Commission No. 63061
To Bargain and Sale Deed.
Southern Pacific Company, a corp.
>
> **BARGAIN AND SALE DEED**
>
> THIS INDENTURE WITNESSETH, that the STATE OF OREGON, by and through its State Highway Commission, for the consideration of the sum of One and no/100 Dollars ($1.00) and other valuable considerations to it paid, has bargained and sold and by these presents does bargain, sell and convey unto the SOUTHERN PACIFIC COMPANY, a corporation, the following described premises, to-wit:
>
> A parcel of land in Lots 5 and 6 of Section 22, Twp. 1 North, Range 10 West, W. M., Tillamook County, Oregon, said parcel being a strip of land of varying width lying on the westerly side of and <u>contiguous to the</u> <u>present</u> right of way of the Tillamook Brach of the Southern Pacific Company; said parcel of land being more particularly described as follows:

Commencing at a point in the original center line of the Tillamook Brach of the Southern Pacific Company as it is now laid out, owned and operated over and across Section 22, Twp. 1, Range 10 West, W. M., County of Tillamook, State of Oregon, said point being known as Engineer's Station 497+19.8 E. C. of the said center line; thence North 24º 25' West at right angles to said center line a distance of 50.0 feet to a point in the original northwesterly right of way line of said Branch railroad; said point being the actual point of beginning of this description; thence along said original right of way line in a southwesterly direction on the arc of a taper curve to the left parallel to and always 50 feet northwesterly from the center line of the original location of said railroad, (the long cord of said taper curve bears South 64º 35' West) a distance of 122.6 feet to a point, said point being 50.0 feet northwesterly from Engineer's Station 495+99.8 C. C. T 2 of the center line of the original constructed line; thence * * * *; containing 0.32 acres.

This deed is an exchange deed given under terms of Section 44-118, Oregon Code 1930.

TO HAVE AND TO HOLD the said premises, with their appurtenances, unto the said Southern Pacific Company, a corporation, its successors and assigns forever.

This deed is entitled "BARGAIN AND SALE DEED" and specifies that the deed "is an exchange deed given under terms of Section 44-118, Oregon

Code 1930." According to the Oregon Court of Appeals, it is "the settled common-law understanding of the purpose and effect of a bargain and sale deed" that "[t]he essential purpose of a bargain and sale deed is to convey whatever title the seller has, without providing a warranty on the seller's part of the nature or quality of that title." *Winters v. Cty. of Clatsop*, 150 P.3d 1104, 1107 (Or. App. 2007) (citing *City of Bend v. Title & Trust Co.,* 289 P. 1044 (Or. 1930) (a bargain and sale deed "contain[]no warranties" and only "act as an instrument of conveyance.

Although this deed uses the phrase "right of way" in the body of the deed it is not describing the interest being conveyed by the deed but rather the geographic location. In addition, although the deed provides for only $1 in consideration it does not contain any railroad purpose language. The court finds that the **State of Oregon 70/76 deed (*Loveridge*, ECF No. 28, Ex. J-54)**, granted fee simple title to the railroad.

75. The Stowell 75/32 Deed

The **Stowell 75/32 deed (Def.'s Ex. 105)** provides in pertinent part:

> THIS INDENTURE, made this 8th day of February A.D.1907, between S. H. Stowell and Josephine Stowell, his wife, of Washington County, Oregon, parties of the first part, and the PACIFIC RAILWAY & NAVIGATION COMPANY, party of the second part, WITNESSETH:
>
> That the parties of the first part, for and in consideration of the sum of $50.00 and other good and valuable consideration to them in

hand paid, by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, conveyed and confirmed and by these presents do grant, bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns all that certain lot, piece, parcel and tract of land, lying, being and situate in t[h]e County of Washington, State of Oregon and being more particularly described as follows:-

Being in the S. W. [1/4] of Sec.[]33 and in the N. E. [1/4] of Sec 32, all in[]T. 3 N R. 4. W. Will. Mer. a strip of land 100 feet wide being 50 feet on each side of the center line of the Pacific Railway and Navigation Company's Railway, as surveyed, located and adopted across said lands and described as follows:-

Beginning at a point where the East line of said Right of Way intersects the West line of said Stowells [sic] land, 475 feet North and 109 feet East of the Southwest corner of said Section 33; Running [sic] thence in a Northwesterly direction along said West line, 180 feet; thence in a North Easterly direction along said West line, 520 feet to its intersection with the West line of said Right of Way; thence in a Northeasterly dire[c]tion along said Right of way, [sic] on a spiral to the Right, 170 feet; thence * * * *; Also Beginning [sic] at a point where the West line of said Right of Way intersects the East line of said N. E. $\frac{1}{4}$ of said Sec. 32, 390 feet North of the Southeast corner

> thereof; Running * * * *, and containing 6.96 acres.
>
> Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.
>
> TO HAVE AND TO HOLD, all and singular, the said premises together with the appurtenances unto the said Pacific Railway & Navigation Company, its successors and assigns forever,[]And [sic] We, [sic] S. H,. Stowell and Josephine Stowell, his wife, grantors above named, do covenant to and with the Pacific Railway & Navigation Company, the above n[a]med grantee, its successors and assigns, that the above granted premises are fee from all incumbrances, and that we will and our heirs, executors and administrators, shall warrant and forever defend the above granted premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever.

The court finds that the phrase “right of way” is being used to describe the geographic location of the preexisting railway line, rather than to refer to the interest being conveyed by the deed. Additionally, the amount of consideration paid was not nominal ($50), there is no mention of a railroad purpose nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences.

Therefore, the court finds that the **Stowell 75/32 deed (Def.'s Ex. 105),** conveyed fee simple title to the railroad.

76. The Surman 6/40 Deed

The **Surman 6/40 deed (Def.'s Ex. 106)** provides in pertinent part:

> Know all Men By These Presents: That for and in consideration of the sum of $150.00 to him in hand paid, the receipt whereof is hereby acknowledged, James Surman, unmarried, does hereby grant, bargain, sell and convey to the Pacific Railway and Navigation Company, and to its successors and assigns forever: <u>all that portion of the land owned by him</u> embraced in a strip of land 100 ft. wide, being 50 ft. on each side of the center line of the Pacific Railway and Navigation Company's railway as now surveyed, located and adopted thru <u>the lands of the aforesaid James Surman</u>, in Lot 2 Section 22, T. 1 N., R. 10 W., W. M., said center line being more particularly described as follows:
>
> * * * [Description] * * *
>
> Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining;
>
> To Have and to Hold unto the Pacific Railway and Navigation Company and to its successors and assigns forever; together with the right to build, maintain and operate thereover a railway and telegraph line.

For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes does not limit the railroad's use to only railroad purposes. Here, the amount of consideration is not nominal ($150), there is no "right of way" language in the title or body of the deed, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. Therefore, the court finds that the **Surman 6/40 deed (Def.'s Ex. 106)**, conveyed fee simple title to the railroad.

77. The Thayer 11/355

The **Thayer 11/355 deed (Def.'s Ex. 107)** provides in pertinent part:

> Claude Thayer and wife — Railway Deed.
> to — No. 7236.
> Pacific Railway and Navigation Co.
>
> KNOW ALL MEN By [sic] THESE PRESENTS; That for and in consideration of the sum of One & 00 DOLLARS, the receipt whereof is hereby acknowledged, we, Claude Thayer and Estelle Thayer, husband and wife, hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAy [sic] AND NAVIGATION COMPANy, [sic] hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:
>
> "A strip of land one hundred (100) [sic] feet wide being fifty (50) feet on each side of

the center line of the railway of the grantee as the same is now surveyed and located through; [sic] Tide Land fronting and abutting on Lot 1 of Sec. 21, T. 1 N. R. 10 W. except Town of Garibaldi.

Also beginning at a point at ordinary high water line South 84º West 24 links dist. from the meander corner between Sections 20 and 21, T. 1 N. R. 10 W. thence South 65º East on ordinary high water line 3.21 chains, thence North 17.89 chains, thence West 2.91 chains, thence South 16.53 chains to point of beginning.

Also through an undivided one half interest in the following tracts;- Beginning at a point on ordinary high water line 34 links South and 320 links West of the meander corner between Sections 20 and 21 T. 3 N. R. 10 W. thence N. 84º East 3.02 chains on ordinary high water line, thence North 16.53 chains, thence West 3.00 chains, thence South 16.84 chains to place of beginning; also through an undivided one half interest in Lots 5, 6, 7, and 8 in Block 3 and Lots 4, [sic] and 5 in Block 4, all in the Town of Garibaldi.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD unto the above named grantee and unto its successors and assigns forever.

> The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all en[c]umbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

As discussed above in the court's analysis of the **Batterson 12/163 deed (Def.'s Ex. 5),** the court does not find that the term "Railway Deed" indicates an easement in the same way that a deed entitled "Right of Way Deed" does. Here, even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Thayer 11/355 deed (Def.'s Ex. 107)**, conveyed fee simple title to the railroad.

78. The Thayer 18/39 Deed

The **Thayer 18/39 deed (Def.'s Ex. 108)** is entitled "1134 Railway Deed" and provides in pertinent part:

> Know All Men by These Presents: That for and in consideration of the sum of One & $^{00}/_{100}$ Dollars, the receipt whereof is hereby acknowledged, We, Claude Thayer and Estelle Thayer[,] husband and wife, of Tillamook, Oregon, hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its

successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:

"A strip of land one hundred(100) [sic] feet wide being fifty (50) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through Lot eight of Section twenty two, in Township one North of Range ten West of Willamette Meridian, save and except a certain one acre tract heretofore conveyed out of said Lot eight;

Also through the tide lands fronting and abutting upon Lots seven and eight in said Section twenty two, in Township one North of Range ten West of Willamette Meridian.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

To have and to hold unto the above named grantee and unto its successors and assigns forever.

The grantors above named do covenant that they are seized of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

As discussed above in the court's analysis of the **Batterson 12/163 deed (Def.'s Ex. 5),** the court does

not find that the term "Railway Deed" indicates an easement in the same way that a deed entitled "Right of Way Deed" does. Here, even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Thayer 18/39 deed (Def.'s Ex. 108),** conveyed fee simple title to the railroad.

79. The Thronburgh 72/531 Deed

The **Thornburgh 72/531 deed (Def.'s Ex. 109)** provides in pertinent part:

> THIS INDENTURE , [sic] made this 12th day of October 1906, between A. Thornburgh, widower, and O. C. Thornburgh, of Washington County, Oregon, parties of the first part, and the Pacific Railway & Navigation Company, a Corporation, party of the second part, WITNESSETH:
>
> That the said parties of the first part, for and in consideration of the sum of Three hundred dollars ($300) to them in hand paid by the party of the second part, the receipt of which is hereby acknowledged, have granted, bargained and sold, conveyed and confirmed and by these presents do grant, bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns, all that certain, [sic] lot, piece, parcel and tract of land, lying, being and situate in Washington County, Oregon, and particularly

described as a portion of Sec. 24, T. 2. N. R. W., Will. Mer., a strip of land 80 feet wide, being 40 feet on each side of the center line of the Pacific Railway and Navigation Company's Railway, as now surveyed and located on said land and described as follows:

* * * [Description] * * * and containing 4.11 acres, and also

A part of Sections 14 and 15, T. 2. N. R. 4 W. ; [sic] a strip of land 80 feet wide, being 40 feet on each side of the center line of the Pacific Railway & Navigation Company's Railway, as now surveyed and located on said land, and described as follows:

* * * [Description] * * *, and containing 6.45 acres.

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and[]remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular, the said premises together with the appurtenances unto the said party of the second part and unto its successors and assigns forever. And the parties of the first part hereby covenant to and with the party of the second part, its successors and assigns, that the parties of the first part, [sic] are the owners in fee simple of the tract of land above described, and the whole thereof; That [sic]

> said premises are fee from all incumbrances, and that the parties of the first part, their heirs, executors and administrators, shall warrant and forever defend the above described and granted premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever.

Here, the amount of consideration paid was not nominal ($300), there is no reference to a "right of way" in the title or body of the deed, and no mention of a railroad purpose nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Thornburgh 72/531 deed (Def.'s Ex. 109)**, granted fee simple title to the railroad.

80. The Thurnheer 114/339 Deed

The **Thurnheer 114/339 deed (Def.'s Ex. 110)** is a form deed and provides in pertinent part:

> Know all Men by these Presents, that Lawrence Thurnheer and Alice Thurnheer, husband and wife of Washington County xxxxxx *State of Oregon, in consideration of* Fifty ($50.00) DOLLARS, to them paid by Southern Pacific ComPany, [sic] a corporation of the State of Kentucky, * * * * * * have bargained and sold, and by these presents do grant, bargain, sell and convey unto said Southern Pacific ComPany, [sic] its successors and * * * assigns, all the following bounded and described real property, situated in the County of Washington and State of Oregon

A strIP [sic] of land 20 feet in width adjoining the 100 foot right-of- way of the Tillamook Brach of said Railroad ComPany [sic] through section 30, townshiP [sic] 3 N, range 4 W, WM, on its northerly side and extending from the east line of section 30 westerly adjacent to said 100 foot right-of-way a distance of 930 feet, more or less, to the northerly line of County Road through said section 30, said parcel of land containing 0.43 acres, more or less, all in section 30, T 3 N. R 4 W. WM. [sic]

* * * * * * [Blank Space] * * * * * *

Together with all and singular the tenements, hereditaments and appurtenances there to [sic] belonging or in anywise appertaining, and also all their estate, right, title and interest in and to the same, including dower and claim of dower.

To Have and to Hold the above described and granted premises unto the said Southern Pacific Company[,] its successors *** and assigns forever. And Lawrence Thurnheer and Alice Thurnhere, grantors above named do covenant to and with Southern Pacific Company[,] the above named grantee[,] its successors * * * and assigns that they are lawfully seized in fee simple of the above granted premises[,] that the above granted premises are free from all incumbrances * * * and that they will and their heirs, executors and administrators shall warrant and forever defend the above granted premises, and ever

> part and parcel thereof, against the lawful claims and demands of all persons whomsoever. (italics in original).

The court finds that the language of this deed viewed as a whole weighs in favor of finding that a fee was granted. Here, the court finds that the deed's use of the phrase "right of way" is not a description of the interest being conveyed but provides a geographic location. Additionally, the amount of consideration paid was not nominal ($50) and there is no reference to a railroad purpose nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Thurnheer 114/339 deed (Def.'s Ex. 110)**, granted fee simple title to the railroad.

81. The Tillamook Beach Realty 11/599 Deed

The **Tillamook Beach Realty 11/599 deed (Def.'s Ex. 111)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS that for and in consideration of the covenants and agreements entered into between the PACIFIC RAILWAY AND NAVIGATION COMPANY, a corporation[,] and the TILLAMOOK BEACH REALTY COMPANY, a corporation[,] by agreement dated this 27th. day of July, 1909, said TILLAMOOK BEACH REALTY COMPANY, a corporation, does hereby grant, bargain, sell and convey to PACIFIC RAILWAY AND NAVIGATION COMPANY, its successors and assigns forever, all of the following described real property situated in the County of Tillamook and State of Oregon, to-wit:

> A strip of land sixty (60) feet wide, being thirty (30) feet on each side of the center line of the railway of the Pacific Railway and Navigation, as the same is surveyed and located through the following described premises, situated in Tillamook County, Oregon, to-wit:
>
> * * * [Description of the premises through which the strip runs, not the strip itself] * * *
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> To Have and to Hold unto the above named Pacific Railway and Navigation Company, its successors and assigns.

Although this deed does not list any money as consideration, there are other indicia that the parties intended to convey fee simple title. The deed lacks any "right of way" language in the title or body, there is no mention of railroad purposes, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Tillamook Beach Realty 11/599 deed (Def.'s Ex. 111)**, conveyed fee simple title to the railroad.

82. The Turner 72/538 Deed

The **Turner 72/528 deed (Def.'s Ex. 113)** provides in pertinent part:

> THIS INDENTURE, made this 21st day of August 1906, between Montgomery Turner and Bessie Turner, his wife, of Washington County, parties of the first part, and the

Pacific Railway & Navigation Company, a Corporation, a Corporation, party of the second part, WITNESSETH:

That the said parties of the first part, for and in consideration of the sum of Fifteen Dollars ($15) to them in hand paid by the party of the second part, the receipt of which is hereby acknowledged, have granted, bargained and sold, conveyed and confirmed and by these presents do grant, bargain and sell, convey and confirm unto the said party of the second part, and its successors and assigns, all that certain lot, piece, parcel and tract of land, lying, being and situate in Washington County, Oregon, and particularly described as a portion of Sec. 25, T. 2 N. R. 4 W. Will. Mer. a strip of land 60 feet wide, being 30 feet on each side of the center line of the Pacific Railway and Navigation Company's Railway, as now surveyed and located on said land, and described as follows:-

* * * [Description] * * *

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

[T]O HAVE aND [sic] TO HOLD, all and singular, the said premises together with the appurtenances unto the said party of the second part and unto its successors and assigns

> as long as used and operated for Railway and Transportation purposes.
>
> And the parties of the first part hereby covenant to and with the party of the second part, its successors and assigns, that the parties of the first part, [sic] are the owners in fee simple of the tract of land above described, and the whole thereof. That said premises are free from all incumbrances,

This deed states that the railroad shall have the property "as long as used and operated for Railway and Transportation purposes." The government argues that this language indicates that the parties intended to convey a fee simple determinable. However, for the same reasons as discussed in the court's analysis of the **Carstens 72/530 deed (Def.'s Ex. 20)**, this deed is different from the deed in *Tolke,* in which the Oregon court found a fee simple determinable interest, because the deed does not provide for an express reversion back to the grantor. Therefore, the court finds that the **Turner 72/528 deed (Def.'s Ex. 113)**, grants an easement the railroad.

83. The Twin Rocks Land Co. 13/450 Deed

The **Twin Rocks Land Co. 13/450 deed (Def.'s Ex. 114)** provides in pertinent part:

> Know all Men by These Presents that for an[d] in consideration of the covenants and agreements entered into between the Pacific Railway and Navigation Company, a corporation, and the Twin Rocks Land Company, a corporation, by agreement dated this 6th day of November, 1909, said Twin

> Rocks Land Company, a corporation, does hereby bargain, grant, sell and convey to Pacific Railway and Navigation Company, its successors and assigns forever, all of the following described real property situated in the County of Tillamook and State of Oregon, to-wit:
>
> A strip of land sixty (60) feet wide being thirty (30) feet on each side of the center line of the railway of the PACIFIC RAILWAY AND NAVIGATION COMPANY, as the same is surveyed and located through the following described premises, situated in Tillamook County, Oregon, to-wit:
>
> * * * [Description of the premises through which the strip runs, not the strip itself] * * *
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named PACIFIC RAILWAY AND NAVIGATION COMPANY, its successors and assigns.

Although this deed does not list any money as consideration, there are other indicia that the parties intended to convey a fee simple. The deed lacks any "right of way" language in the title or body, there is no mention of railroad purposes, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such the court finds that the **Twin Rocks Land Co. 13/450 deed (Def.'s Ex. 114)**, conveyed fee simple title to the railroad.

84. The Vantress 13/98 Deed

The **Vantress 13/98 deed (Def.'s Ex. 115),** which the parties in *Loveridge* stipulated as having granted a fee simple to the railroad, but the *Albright* plaintiffs did not, and provides in pertinent part:

> Know all Men by These Presents[:] That for and in consideration of the sum of Five Hundred and $^{00}/_{100}$ Dollars[,] the receipt whereof is hereby acknowledged, We[,] P.B. Vantress and Bessie Vantress[,] husband and wife, hereinafter called the grantors[,] do hereby bargain, sell[,] grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit:
>
> A strip of land one hundred (100) feet wide being fifty (50) feet in each side of the center line of the railway of the grantee as the same [is] surveyed and located through Lots one and two and 1044 acres off the East side of Lot three, all in Section five, Township two North of Range nine West of the Willamette Meridian, said strip containing seven acres and center line being more particularly described as follows:-
>
> * * * [Description] * * *
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining[.]

> To Have and to Hold unto the above named grantee and unto its successors and assigns forever.
>
> The grantors above named do covenant that they are seised of the aforesaid premises in fee simple and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

Here, the amount of consideration paid was not nominal ($500), there is no reference to a "right of way" in the title or body of the deed, and no mention of a railroad purpose nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Vantress 13/98 deed (Def.'s Ex. 115),** granted fee simple title to the railroad.

85. The Watt 12/343 Deed

The **Watt 12/343 deed (Def.'s Ex. 116)** is entitled "No. 8225. Railway Deed." and provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One and $^{00}/_{100}$ DOLLARS, [sic] The [sic] receipt whereof is hereby acknowledged, we, George Watt and Helen Watt, his wife[,] and Robert Watt and Lois A. Watt, his wife, hereinafter called the grantors, do bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY,

hereinafter called the grantee, and * * * to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:

> "A strip of land sixty (60) feet wide being thirty (30) feet on each side of the center line of the railway o f [sic] the grantee as the same is surveyed and located through Lots One, two and three of Section Seven and Lot one of Section eight, all in Township One North of Section eight, all in Township One North of Range ten Wes t [sic] of Willamette Meridian.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.
>
> The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

As discussed above in the court's analysis of the **Batterson 12/163 deed (Def.'s Ex. 5),** the court does not find that the term "Railway Deed" indicates an easement in the same way that a deed entitled "Right of Way Deed" does. Here, even though the amount of consideration is nominal ($1), without any "right of

way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Watt 12/343 deed (Def.'s Ex. 116)**, conveyed fee simple title to the railroad.

86. The Watt 12/344 Deed

The **Watt 12/344 deed (Def.'s Ex. 117)** is entitled "No. 8226. Railway Deed." and provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One and $^{00}/_{100}$ DOLLARS, the receipt whereof is hereby acknowledged, we, George Watt and Helen Watt, husband and wife, hereinafter called the grantors, do bargain, sell, grant, convey and confir, [sic] to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:
>
> "A strip of land one hundred (100) feet wide being fifty (50) feet on each side * * * of the center line of the railway of the grantee as the same in [sic] surveyed and located through Lot one of Section nine and also through the tide land fronting and abutting upon Lots One [sic] and Four [sic] of said Section nine; also through Lot one of Section sixteen and the tide fronting and abutting upon said Lot one of Section sixteen, all in Township two North of

> Range ten West of Willamette Meridian. Save and except a tract 105 feet by 210 feet in Lot 1 of Section 9, Township 2 North Range 10 West reserved by G. M. Lock.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.
>
> The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and[]unto its successors and assigns against the lawful claims of all persons whomsoever.

As discussed above in the court's analysis of the **Batterson 12/163 deed (Def.'s Ex. 5),** the court does not find that the term "Railway Deed" indicates an easement in the same way that a deed entitled "Right of Way Deed" does. Here, even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Watt 12/344 deed (Def.'s Ex. 117)**, conveyed fee simple title to the railroad.

87. The Watt 12/345 Deed

The **Watt 12/345 deed (Def.'s Ex. 118)** is entitled "No. 8227. Railway Deed." and provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the sum of One and $^{00}/_{100}$ DOLLARS, the receipt whereof is hereby acknowledged, we, John Watt and Sarah M. Watt[,] husband and wife, hereinafter called the grantors, do bargain, sell, grant, convey and confirm [sic] to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to-wit:
>
> "A **strip of land** one hundred (100) feet wide being fifty (50) feet on each side of the center line of the railway of the grantee as the same in [sic] surveyed and located **through** Lots two, three and four of Section nine, in Township two North of Range ten West of Willamette Meridian[.]
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD unto the above named grantee, and unto its successors and assigns forever.
>
> The grantors above named do covenant that they are seised of the aforesaid premises in fee simple, and that the same are free from

> all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and[]unto its successors and assigns against the lawful claims of all persons whomsoever.

As discussed above in the court's analysis of the **Batterson 12/163 deed (Def.'s Ex. 5),** the court does not find that the term "Railway Deed" indicates an easement in the same way that a deed entitled "Right of Way Deed" does. Here, even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Watt 12/345 deed (Def.'s Ex. 118)**, conveyed fee simple title to the railroad.

88. The Western Timber 77/108 Deed

The **Western Timber 77/108 deed (Def.'s Ex. 119)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS, ThAt [sic] the Western Timber Co., a corporation organized and existing under the laws of the State of Washington, for and in consideration of the sum of the sum of One Dollar ($1.00) and other valuable considerations to it paid, the receipt whereof is hereby acknowledged, does hereby bargain, sell, grant, convey and confirm to the Pacific Railway and Navigation Company, a Corporation, and to its successors and assigns forever, all of the following described real

property situate in the County Washington, State of Oregon, to-wit:-

A strip of land one hundred (100) feet in width, being fifty (50) feet on each side of and parallel with the center line of the track of the Pacific Railway and Navigation Company, as the same is surveyed, located and adopted through the northeast quarter of Section Twenty seven (27) and the southeast quarter of Section Twenty two (22), in Township Three (3) North, Range Five (5) West of the Willamette Meridian, said center line being described as follows:

* * * [Description] * * *

Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining. <u>Reserving, however, unto</u> <u>the said Western Timber Co. , [sic] its successors and assigns, the right to</u> <u>cross said right of way at any point or points where such crossing is</u> <u>desired.</u> TO HAVE AND TO HOLD unto the said Pacific Railway and Navigation Company, and to its successors and assigns forever.

The aforesaid grantor, the Western Timber Co., does here covenant that it is the owner in fee simple of the above granted premises and that it will forever warrant and defend the same unto the grantee, its successors and assigns forever, against the lawful claims of all persons whomsoever.

Here, the court finds that the deed's use of the phrase "right of way" is a description of the interest being conveyed. Additionally, the amount of consideration is nominal ($1) and the grantor retained a right to cross the right of way at any points it

desired. Therefore, the court finds that the **Western Timber 77/108 deed (Def.'s Ex. 119)**, conveyed an easement to the railroad.

89. The Westinghouse 84/54 Deed

The **Westinghouse 84/54 deed (Def.'s Ex. 120)** is a form deed and provides in pertinent part:

> Know all Men by these Presents, *THAT* We, G.E.Westinghouse and Ida C. Westinghouse[,] his wife of Timber * * * *State of Oregon, in consideration of* Six hundred and seventy five DOLLARS, *to* us *paid by* Pacific Railway and Navigation Company[,] its successors and assigns *of * * * * State of Oreg*on * * * * * * * * *ha[ve] bargained and sold, and by these presents do grant, bargain, sell and convey unto said* Pacific Railway Navigation Company[,] *heirs and assigns, all the following bounded and described real property, situated in the County of Washington and State of Oregon*
>
> A strip of land one hundred fEet [sic] in width, being fifty feet on each side of and parallel with the center line of the tracks of the Pacific Railway and Navigation Company on the Nehalem line and also on the Salmonberry line <u>as the same are surveyed</u>

> and located through the North West quarter of Section, [sic] twenty seven (27) in Township three (3) North of Range five (5) West W. M. and containing seven and one tenth (7 1/10) acres no more and no less * * * * * * [Empty space] * * * * *Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and also all* our *estate, right, title and interest in and to the same, including dower and claim of dower.*
>
> *TO HAVE AND TO HOLD the above described and granted premises unto the said* Pacific Railway and Navigation Company and to its successors * * * *and assigns forever. And* G.E. Westinghouse and Ida C. Westinghouse *grantor s* [sic] *above named do covenant to and with* the Pacific Railway and Navigation Co *the above named grantee*[,] its succe[ssors][]*and assigns that* we are lawfully seized *in fee simple of the above granted premises, that* the above granted premises *are free from all incumbrances* * * * [Empty space] * * * *and that* we *will and* our *heirs, executors and administrators shall warrant and forever defend the above granted premises, and ever part and parcel thereof, against the lawful claims and demands of all persons whomsoever.* (italics in original).

Here, the amount of consideration paid was not nominal ($665), there is no reference to a "right of way" in the title or body of the deed, and no mention of a railroad purpose nor does the deed contain any

requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Westinghouse 84/54 deed (Def.'s Ex. 120)**, granted fee simple title to the railroad.

90. The Westinghouse 85/39 Deed

The **Westinghouse 85/39 deed (Def.'s Ex. 121)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That I, John F. Westinghouse, a single man[,] for and in consi deration [sic] of the sum of One Dollars, [sic] to me in hand paid, the receipt whereof is hereby acknowledged, do hereby bargain, sell, grant,[]convey and confirm to Pacific Railway and Navigation Company, and to its successors and assigns forever, all of the following described real property situate in the County of Washington and State of Oregon, to-wit:
>
> A strip of land one hundred (100) feet in width, being fifty (50) feet on each side of and parallel with the center line of the track of the Pacific Railway and Navigation Company, as the same is surveyed and located through a strip of land more particularly described as the West one half of Southwest one quarter and the Southwest one quarter of Northwest one quarter of Northwest one quarter [of] Sec.[]26, T 3 N. R. 5 W., Willamette Meridian and containing four and forty two hundredths (4.42) acres more or less. Together with the tenements, hereditaments and appurtenances

> thereunto belonging or in anywise appertaining.
>
> TO HAVE AND TO HOLD to the said Pacific Railway and Navigation Company, and to its successors and assigns forever.
>
> The aforesaid grantor John F. Westinghouse does hereby he is the owner in fee simple of the ab[o]ve grante[d] premises, and that he will forever qarrant [sic] and defend the same unto the Pacific Railway and Navigation Company, its successors and assigns against the lawful claims of all persons whomsoever.

Even though the amount of consideration paid was nominal ($1), there is no reference to a "right of way" in the title or body of the deed, and no mention of a railroad purpose nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Westinghouse 85/39 deed (Def.'s Ex. 121)**, granted fee simple title to the railroad.

91. The Wheeler 16/2 Deed

The **Wheeler 16/2 deed (Def.'s Ex. 122)** provides in pertinent part:

> Know All Men by These Presents: That Coleman H. Wheeler and Cora E. Wheeler, hereinafter called the grantors, for and in consideration of the sum of $1.00 to them in hand paid, the receipt whereof is hereby acknowledged, does [sic] hereby release, remit and forever quit claim [sic] unto Pacific Railway and Navigation Company, hereinafter called the grantee, its successors and assigns

> forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit: A right of way 60 feet in width, being 30 feet on each side of and parallel with the center line of the grantee's railway as the same is surveyed, staked out, located and adopted through the following described real property, to-wit:
>
> All that tract or parcel of land in Lots Four (4) and Five (5) of Section Two (2), Township Two (2) North of Range Ten (10) West of the Willamette Meridian Beginning at the Northeast corner of Charles Seaman's four acre tract on the meander line of the Nehalem River; thence Easterly along and up said River sixteen (16) rods; thence South twenty (20) rods parallel with Charles Seaman's line; thence West to Charles Seaman's East line; thence North to the Nehalem River to the place of beginning and containing two acres more or less.
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> To Have and to Hold to the above named grantee and to its successors and assigns forever.

This deed uses the phrase "right of way" in the granting clause to describe the geographic location of the interest being conveyed. Even though the amount of consideration is nominal ($1), without any mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle

guards, or fences, the court finds that the **Wheeler 16/2 deed (Def.'s Ex. 122)**, granted fee simple title to the railroad.

92. The Wheeler Lumber 16/3 Deed

The **Wheeler Lumber 16/3 deed (*Albright*, ECF No. 34, Ex. 82)** provides in pertinent part:

> Know All Men by These Presents: That for and in consideration of the sum of $1.00 to it in hand paid, the receipt whereof is hereby acknowledged, The Wheeler Lumber Company, hereinafter called the grantor, does hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the county of Tillamook and State of Oregon, to-wit:
>
> A strip of land 60 feet in width, being thirty 30 feet on each side of and parallel with the center line of the grantee's railway as the same is located, staked out, and surveyed through the following described three parcels of real property, to-wit:
>
> * * * [Describing the three parcels through which the strip being conveyed runs] * * *
>
> Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.
>
> To Have and to Hold to the above named grantee and to its successors and assigns

> forever; the grantors confirming also to the grantee, its successors and assigns, the right to build, maintain and operate a line of railway thereover.

For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes does not limit the railroad's use to only railroad purposes. Here, even though the amount of consideration is nominal ($1.00), without any "right of way" language in the title or body of the deed nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Wheeler Lumber 16/3 deed (*Albright*, ECF No. 35, Ex. 82),** conveyed fee simple title to the railroad.

93. The Wheeler Lumber Co. 16/5 Deed

The **Wheeler Lumber Co. 16/5 deed (Def.'s Ex. 123)**, which is very similar to the above-analyzed Wheeler Lumber Co. 16/3 deed, provides in pertinent part:

> Know All Men by These Presents, that for and in consideration of the sum of One Dollar ($1.00) to it in hand paid, the receipt whereof is hereby acknowledged, The Wheeler Lumber Company, hereinafter called the grantor, does hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the county of Tillamook and state of Oregon, to-wit:

A strip of land sixty feet in width being thirty feet on each side of and parallel with the center line of the grantee's railway as the same is last located, staked out, surveyed and being constructed through Lots Four (4), Five[](5), Six[](6) and that part of Lot Three (3) lying west of the lands in said lot heretofore conveyed by said grantor to Willie G. Du Bois, all in Section Three (3) and the East Half (E ½) of Lot One (1) in Section Four (4) and through all tide lands fronting and abutting on all of the above described lands, all in Township Two[](2), North Range Ten (10) West Willamette Meridian.

Also, a strip of land sixty feet in width being thirty feet on each side of and parallel with the center line of the grantee's railway as the same is last located, staked out, surveyed and being constructed through all the tide lands fronting and abutting on that part of said Lot Three (3) in said Section Three (3) in said Township Two[](2) North, Range Ten (20) West, Willamette Meridian, described as follows: * * * * [Describing the land through which the strip being conveyed runs] * * *

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

To Have and to Hold to the above named grantee and to its successors and assigns forever; the grantors confirming also to the grantee, its successors and assigns, the right to

> build, maintain and operate a line of railway thereover.
>
> The aforesaid grantor does hereby covenant that it is the owner in fee simple of the above granted premises, and that it will warrant and defend same unto the said grantee aforesaid, its successors and assigns, against the lawful claims and demands of all persons whomsoever.

For the same reasons as discussed in this court's review of the **Alley 5/475 deed**, the court finds that the language confirming that the land granted can be used for railroad purposes does not limit the railroad's use to only railroad purposes. Here, even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Wheeler Lumber Co. 16/5 deed (Def.'s Ex. 123)**, conveyed fee simple title to the railroad.

94. The Williams 6/607 Deed

The **Williams 6/607 deed (Def.'s Ex. 125)** provides in pertinent part:

> George H. Willaims et ux
-to-
P. R. and N. Co.
>
> RAILWAY DED
No. 4113.
>
> KNOW ALL MEN BY THESE PRESENTS, That for and in consideration of the sum of Ten $^{00}/_{100}$ DOLLARS[,] the receipt whereof is hereby acknowledged, and other

valuable consideration moving to them[,] George H. Williams and Bessie Williams, his wife,, hereinafter called the grantors, do hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, and to its successors and assigns forever, all of the following described real property situate in the County of Tillamook and State of Oregon, to wit:

"A strip of land one hundred (100) feet wide being fifty (50) feet on each side of the center line of the railway of the grantee as the same is surveyed and located through Lots Three, [sic] Four, [sic] Five [sic] and Six [sic] of Block Eleven [sic] in Cone and McCoy's Addition to Bay City, according to the plat thereof of record in Tillamook County, Oregon.

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD unto the above named grantee and unto its successors and assigns forever.

The grantors above named do covenant that they are seized of the aforesaid premises in fee simple, and that the same are free from all encumbrances, and that they will warrant and defend the premises herein granted unto the grantee aforesaid, and unto its successors and assigns against the lawful claims of all persons whomsoever.

Here, the amount of consideration paid was not nominal ($10), there is no reference to a "right of way" in the title or body of the deed, and no mention of a railroad purpose nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Williams 6/607 deed (Def.'s Ex. 125)**, conveyed fee simple title to the railroad.

95. The Wilson 75/244 Deed

The **Wilson 75/244 deed (Def.'s Ex. 126)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That we Brice Wilson and Sarah E. Wilson[,] husband and wife, for and in consideration of the sum[]of One Dollars, [sic] to them in hand paid, the receipt whereof is hereby acknowledged, do hereby bargain, sell, grant, convey and confirm to Pacific Railway and Navigation Company, and to its successors and assigns forever, all of the following described real property situate, in the County of Washington and State of Oregon, to-wit:
>
> A strip of land one Hundred [sic] feet in width, being fifty feet on each side of and parallel with the center line of the track of the Pacific Railway and Navigation Company, as the same is surveyed and located through the East half of the Northeast quarter of Section twenty eight (28) in Township three (3) North Range five (5) West of the Willamette Meridian.

> The said center line enters said land about 1185 feet south of the Northeast corner and runs southwesterly across the same to a point about 105 feet west of the South east [sic] corner thereof.
>
> Together with the tenements, hereditaments and appurtenances, thereunto belon[g]ing or in anywise appertaining.
>
> TO HAVE AND TO HOLD to the said Pacific Railway and Navigation Company, and to its successors and assigns forever.
>
> The aforesaid Brice Wilson and Sarah E. Wilson do hereby covenant that they are the owners in fee simple of the above granted premises, and that they will forever warrant and defend the same unto the Pacific Railway Company, its successors and assigns, against the lawful claims of all persons whomsoever.

Even though the amount of consideration is nominal ($1), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Wilson 75/244 deed (Def.'s Ex. 126)**, conveyed fee simple title to the railroad.

96. The Woodbury 16/481 Deed

The **Woodbury 16/481 deed (Def.'s Ex. 127)** is entitled "No. 10888 Warranty Deed" and provides in pertinent part:

Know All Men by These Presents: That for and in consideration of the sum of Ten ($10.00) Dollars, to them in hand paid, the receipt whereof is hereby acknowledged, and of other valuable considerations, E. D. Woodbury and Maude Woodbury, his wife,, hereinafter called the grantors, do bargain, sell[,] grant, convey and confirm to Pacific Railway and Navigation Company, hereinafter called the grantee, and to its successors and assigns forever, the following described real property situate in the County of Tillamook and State of Oregon, to wit:

A strip of land sixty (60) feet in width, being thirty (30) feet on each side of the center line of the grantee's railway as the same is surveyed and located through the following described real property, to wit:

* * * [Describing the property through which the strip conveyed runs] * * *

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining,

To Have and to Hold to the grantee, and to its successors and assigns forever.

The grantors covenant with the grantee that they will warrant and defend the premises herein granted against the lawful claims and demands of all persons whomsoever claiming by, through or under the grantors or either of them.

Here, the amount of consideration paid was not nominal ($10), there is no reference to a "right of way" in the title or body of the deed, and no mention of a railroad purpose nor does the deed contain any requirement for the railroad to build structures such as crossings, cattle guards, or fences. As such, the court finds that the **Woodbury 16/481 deed (Def.'s Ex. 127)**, conveyed fee simple title to the railroad.

97. The Woodbury 23/399 Deed

The **Woodbury 23/399 deed (Def.'s Ex. 128)** provides in pertinent part:

> Know All Men by These Presents: That we, E.E. Woodbury and Maude Woodbury, his wife, the grantors, in consideration of the sum of Two + $^{00}/_{100}$ Dollars, paid by Pacific Railway and Navigation, the grantee herein, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do bargain, sell, transfer and convey unto said Pacific Railway and Navigation Company, an Oregon Corporation, and to its successors and assigns forever, a strip of land sixty (60) feet in width, being thirty (30) feet on each side of the center line of the railway of said Company as the same is now located, staked out, and operated through Section Twenty-Nine (29), Township Two (2) North, Range Ten (10) West of the Willamette Meridian. Which strip lies between the line between Sections 29 and 32 on the South and the North boundary of North Street of said Lake Lytle Tract, as the same is platted in and by Lake Lytle Plat and between Blks. [sic] 1, 7

> and 3 of Lake Lytle on the East and Blks [sic] 4, 8 and 14 of Lake Lytle on the West.
>
> To Have and to Hold the above described premises unto the said Pacific Railway and Navigation Company and to its successors and assigns forever.

Even though the amount of consideration is nominal ($2), without any "right of way" language in the title or body of the deed, and no mention of a railroad purpose, nor any requirement for the railroad to build structures such as crossings, cattle guards, or fences, the court finds that the **Woodbury 23/399 deed (Def.'s Ex. 128)**, conveyed fee simple title to the railroad.

98. The Wright-Blodgett Co. 15/493 Deed

The **Wright-Blodgett Co. 15/493 deed (Def.'s Ex. 129)** is entitled "Right of Way Deed. NO. 10598" and provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That , [sic] in consideration of the sum of[]Ten (10) Dollars, the receipt whereof is hereby acknowledged, and other valuable considerations moving to it, WRIGHT-BLODGETT COMPANY, [sic] LIMITED, hereinafTer [sic] called the grantor, does bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee, a strip of land one hundred (100) feet in width, being fifty (50) feet on each side of and parallel with the center line of the railway of the grantee, as the same is surveyed, staked out

and located through the following described real property situate in the County of Tillamook and State of Oregon, to-wit :- [sic]

* * * [Describing the property through which the strip conveyed runs] * * *

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD to the grantee and to its successors and assigns forever.

Provided, however, and this conveyance is made upon the express understanding and condition that the grantor reserves to itself, its successors and assigns, the right to construct across the strip of land herein conveyed and across the railway of the grantee constructed thereon, a logging railroad, without compensation to the grantee, its successors and assigns, said crossing to be at grade and at some suitable point, the point of crossing and the manner of its construction to be subject to the approval of the chief engineer of the grantee and an engineer to be selected by the grantor; the said logging railroad to be operated at all times in such a manner as not to interfere with the operation by the[]grantee of its railway over said strip of land.

And further provided that the grantee dur ing [sic] the construction of its railway upon the right of way herein granted shall indemnify and save harmless the grantor from loss or damage by fire to its remaining timber

> upon the land across which right of way is herein granted, and its acceptance to this grant may be deemed its obligation so to do.
>
> The grantor covenants with the grantee that it will warrant and defend the premises herein granted against all lawful claims and demands of all persons claiming the same, by, through or under the grantor.

This deed is entitled "Right of Way Deed" and contains "'language relating to the use or purpose to which the land is to be put or in other ways cutting down or limiting, directly or indirectly, the estate conveyed[.]'" *Bouche*, 293 P.2d at 209 (quoting 132 A.L.R. 145). The deed specifically states that "this conveyance is made upon the express understanding and condition that the grantor reserves to itself, its successors and assigns, the right to construct across the strip of land herein conveyed and across the railway of the grantee constructed thereon, a logging railroad, without compensation to the grantee, its successors and assigns, said crossing to be at grade and at some suitable point, the point of crossing and the manner of its construction to be subject to the approval of the chief engineer of the grantee and an engineer to be selected by the grantor; the said logging railroad to be operated at all times in such a manner as not to interfere with the operation by the[]grantee of its railway over said strip of land." The fact that the grantor reserved to itself the right to construct a logging railroad across the lands conveyed in the deed is inconsistent with the grant of a fee to the railroad and thus indicates the original parties' intent to only grant an easement. The deed also provides that "the grantee dur ing [sic] the construction of its railway

upon the right of way herein granted shall indemnify and save harmless the grantor from loss or damage by fire to its remaining timber upon the land across which right of way is herein granted, and its acceptance to this grant may be deemed its obligation so to do." This language also suggests the grant of only an easement. The court finds that the **Wright-Blodgett Co. 15/493 deed (Def.'s Ex. 129)**, conveyed an easement to the railroad.

99. The Wright-Blodgett Co. 105/393 Deed

The **Wright-Blodgett Co. 105/393 deed (Def.'s Ex. 130)** provides in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS: That , [sic] in consideration of the sum of Ten (10) Dollars, the receipt whereof is hereby acknowledged, and other valuable considerations moving to it, WRIGHT-BLODGETT COMPANY, LIMITED, hereinafter called the grantor, does hereby bargain, sell, grant, convey and confirm to PACIFIC RAILWAY AND NAVIGATION COMPANY, hereinafter called the grantee , [sic] and to its successors and assigns , [sic] a **strip of land** one hundred (100) feet in width, being fifty (50) feet on each side of and parallel with the center line of the railway of the grantee, as the same is surveyed, staked out nad [sic] located through the following described real property situate in the County of Washington and State of Oregon,[] to-wit:-
>
> * * * [Describing the property through which the strip conveyed runs] * * *

Together with the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining. TO HAVE AND TO HOLD to the grantee and to its successors and assigns forever. Provided, however , [sic] and this conveyance is made upon the express understanding and condition that the grantor resreves [sic] to itself, its successors and assigns, the right to construct across the strip of land herein conveyed and across the railway of the grantee constructed thereon, a logging railroad, without compensation to the grantee, its successors and assigns, said crossing to be at grade and at some suitable point, the point of crossing and the manner of its construction to be subject to the approval of the chief engineer of the[]grantee and an engineer to be selected by the grantor; the said logging railroad to be operated at all times in such a manner as not to interfere with the operation by the[]grantee of its railway over said strip of land. A n d further provided, that the grantee during the construction of its railway upon the right of way herein granted shall indemnify and save harmless the grantor from loss or damage by fire to its remaining timber upon the land across which right of way is herein granted, and its acceptance to this grant may be deemed its obligation so to do.

The grantor covenants with the grantee that it will warrant and defend the premises herein granted against all lawful claims and

demands of all persons claiming the same by, []through [sic] or under the grantor.

As described above in the courts analysis of **Wright-Blodgett Co. 15/493 deed (Def.'s Ex.139)**, this includes purpose language or limiting language establishing that an easement and not fee was intended to be conveyed. Therefore, the court finds that the **Wright-Blodgett Co. 105/393 deed (Def.'s Ex. 130)**, conveyed an easement to the railroad.

VIII. Conclusion

For the foregoing reasons the court **GRANTS-IN-PART** and **DENIES-IN-PART** the parties' motions for partial summary judgment. The parties shall have until **September 7, 2018**, to file a proposed schedule for resolving the remaining issues in these cases. The court will thereafter schedule a status conference to finalize the parties' next steps.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Senior Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GARY E. ALBRIGHT, *et al*.,
Plaintiff-Appellants
CLAUDE J. ALLBRITTON, *et al*.,
Plaintiff-Appellants,
v.
UNITED STATES,
Defendant- Appellee.

PERRY LOVERIDGE, *et al*.,
Plaintiffs
NEAL ABRAHAMSON, *et al*.,
Plaintiff-Appellants,
v.
UNITED STATES,
Defendant- Appellee.

GARY E. ALBRIGHT, *et al*.,
Plaintiffs
DANIEL EARL HIGGINS, III, MICHAEL J. OPOKA, ZELDA L. OPOKA,
Plaintiff-Appellants,
v.
UNITED STATES,
Defendant- Appellee.

Nos. 2019-2078, 2019-2080, 2019-2090, 2019-2316

Appeals from the United States Court of Federal Claims in Nos. 1:16-cv-00912-NBF, 1:16-cv-01565-NBF, 1:18-cv-00375-NBF, Senior Judge Nancy B. Firestone

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ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, LINN*, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

ORDER

Appellants filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

It is Ordered That:

The petiton for panel hearing is denied.

The petition for rehearing en banc is denied,

The mandate of the court will issue on February 25, 2021.

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* Circuit Judge Linn participated only in the decision on the petition for panel rehearing.

For the Court

February 18, 2021	/s/Peter R. Marksteiner
Date	Peter R. Marksteiner
	Clerk of Court

APPENDIX F

United States Code Annotated
Title 16. Conservation
Chapter 27. National Trials Systems
(Refs & Annos)

16 U.S.C.A. § 1241
§ 1241. Congressional statement of policy and declaration of purpose
Currentness

(a) Considerations for determining establishment of trails

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

(b) Initial components

The purpose of this chapter is to provide the means for attaining these objectives by instituting a national system of recreation, scenic and historic 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.

(c) Volunteer citizen involvement

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 chapter to encourage and assist volunteer citizen involvement in the planning, development, maintenance, and management, where appropriate, of trails.

16 U.S.C.A. § 1247

§ 1247. State and local area recreation and historic trails

Effective: December 19, 2014

Currentness

(a) Secretary of the Interior to encourage States, political subdivisions, and private interests; financial assistance for State and local projects

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 chapter 2003 of Title 54, needs and opportunities for establishing park, forest, and other recreation and historic trails on lands owned or administered by States, and recreation and historic trails on lands in or near urban areas. The Secretary is also directed to encourage States to consider, in their comprehensive statewide historic preservation plans

and proposals for financial assistance for State, local, and private projects submitted pursuant to division A of subtitle III of Title 54, needs and opportunities for establishing historic trails. He is further directed, in accordance with the authority contained in chapter 2003 of Title 54) 1 , to encourage States, political subdivisions, and private interests, including nonprofit organizations, to establish such trails.

(b) Secretary of Housing and Urban Development to encourage metropolitan and other urban areas; administrative and financial assistance in connection with recreation and transportation planning; administration of urban open-space program

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.

(c) Secretary of Agriculture to encourage States, local agencies, and private interests

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) Interim use of railroad rights-of-way

The Secretary of Transportation, the Chairman of the Surface Transportation Board, 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 this chapter, 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 Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

(e) Designation and marking of trails; approval of Secretary of the Interior

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.

APPENDIX G

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 91. United States Court of Federal Claims (Refs & Annos)

28 U.S.C.A. § 1491
§ 1491 Claims against United States generally; actions involving Tennessee Valley Authority
Effective: December 21, 2011
Currentness

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position,

placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(b)(1) Both the Unites[1] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

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[1] So in original.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(5) If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A-76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, then an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action.

(6) Jurisdiction over any action described in paragraph (1) arising out of a maritime contract, or a solicitation for a proposed maritime contract, shall be governed by this section and shall not be subject to the jurisdiction of the district courts of the United States under the Suits in Admiralty Act (chapter 309 of title 46) or the Public Vessels Act (chapter 311 of title 46).

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

APPENDIX H

United States Code Annotated
Title 49. Transportation (Refs & Annos)
Subtitle IV. Interstate Transportation (Refs & Annos)
Part A. Rail (Refs & Annos)
Chapter 105. Jurisdiction (Refs & Annos)

49 U.S.C.A. § 10502
§ 10502. Authority to exempt rail carrier transportation
Currentness

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part–

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either –

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of

market power.

(b) The Board may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party. The Board shall, within 90 days after receipt of any such application, determine whether to begin an appropriate proceeding. If the Board decides not to begin a class exemption proceeding, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of an application under this subsection shall be completed within 9 months after it is begun.

(c) The Board may specify the period of time during which an exemption granted under this section is effective.

(d) The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title. The Board shall, within 90 days after receipt of a request for revocation under this subsection, determine whether to begin an appropriate proceeding. If the Board decides not to begin a proceeding to revoke a class exemption, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of a request under this subsection shall be

completed within 9 months after it is begun.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title. Nothing in this subsection or section 11706 of this title shall prevent rail carriers from offering alternative terms nor give the Board the authority to require any specific level of rates or services based upon the provisions of section 11706 of this title.

(f) The Board may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement.

(g) The Board may not exercise its authority under this section to relieve a rail carrier of its obligation to protect the interests of employees as required by this part.

APPENDIX I

United States Code Annotated
Title 49. Transportation (Refs & Annos)
Subtitle IV. Interstate Transportation (Refs & Annos)
Part A. Rail (Refs & Annos)
Chapter 109. Licensing (Refs & Annos)

49 U.S.C.A. § 10903
§ 10903. Filing and procedure for application to abandon or discontinue

Effective: October 1, 2012
Currentness

(a)(1) A rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to–

(A) abandon any part of its railroad lines; or

(B) discontinue the operation of all rail transportation over any part of its railroad lines,

must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter.

(2) When a rail carrier providing transportation subject to the jurisdiction of the Board under this part files an application, the application shall include–

(A) an accurate and understandable summary of the rail carrier's reasons for the proposed

abandonment or discontinuance;

(B) a statement indicating that each interested person is entitled to make recommendations to the Board on the future of the rail line; and

(C)(i) a statement that the line is available for subsidy or sale in accordance with section 10904 of this title, (ii) a statement that the rail carrier will promptly provide to each interested party an estimate of the annual subsidy and minimum purchase price, calculated in accordance with section 10904 of this title, and (iii) the name and business address of the person who is authorized to discuss the subsidy or sale terms for the rail carrier.

(3) The rail carrier shall–

(A) send by certified mail notice of the application to the chief executive officer of each State that would be directly affected by the proposed abandonment or discontinuance;

(B) post a copy of the notice in each terminal and station on each portion of a railroad line proposed to be abandoned or over which all transportation is to be discontinued;

(C) publish a copy of the notice for 3 consecutive weeks in a newspaper of general circulation in each county in which each such portion is located;

(D) mail a copy of the notice, to the extent practicable, to all shippers that have made significant use (as designated by the Board) of the railroad line during the 12 months preceding the filing of the application; and

(E) attach to the application filed with the Board an affidavit certifying the manner in which subparagraphs (A) through (D) of this paragraph have been satisfied, and certifying that subparagraphs (A) through (D) have been satisfied within the most recent 30 days prior to the date the application is filed.

(b)(1) Except as provided in subsection (d), abandonment and discontinuance may occur as provided in section 10904.

(2) The Board shall require as a condition of any abandonment or discontinuance under this section provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under sections 11326(a) and 24706(c) of this title before May 31, 1998.

(c)(1) In this subsection, the term "potentially subject to abandonment" has the meaning given the

term in regulations of the Board. The regulations may include standards that vary by region of the United States and by railroad or group of railroads.

(2) Each rail carrier shall maintain a complete diagram of the transportation system operated, directly or indirectly, by the rail carrier. The rail carrier shall submit to the Board and publish amendments to its diagram that are necessary to maintain the accuracy of the diagram. The diagram shall–

(A) include a detailed description of each of its railroad lines potentially subject to abandonment; and

(B) identify each railroad line for which the rail carrier plans to file an application to abandon or discontinue under subsection (a) of this section.

(d) A rail carrier providing transportation subject to the jurisdiction of the Board under this part may–

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Board finds that the present or future public convenience and necessity require or permit

the abandonment or discontinuance. In making the finding, the Board shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

(e) Subject to this section and sections 10904 and 10905 of this title, if the Board–

(1) finds public convenience and necessity, it shall–

(A) approve the application as filed; or

(B) approve the application with modifications and require compliance with conditions that the Board finds are required by public convenience and necessity; or

(2) fails to find public convenience and necessity, it shall deny the application.

APPENDIX J

United States Code Annotated
Title 49. Transportation
Subtitle B. Other Regulations Relating to Transportation
Chapter X. Surface Transportation Board (Refs & Annos)
Subchapter B. Rules of Practice
Parts 1150 to 1174 – Licensing Procedures
Parts 1150 to 1159 – Rail Licensing Procedures
Part 1152. Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903 (Refs & Annos)
Subpart C. Procedures Governing Notice, Applications, Financial Assistance, Acquisition for Public Use, and Trail Use

49 C.F.R.. § 1152.29

§ 1152.29. Prospective use of rights-of-way for interim trail use and rail banking.

Effective: February 2, 2020
Currentness

(a) Contents of request for interim trail use. If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and rail banking pursuant to 16 U.S.C. 1247(d), it must file a comment or otherwise include a request in its filing (in a regulated abandonment proceeding) or a petition (in an exemption proceeding)

indicating that would like to do so. The comment/request or petition must include:

(1) A map depicting, and an accurate description of, the right-of-way, or portion thereof (including mileposts), proposed to be acquired or used;

(2) A statement indicating the trail sponsor's willingness to assume full responsibility for:

(i) Managing the right-of-way;

(ii) Any legal liability arising out of the transfer or use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability); and

(iii) The payment of any and all taxes that may be levied or assessed against the right-of-way; and

(3) An acknowledgment that interim trail use is subject to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section, and subject to possible future reconstruction and reactivation of the right-of-way for rail service. The statement must be in the following form:

Statement of Willingness To
Assume Financial Responsibility

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29 with respect to the right- of-way owned by _____ (Railroad) and operated by _____ (Railroad),

_____ (Interim Trail Sponsor) is willing to assume full responsibility for: (1) Managing the right-of-way, (2) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability), and (3) the payment of any and all taxes that may be levied or assessed against the right of way. The property, known as _____ (Name of Branch Line), extends from railroad milepost _____ near _____ (Station Name), to railroad milepost _____, near _____ (Station name), a distance of _____ miles in [County(ies), (State(s)]. The right-of-way is part of a line of railroad proposed for abandonment in Docket No. STB AB _____ (Sub–No.). A map of the property depicting the right-of-way is attached.

_____ (Interim Trail Sponsor) acknowledges that use of the right-of-way is subject to the sponsor's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. A copy of this statement is being served on the railroad(s) on the same date it is being served on the Board.

(b) When to file.

(1) In abandonment application proceedings under 49 U.S.C. 10903, interim trail use statements are due within the 45- day protest and comment period following the date the abandonment application is filed. See §

1152.25(c). The applicant carrier's response notifying the Board whether and with whom it intends to negotiate a trail use agreement is due within 15 days after the close of the protest and comment period (i.e., 60 days after the abandonment application is filed).

(i) In every proceeding where a Trails Act request is made, the Board will determine whether the Trails Act is applicable.

(ii) If the Trails Act is not applicable because of failure to comply with paragraph (a) of this section, or is applicable but the carrier either does not intend to negotiate an agreement, or does not timely notify the Board of its intention to negotiate, a decision on the merits will be issued and no Certificate of Interim Trail Use or Abandonment (CITU) will be issued. If the carrier is willing to negotiate an agreement, and the public convenience and necessity permit abandonment, the Board will issue a CITU.

(2) In exemption proceedings, a petition containing an interim trail use statement is due within 10 days after the date the notice of exemption is published in the Federal Register in the case of a class exemption and within 20 days after publication in the Federal Register of the notice of filing of a petition for exemption in the case of a petition for exemption. When an interim trail use comment(s) or petition(s) is filed in an exemption proceeding, the railroad's reply to

the Board (indicating whether and with whom it intends to negotiate an agreement) is due within 10 days after the date a petition requesting interim trail use is filed.

(3) Late-filed trail use statements must be supported by a statement showing good cause for late filing.

(c) Abandonment application proceedings.

(1) In abandonment application proceedings, if continued rail service does not occur pursuant to 49 U.S.C. 10904 and § 1152.27, and a railroad agrees to negotiate an interim trail use/railbanking agreement, then the Board will issue a CITU to the railroad and to the interim trail sponsor for that portion of the right-of-way as to which both parties are willing to negotiate.

(i) The CITU will permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and material consistent with interim trail use and railbanking, as long as such actions are consistent with any other Board order, 30 days after the date the CITU is issued; and permit the railroad to fully abandon the line if no interim trail use agreement is reached within one year from the date on which the CITU is issued, subject to appropriate conditions, including labor protection and environmental matters.

(ii) Parties may request a Board order to extend, for one-year periods, the interim trail use negotiation period. Up to three one-year extensions of the initial period may be granted if the trail sponsor and the railroad agree. Additional one-year extensions, beyond three extensions of the initial period, are not favored but may be granted if the trail sponsor and the railroad agree and extraordinary circumstances are shown.

(2) The CITU will indicate that any interim trail use is subject to future restoration of rail service and to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section. The CITU will also provide that, if an interim trail use agreement is reached (and thus interim trail use established), the parties shall file the notice described in paragraph (h) of this section. Additionally, the CITU will provide that if the sponsor intends to terminate interim trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of the CITU and request that it be vacated on a specified date. If a party requests that the CITU be vacated for only a portion of the right-of-way, the Board will issue an appropriate replacement CITU covering the remaining portion of the right-of-way subject to the interim trail use agreement. The Board will reopen the abandonment proceeding, vacate the CITU, and issue a decision permitting

immediate abandonment for the involved portion of the right-of-way. Copies of the decision will be sent to:

(i) The abandonment applicant;

(ii) The owner of the right-of-way; and

(iii) The current trail sponsor.

(3) If an application to construct and operate a rail line over the right-of-way is authorized under 49 U.S.C. 10901 and part 1150 of this title, or exempted under 49 U.S.C. 10502, then the CITU will be vacated accordingly.

(d) Abandonment exemption proceedings.

(1) In abandonment exemption proceedings, if continued rail service does not occur under 49 U.S.C. 10904 and § 1152.27, and a railroad agrees to negotiate an interim trail use/railbanking agreement, then the Board will issue a Notice of Interim Trail Use or Abandonment (NITU) to the railroad and to the interim trail sponsor for the portion of the right-of-way as to which both parties are willing to negotiate.

(i) The NITU will permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and materials, consistent with interim trail use and railbanking, as long as such actions are consistent with any other Board order, 30 days after the date the NITU is issued; and permit

the railroad to fully abandon the line if no interim trail use agreement is reached within one year from the date on which the NITU is issued, subject to appropriate conditions, including labor protection and environmental matters.

(ii) Parties may request a Board order to extend, for one-year periods, the interim trail use negotiation period. Up to three one-year extensions of the initial period may be granted if the trail sponsor and railroad agree. Additional one-year extensions, beyond three extensions of the initial period, are not favored but may be granted if the trail sponsor and railroad agree and extraordinary circumstances are shown.

(2) The NITU will indicate that interim trail use is subject to future restoration of rail service and to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section. The NITU will also provide that, if an interim trail use agreement is reached (and thus interim trail use established), the parties shall file the notice described in paragraph (h) of this section. Additionally, the NITU will provide that if the sponsor intends to terminate interim trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of the NITU and request that it be vacated on a specific date. If a party requests that the NITU be vacated for only a portion of the right-of-

way, the Board will issue an appropriate replacement NITU covering the remaining portion of the right-of-way subject to the interim trail use agreement. The Board will reopen the exemption proceeding, vacate the NITU, and issue a decision reinstating the exemption for that portion of the right-of-way. Copies of the decision will be sent to:

(i) The abandonment exemption applicant;

(ii) The owner of the right-of-way; and

(iii) The current trail sponsor.

(3) If an application to construct and operate a rail line over the right-of-way is authorized under 49 U.S.C. 10901 and part 1150 of this title, or exempted under 49 U.S.C. 10502, then the NITU will be vacated accordingly.

(e) Late-filed requests; notices of consummation.

(1) Where late-filed trail use statements are accepted, the Director (or designee) will telephone the railroad to determine whether abandonment has been consummated and, if not, whether the railroad is willing to negotiate an interim trail use agreement. The railroad shall confirm, in writing, its response, within 5 days. If abandonment has been consummated, the trail use request will be dismissed. If abandonment has not been consummated but the railroad refuses to negotiate, then trail use will be denied. If abandonment has not been consummated and the railroad is willing to

negotiate, the abandonment proceeding will be reopened, the abandonment decision granting an application, petition for exemption or notice of exemption will be vacated, and an appropriate CITU or NITU will be issued. The effective date of the CITU or NITU will be the same date as the vacated decision or notice.

(2) A railroad that receives authority from the Board to abandon a line (in a regulated abandonment proceeding under 49 U.S.C. 10903, or by individual or class exemption issued under 49 U.S.C. 10502) shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line (e.g., discontinued operations, salvaged the track, canceled tariffs, and intends that the property be removed from the interstate rail network). The notice shall provide the name of the STB proceeding and its docket number, a brief description of the line, and a statement that the railroad has consummated, or fully exercised, the abandonment authority on a certain date. The notice shall be filed within 1 year of the service date of the decision permitting the abandonment (assuming that the railroad intends to consummate the abandonment). Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions, including Trails Act conditions). If, after 1 year from the date of

service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. In that event, a new proceeding would have to be instituted if the railroad wants to abandon the line. Copies of the railroad's notice of consummation shall be filed with the Chief, Section of Administration, Office of Proceedings. In addition, the notice of consummation shall be sent to the State Public Service Commission (or equivalent agency) of every state through which the line passes. If, however, any legal or regulatory barrier to consummation exists at the end of the 1– year time period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier. For good cause shown, a railroad may file a request for an extension of time to file a notice so long as it does so sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing.

(f) Substitution of trail user.

(1) When a trail user intends to terminate trail use and another person intends to become a trail user by assuming financial responsibility for the right-of-way, then the existing and future trail users shall file, jointly:

(i) A copy of the extant CITU or NITU; and

(ii) A Statement of Willingness to Assume Financial Responsibility by the new trail user.

(iii) An acknowledgement that interim trail use is subject to possible future reconstruction and reactivation of the right- of-way for rail service.

(2) The parties shall indicate the date on which responsibility for the right-of-way is to transfer to the new trail user. The Board will reopen the abandonment or exemption proceeding, vacate the existing NITU or CITU; and issue an appropriate replacement NITU or CITU to the new trail user.

(g) Consent after Board decision or notice. In proceedings where a timely trail use statement is filed, but due to either the railroad's indication of its unwillingness to negotiate interim trail use agreement, or its failure to timely notify the Board of its willingness to negotiate, a decision authorizing abandonment or an exemption notice or decision is issued instead of a CITU or NITU, and subsequently the railroad and trail use proponent nevertheless determine to negotiate an interim trail use agreement under the Trails Act, then the railroad and trail use proponent must file a joint pleading requesting that an appropriate CITU or NITU be issued. If the abandonment has not been consummated, the Board will reopen the proceeding, vacate the outstanding decision or notice (or portion thereof), and issue an appropriate CITU or NITU that will permit the parties to negotiate for a period agreed to by the parties in their joint filing, but not to exceed

one year, at the end of which, the CITU or NITU will convert into a decision or notice permitting abandonment.

(h) Notice of interim trail use agreement reached. When the parties negotiating for rail banking/interim trail use reach an agreement, the trail sponsor and railroad shall jointly notify the Board within 10 days that the agreement has been reached. The notice shall include a map depicting, and an accurate description of, the involved right-of-way or portion thereof (including mileposts) that is subject to the parties' interim trail use agreement and a certification that the interim trail use agreement includes provisions requiring the sponsor to fulfill the responsibilities described in paragraph (a)(2) of this section. Additionally, if the interim trail use agreement establishes interim trail use over less of the right-of-way than is covered by the CITU or NITU, the notice shall also include a request that the Board vacate the CITU or NITU and issue a replacement CITU/NITU for only the portion of the right-of-way covered by the interim trail use agreement. The Board will reopen the abandonment proceeding, vacate the CITU or NITU, issue an appropriate replacement CITU or NITU for only the portion of the right-of-way covered by the interim trail use agreement, and issue a decision permitting immediate abandonment of the portion of the right-of-way not subject to the interim trail use agreement. Copies of the decision will be sent to:

(1) The rail carrier that sought abandonment authorization;

(2) The owner of the right-of-way; and

(3) The current trail sponsor.