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*The views expressed in this Journal may or may not be the views  
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## WHO OWNS THE RIGHTS TO RAILROAD RIGHTS-OF-WAY?

*Kristine Little*<sup>1</sup>

### I. INTRODUCTION

In the 19<sup>th</sup> century, interest in populating the West grew but there was not a sufficient transportation structure to do so. To facilitate the settlement and development of the West, Congress granted railroads various rights of way under the “pre-1871 Acts” and the General Railroad Right-of-Way Act of 1875. The Acts were intended to provide the railroads with the necessary land to construct rail lines and additional land to be sold to finance construction.<sup>2</sup>

However, the language in both the pre-1871 Acts and the 1875 Act did not articulate the nature of the railroads’ right of way. There was also little recorded discussion of the exact nature of the legal interest being conveyed to the railroads. Subsequently, disputes arose between the railroads and the adjacent landowners regarding the nature of the railroads’ interests. That has led to a Circuit split after a recent decision by the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit recently reversed a United States District Court’s grant of summary judgment against Union Pacific Railroad (“UP”). The Ninth Circuit’s holding

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<sup>2</sup> See generally Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights of Way and the Myth of Congress’s “1871 Shift,”* 82 U COLO. L. REV. 85 (2011) (Hereinafter “Roberts”).

conflicts with holdings in the Eighth and Tenth Circuits. UP has been leasing land under 1,800 miles of its right of way to the Santa Fe Pacific Pipeline (“SFPP”) and was challenged by adjacent landowners on UP’s ability to lease under its right of way. The District Court held that both the pre-1871 Acts and the 1875 Act granting rights of way to railroads required a “railroad purpose” and that UP’s lease to SFPP served no such purpose. The Ninth Circuit reversed the order granting a motion to dismiss UP’s Counterclaims and held that UP has the right to lease the subsurface because the Court found that the use of any oil in the pipeline for the operation of the railroad deemed the pipeline a railroad use. This article discusses the Ninth Circuit decision, prior case history, the legislative history of the pre-1871 Acts and the General Railroad Right of Way Act of 1875 and some possible implications of the decision, if it remains unchallenged or unchanged.

## **II. FACTUAL BACKGROUND**

UP operates over approximately 32,000 miles of track. Most of the track was issued to UP by Congress under the pre-1871 Acts and the 1875 Act. But the track that is the subject of the Ninth Circuit’s decision is track UP acquired from Southern Pacific Railroad (“SP”) in 1996.

SP first leased the land under its rights of way to an affiliate in the 1950s. The affiliate built the 1,800 miles of pipeline to transport petroleum products. When UP acquired SP’s track, SFPP, a subsidiary of Kinder Morgan, acquired the pipeline. As a result, UP and SFPP entered into a series of agreements that granted SFPP a perpetual easement in exchange for fair market rent. In the event that the parties could not agree on fair market rent, the

agreement stipulated for proceedings in California state court.

In a proceeding to determine the fair market rent for 2004 to 2014, SFPP questioned UP's title to the right of way, arguing that fair market rent for the easement should be reduced. However, SFPP did not question UP's right to grant the easement. In 2012, the state trial court held that UP had a sufficient property interest in the land beneath its right of way and was entitled to collect rent from SFPP. However, during oral argument before the California Court of Appeals, the Court raised, *sua sponte*, the issue of whether, based on prior judicial precedent, a railroad in such circumstances had the lawful right to grant a pipeline easements under its rights of way.<sup>3</sup> Upon supplemental briefing, the Court determined that the pre-1871 Acts and the 1875 Act did not grant UP the right to lease the land under its rights of way.

Due to the California Court of Appeal's decision, owners of property that was formerly public land adjacent to the rights-of-way filed class action lawsuits in Nevada, Arizona, New Mexico and California. The proceedings sought damages for trespass and similar theories. In response, UP asserted counterclaims for declaratory relief and to quiet title. In the California case, the District Court dismissed those counterclaims and held that, based on prior judicial precedent, both the pre-1871 Acts and the 1875 Act required a "railroad purpose" and that the pipeline did not serve such a purpose under the Acts.

Pursuant to 28 U.S.C. § 1292(b), the District Court certified two issues for interlocutory review:

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<sup>3</sup> *UP v. SFPP*, 231 Cal. App. 4th 134, 155 (2014).

1. Can Union Pacific authorize a use of the subsurface underneath the railroad right of way if the use does not serve a “railroad purpose”?
2. Can Union Pacific demonstrate a “railroad purpose” in granting a subsurface easement to a third party to operate a commercial petroleum pipeline through the subsurface of the rights of way?

The Ninth Circuit held that (1) land issued to UP through the pre-1871 Acts do not require a “railroad purpose” and (2) that, although the 1875 Act requires a “railroad purpose,” UP plausibly asserted a benefit from leasing the land under its right of way for the use of a pipeline sufficient to meet that purpose. (UP argued that it used the pipeline to transport fuel it purchased from third-parties, which it then used to power its locomotives.<sup>4</sup>) Accordingly, the Ninth Circuit reversed the District Court’s order granting a motion to dismiss UP’s counterclaims.

### III. LEGISLATIVE HISTORY

In the 19<sup>th</sup> century, the United States government owned larges expanses of land but not the necessary transportation infrastructure to encourage development.<sup>5</sup> At the time, some members of Congress wanted to fund roads and other transportation improvements. However, some questioned the authority of Congress to subsidize the construction of roads and other transportation improvements because some member in Congress felt that such subsidies exceeded Congress’s constitutional powers.

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<sup>4</sup> *Wells v. UP*, No. 16-56562 (9th Cir. 2018).

<sup>5</sup> *Brandt v. US*, 134 S. Ct. 1257 (2014).

Notwithstanding, both Parties agreed that the Constitution gave Congress the authority to dispose of public lands as it saw fit.<sup>6</sup> Therefore, to alleviate the concerns of Congress' constitutional authority to directly subsidize internal improvements, Congress based these Acts [pre-1871 Acts] granting rights of way to the railroads on its "power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>7</sup>

Thus, Congress began a policy of subsidizing railroad construction by offering lavish grants from the public domain. Congress would grant the railroad right of way through public land. This policy included grants of property larger than would be needed for the rail right of way. Generally, the land was granted in checkerboard blocks and railroads had the option to either develop their lots or sell the lands to finance construction of rail lines. To encourage settlement and the development of the West, Congress would grant those same public lands to homesteaders and other settlers with the condition that the lands would continue to be subject to the railroad's right of way. In the 1860s, the Civil War aided the development of the transcontinental railroad. The States that had seceded were, of course, no longer sending representatives to Congress. Accordingly, the remaining Congress was free to act and facilitate the development of the transcontinental railroad without dissent from those southern opponents.<sup>8</sup>

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<sup>6</sup> U.S. Const. art. IV, § 3.

<sup>7</sup> *Id.*

<sup>8</sup> Withdrawal of Solicitor's Opinion M-37025 issued on November 4, 2011, and Partial Withdrawal of Solicitor's Opinion M-36964 issued on January 5, 1989, Acting Solicitor and Principal Deputy Solicitor, Sept. 1, 2017 <https://www.doi.gov/sites/doi.gov/files/uploads/m-37048.pdf>.

Congressional policy on railroad grants began to shift, however, after 1871.<sup>9</sup> Despite the checkerboard land grants reaching their peak in the 1860s, public sentiment towards granting the railroads large land grants began to sour. The public's opposition was not targeted to the rights of way granted to the railroads but rather was directed to the practice of granting the railroads large stretches of land. Western settlers, initially the biggest supporters of the transcontinental railroad, began to complain that the railroads were too slow in selling unused land to farmers and settlers, hindering settlers' ability to "homestead" or purchase government lands. Thus, Congress changed its policy in favor of homesteaders.<sup>10</sup>

Subsequently, after 1871, grants of public land to railroads were discontinued. Congress, however, still wanted to continue to encourage development to the West and the development of a nationwide railroad system. Therefore, Congress still needed a means to provide the railroads the ability to lay track across public domain. As a result, Congress passed a number of special Acts granting the designated railroads the "right of way" through the public lands of the US without the accompanying land subsidy. Those grants were not intended to convey any land to the railroad.<sup>11</sup>

In 1875, to avoid passing legislation for each new railroad right of way, Congress passed the General Right of Way Act. The Act ended the checkerboard grants to the

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<sup>9</sup> *Supra* note 2, *Roberts* at 98.

<sup>10</sup> Cong. Globe, 42nd Cong., 2d Sess., 585 (1871) ("Resolved, that in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporation ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands be held for the purpose of securing homesteads to actual settlers, and for education purposes, as may be provided by law.")

<sup>11</sup> *See* 2 Cong. Rec. 2898 (1874).



railroads, placed a one-year limit on the railroads to file profiles of the planned rights of way, and imposed a five-year limit on construction of the rail lines. Under the General Right of Way Act, Congress makes clear that the intent with the 1875 Act was to simply grant the railroads the rights of way. When presenting the bill, Senator William Morris Stewart remarked “the bill grants the right of way simply. There is no grant of lands except for stations and depots and the right of way over the public lands.”<sup>12</sup> The General Railroad Right of Way Act remained in effect until 1976, when it was superseded by the Federal Land Policy and Management Act.<sup>13</sup>

Both Acts represent a period in US history where the primary concern was to facilitate the expansion and development of the West. Thus, the vague nature of the interest conveyed in the grants marked a period where the primary focus was on development and not the nature of the right of way being conveyed. This lack of specificity has resulted in the Courts interpreting the interests conveyed inconsistently. As discussed more fully below, courts have distinguished between the nature of the right of way granted under both Acts. Indeed, the courts have generally agreed that the 1875 Act represented a shift in Congressional policy from the pre-1871 Acts. The courts have defined this shift in policy by classifying the interest conveyed to the railroads pre-1871 as a limited fee, and grants conveyed under the 1875 Act as an easement. However, there is still a significant disagreement among the courts on what the scope of the limited fee and easement entitles the railroads.

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<sup>12</sup> *Id.*

<sup>13</sup> Pub. L. No. 94-579, § 706 (1976).

## IV. JUDICIAL HISTORY

Under the pre-1871 Acts, the courts began defining the property interest conveyed in the railroads right of way to be one of a limited fee.<sup>14</sup> However, case law has produced varying interpretations of the interest in the right of way conveyed to the railroads. In *St. Joseph and Denver City Railroad v. Baldwin*,<sup>15</sup> the Supreme Court determined that the land conveyed by an Act of Congress on July 23, 1866 was a present and absolute grant. The Court reasoned that the intent of public grants was to facilitate the development of a transcontinental railroad. In contrast, in *New Mexico v. U.S. Trust Co.*,<sup>16</sup> the Supreme Court held that the right of way granted to a railroad was more than just the right to cross lands. Rather, the Court asserted that a railroad's right of way was more than an ordinary easement, "But if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted, one having the attributes of the fee, perpetuity and exclusive use and possession."<sup>17</sup>

### A. EARLY LIMITED FEE AND EASEMENT CASES

One of the main cases defining this limited fee interest is the 1903 case of *Northern Pacific Railway v. Townsend*.<sup>18</sup> In *Townsend*, the owner of land adjacent to the Railroad's right of way claimed that he was entitled to adverse possession of a portion of the right of way under

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<sup>14</sup> *Missouri, Kansas, Texas Railway Co. v. Roberts*, 152 US 114 (1894) (the Supreme Court determined that the lands granted to the railroad were granted in fee).

<sup>15</sup> 103 US 426 (1880).

<sup>16</sup> 172 US 171 (1898).

<sup>17</sup> *Id.* at 183.

<sup>18</sup> 190 US 267 (1903).

Minnesota law. The land had been granted through the pre-1871 Acts. The Court rejected the owner's claims and held that he could not adversely possess federally granted land and that he did not acquire any rights to the land. Here, the Court held that the land was passed by grant but was of a limited fee with an exclusive right of possession in the railroad and an implied condition of reverter. The Court reasoned that the grants conferred under the pre-1871 Acts were intended for the "perpetual use of the land for the legitimate purposes of the railroad."<sup>19</sup>

In contrast, in the 1942 case of *Great Northern v. United States*,<sup>20</sup> the central issue was to determine whether the railroad had any right to the oil and minerals underlying its right of way. Citing the shift in Congressional Policy after 1871, the Court distinguished the right of way conveyed under the 1875 Act from land grants issued under the pre-1871 Acts. In this instance, the right of way had been conveyed to UP under the 1875 Act. Here, the Supreme Court held that the right of way granted was clearly an easement and not a fee interest. The Court reasoned that the language under the statute was one of use and occupancy, rather than a grant of the land itself. The Court explained that the land grants after 1871 were merely an easement, whereas the "outright grants to a railroad of alternate sections of public lands" conveyed under the pre-1871 Acts were not intended to "give only an easement in the right of way" and were a limited fee.<sup>21</sup>

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<sup>19</sup> *Townsend*, 190 US at 271.

<sup>20</sup> 315 US 262 (1942).

<sup>21</sup> *Id.* at 278.

However, in the 1957 case of *United States v. Union Pacific Railroad Co.*,<sup>22</sup> the court further clouded the issue. Here, the United States brought an action to prohibit UP from drilling oil and gas in their right of way. The right of way was granted under Section 2 of the Act of July 1, 1862. The United States argued that the grant did not include mineral rights and was excepted under Section 3 of the Act. Contrary to prior holdings, the Court rejected UP's reliance on case law establishing that the railroads have a limited fee in the land. Per the Court, those limited fee cases merely established that the railroads "receive all surface rights to the right of way and all rights incident to a use for railroad purposes."<sup>23</sup> Further, the case law cited by UP did not pertain to subsurface oil and mineral rights and the word "right of way" in the Act "describes a lesser interest in the grant of public land." The Court held that "whatever may be the nature of Union Pacific's interest in the right of way, drilling for oil on or under it is not a railroad purpose within the meaning of § 2 of the Act."<sup>24</sup>

In both the Eighth<sup>25</sup> and Tenth<sup>26</sup> Circuits, the Courts further narrowed the railroads' right of way after *United States v. Union Pacific Railroad Co.*, supra. In both these cases, Energy Transportation Systems, Inc. was planning the construction of a pipeline under UP's right of way. UP objected to construction of the pipeline under its right of way. However, the Courts held UP's interest in the right of way is limited to the surface rights and other rights used in

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<sup>22</sup> 353 US 112 (1957).

<sup>23</sup> *Id.* at 119.

<sup>24</sup> *Id.* at 114

<sup>25</sup> *Energy Transp. Sys., Inc. v. UP*, 619 F.2d 696 (8th Cir. 1980).

<sup>26</sup> *Energy Transp. Sys. Inc. v. UP*, 606 F.2d 934 (10th Cir. 1979).

the construction and operation of the railroad. Therefore, UP has no rights to the subsurface.

## B. RECENT COURT DECISIONS

In *Brandt Revocable Trust v. United States*,<sup>27</sup> UP sold a rail line and the right of way between Laramie to Coalmont, Colorado to the Wyoming and Colorado Railroad (“W&CR”). The right of way was granted pursuant to the 1875 Act. W&CR planned to use the rail line as a tourist attraction, but the rail line failed to be profitable. W&CR notified the Surface Transportation Board of its intent to abandon its right of way. W&CR completed abandonment of the line in 2004. In 2006, the U.S. Government initiated a judicial proceeding seeking a declaration of abandonment and an order to quiet title in the United States to the right of way. The Government named the owners of 31 parcels of land crossed by the abandoned right of way as defendants. The Government either settled or obtained a default judgment against all but one of the defendants, a Marvin Brandt. Brandt argued that the right of way that stretched across his property was a mere easement, which was extinguished when W&CR abandoned the railroad. The Government countered that it had always retained a reversionary interest in the right of way. Citing the similarity in the language in the 1875 Act and the pre-1871 Acts, the Government asserted that the 1875 Act granted the railroad something more than an ordinary easement.

The Court noted that although the interest Congress granted to railroads in their rights of way was not explicitly defined in the statutes, it had been answered in prior case

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<sup>27</sup> 134 S. Ct. 1257 (2014).

law. The Court rejected the Government's assertion that *Great Northern* only referred to the oil and mineral rights and that the Court should limit its characterization of the right of way under the 1875 Act to that context. According to the Court, the case turned on what type of interest was granted to the railroads and that interest had already been defined in *Great Northern*. Therefore, the right of way was simply an easement.

In contrast, in *Wedemeyer v. CSX Transportation, Inc.*,<sup>28</sup> the Seventh Circuit expanded the easement rights of the railroads. Landowners living adjacent to CSX track filed a complaint seeking "immediate and sole possession" of the property underlying the rail line. The plaintiff's predecessor-in-interest had opted into the class action and had filed an affidavit of ownership stating that he held superior title to the property in the underlying rail line. The landowners asserted that CSX had abandoned the track at issue in December 2003 because of a settlement agreement and declaratory judgment filed in an Indiana state court class action—*Clark v. CSX Transp., Inc.*<sup>29</sup> In *Clark*, the Court held that CSX's right of way was less than fee title and was an easement. The Court held that the Settlement Class Member's title to the portion of the track at issue adjacent to their property was superior to any claims of title by CSX.

Prior to *Clark*, CSX had filed a petition for exemption in 1989 with the Interstate Commerce Commission ("ICC") to end CSX's common carrier obligation on a 26.73-mile segment of track, near Milepost 132.45 in Mitchellville, Indiana to Milepost 159.18 near

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<sup>28</sup> 850 F.3d 889 (7th Cir. 2017).

<sup>29</sup> *Clark v. CSX Transp., Inc.*, No. 29D03-9308-CP-404 (Hamilton Cty. Super. Ct.).

Roachdale, Indiana. The ICC granted CSX's petition and, in 1990, CSX notified the ICC that the segment of track had been abandoned. Beginning in 1992, CSX leased a portion of the track to a grain shipper while still retaining the right to use the abandoned track as needed.

Plaintiffs argued that CSX had abandoned the track at issue, which extinguished CSX's easements. The plaintiffs claimed that the original purpose of the tracks at issue was for mainline rail service between Indianapolis and Decatur and that the shift in use of the track extinguished CSX's easement. The Court held that the 1876 deed conveying the land to the railroad states that its purpose is "for the right of way and the use and purpose of the construction of the Railway of said Company, and the use and purpose of the track and roadway of said Company."<sup>30</sup> The court reasoned that the broad language of the statute did not limit CSX's use of the rail right of way to mainline or common carrier service. The Court held that the current use of the line by CSX and the grain shipper fell within the broad scope of the statute. Therefore, CSX's easement had not been extinguished.

## **V. SUMMARY OF THE NINTH CIRCUIT DECISION IN WELLS V. UNION PACIFIC RAILROAD CO.**

As indicated above, the Ninth circuit was asked to review two issues: (1) whether UP can authorize the use of the subsurface underneath the railroad right of way if the use does not serve a "railroad purpose"; and (2) whether UP can demonstrate a "railroad purpose" in granting a

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<sup>30</sup> *Wedemeyer*, 850 F.3d at 897.

subsurface easement to a third-party to operate a commercial petroleum pipeline through the subsurface.

In terms of “railroad purpose,” the Court noted that the term was not present in the statutory language of the pre-1871 Acts or the 1875 Act. Rather, the term was established in *United States v. Union Pacific Railroad Co.* With respect to the right of way granted under the pre-1871 Acts, the Court held that the “limited fee” described under *Townsend* did not restrict the use of the right of way to a railroad purpose. Moreover, *Townsend* only established that the railroad obtained, at a minimum, the rights to carry out a railroad purpose. It did not establish whether a railroad purpose was required under the pre-1871 Acts. Therefore, the railroad did not need to establish a sufficient railroad purpose to operate pipeline under rights of way conferred through the pre-1871 Acts. Although *United States v. Union Pacific Railroad Co.* narrowed the holding in *Townsend*, the Ninth Circuit found the District Court’s reliance on *Union Pacific* to be misplaced with respect to the use of subsurface rights. Because *Union Pacific*’s holding was focused on whether the interest granted to the railroad extended to the oil and mineral rights under its right of way, it did not apply to subsurface rights. The Court reasoned that the leasing of subsurface rights was not the same as extracting oil rights, arguing that Section 3 of the Act only prohibits the grantee from extracting mineral rights and does not prevent the grantee from using the subsurface for any other purpose. Thus, *Union Pacific* did not limit the use of the subsurface rights by the railroads.

Finally, in support of its conclusion that a railroad purpose was not required for grants conveyed under the pre-1871 Acts, the Court turned to *Brandt*. Under *Brandt*,



the Court held that the 1875 Act conveyed an interest different from that conveyed by the pre-1871 Acts and that the right of way conveyed under the pre-1871 Acts was a fee simple defeasible in everything except mineral rights. Therefore, as long as UP continued to operate a railroad through the right of way, UP is free to lease the subsurface rights to SFPP regardless of whether it conforms to a railroad purpose.

With respect to the 1875 Act, UP had conceded that the lands granted under this statute were conveyed through a broad easement “for railroad purposes.” Thus, the main issue that the Courts had to address was whether UP has provided sufficient evidence of whether the pipeline was serving a sufficient railroad purpose. Although the Court concluded that the pre-1871 Acts did not require a railroad purpose for its right of way granted under the pre-1871 Acts, UP had to show that the pipeline provided a “railroad purpose” for lands granted under the 1875 Act. UP asserted that the pipeline served a railroad purpose because UP uses capacity on the pipelines to transport fuel it purchases from third-party refineries. UP claimed that it used this fuel to power its locomotives and that transporting the fuel from the pipeline reduced its operating cost by millions of dollars a year. The Court reasoned that it had long been established that a railroad right of way conferred more than a right to run trains over the land.<sup>31</sup> Therefore, railroads could conduct a variety of activities incidental to railroad operations that would meet the “railroad purpose” standard.

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<sup>31</sup> See *New Mexico v. U.S. Trust Co.*, 172 U.S. 171, 183 (1898) (“The phrase “right of way,” besides, does not necessarily mean the right of passage merely. Obviously, it may mean one thing in a grant to a natural person for private purposes and another thing in a grant to a railroad for public purposes — as different as the purposes and uses and necessities respectively are.”).

The Court determined that UP had established a sufficient railroad purpose under the incidental use doctrine. It reasoned that the Supreme Court has embraced the “incidental use doctrine” even if not in direct connection to the pre-1871 Acts or the 1875 Act. The Court rejected the District Court’s finding that the pipeline was not within the scope of the incidental use doctrine. The Court based its decision on the Supreme Court’s holding that a railroad may erect structures if, in its judgment, they were convenient for the receipt and delivery of freight on its road. In addition, the Court rejected the District Court’s argument that the incidental use doctrine did not apply because the pipeline was operated by a third-party. The Court held that it established that a railroad may “license third parties to do what it could do itself, even if the third-party benefits in addition to the railroad.”<sup>32</sup> Thus, the Court held that “the pre-1871 Acts do not require a “railroad purpose” and that UP plausibly alleged that the pipeline serves such a purpose under the 1875 Act.

## VI. CONCLUSION

Unlike the Eighth and Tenth Circuits, where those Courts construed the railroads’ interest in the rights of way even further than the holding in *Union Pacific*, the Ninth Circuit decision has construed the applicable Congressional Acts to enlarge the railroads’ rights. Based on the decision establishing (1) that use of rights of way conveyed under the pre-1871 Acts was not restricted to a railroad purpose; and (2) that a railroad has rights to use both the surface and subsurface as long as the railroad could establish a sufficient railroad purpose, the Ninth Circuit has construed

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<sup>32</sup> *Wells*, No. 16-56562 at 27 (9th Cir. 2018).

a railroad's interests in a manner consistent with the broad definition under *Townsend*. The Ninth Circuit is correct that land conveyed under pre-1871 Acts were intended to be outright grants to the railroad, but its interpretation of the 1875 Act expands the scope of a railroad easement in ways arguably not warranted by the term "railroad purpose."

As indicated above, the pre-1871 Acts and the 1875 Act represent a period in US history where the primary concern was to facilitate the expansion and development of the West. This was apparent in *Townsend*, where the Court held that the railroad's interest in constructing and operating a transcontinental railroad was held to be superior to an individual's claim by adverse possession. Thus, the vague nature of the interest conveyed in the grants marked a period where the primary focus was on development and not the nature of the right of way being conveyed.

However, the legislative history of the 1875 Act does not indicate an intention by Congress to grant something more than the right to operate in the rights of way. Moreover, Congress was responding to public opposition to what it saw as lavish grants and revised the law to still allow the transcontinental railroad to develop without granting large tracts of land. As indicated in *Great Northern*, the Court held that the Act of 1875 only granted an easement stating, "section 1 indicates that the right is one of passage since it grants 'the' not a, 'right of way through the public lands of the United States.'"<sup>33</sup>

Although the broad nature of what the Ninth Circuit considers to be a railroad purpose is in line with Surface

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<sup>33</sup> *Great Northern*, 315 US at 271.

Transportation Board decisions regarding preemption, the overbroad nature of what the Court defines as a “railroad purpose” provides little guidance to interested parties disputing the railroad’s use of its right of way. Moreover, it fails to limit what can be considered a “railroad purpose.” Based on this decision, adjacent property owners or interested parties would be hard-pressed to establish that any activities of the railroad were not for a “railroad purpose” simply because the railroad is a railroad.

The Ninth Circuit decision is at odds with other Circuit decisions that narrowly construed the interest granted to the railroads through the pre-1871 Acts and 1875 Act.<sup>34</sup> As indicated above, the Eighth and Tenth Circuits held that the railroad was granted only the surface rights in its right of way and not the sub-surface rights. Until and unless the Supreme Court grants review in the Ninth Circuit case or in another one of the cases raising these issues, there will remain a Circuit split as to how to define a railroad’s property interest in its rights of way. As the law now stands, the Ninth Circuit’s holding is to the detriment of landowners whose properties are adjacent to rail lines within the Ninth Circuit’s jurisdiction.

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<sup>34</sup> See *Energy Transp. Sys., Inc. v. UP*, 619 F.2d 696 (8th Cir. 1980); *Energy Transp. Sys. Inc. v. UP*, 606 F.2d 934 (10th Cir. 1979); *Union Pacific*, 353 US 112 (1957).