Defining the true title status of Railroad Right-of-Way in the American West - A review of the California position announced November 5, 2014

Early in 2014, the problematic nature of railroad right-of-way (RR R/W) from a title perspective was vividly displayed in the case of Brandt Revocable Trust v United States (US) (134 S. Ct. 1257) and the potential impact of that decision upon certain very popular yet highly controversial surface uses of former RR R/W has been well documented. In reaching the High Court, the Brandt case focused the attention of land rights professionals around the nation upon the fate of RR R/W that is no longer in use for its originally intended purpose, which of course is not an uncommon scenario, since extensive railroad abandonment has occurred in recent decades. Near the close of 2014 however, the California Court of Appeals (CCOA) addressed another case involving RR R/W, which appears to be well positioned to unleash an even more powerful legal shock wave, with truly enormous consequences for participants in the utility industry, as this time the controversy relates to subsurface land use of both former RR R/W and currently active RR R/W. While both the Brandt case and the one reviewed herein are, at their core, controversies implicating title to land, this latter battle, which is now awaiting attention from the California Supreme Court, could ultimately produce the most explicit and detailed clarification of the legal status of vast portions of the existing network of RR R/W traversing the American West that has ever been handed down.

The historical developments underlying and leading up to the case of Union Pacific Railroad (UP) v Santa Fe Pacific Pipelines (SF) (231 Cal. App. 4th 134) superficially appear to present an example of typical commercial and industrial collaboration and progress, of a mutually beneficial nature, with respect to both the collaborators and the public. As we shall see however, serious adverse consequences can arise from unfounded and unwise assumptions regarding land rights, even after the relevant legal issues have effectively remained dormant for several decades, only to be subsequently exposed when friction between partners over financial matters brings those latent issues finally to the forefront. As is typically true, proper legal interpretation of granting language is the straw that stirs the drink, and in this instance the use of highly general language, characteristic of early grants made by the US, necessitates judicial analysis of certain very basic words, the full or exact meaning of which we may rarely pause to ponder. It could certainly be suggested, with the benefit of hindsight after the passage of a century and a half, that the original language employed in many US grants was chosen unwisely or without sufficient foresight, but our courts today recognize, as they must, the futility of such protests, and proceed to address the legal implications of the selected language with stern objectivity.

The panoramic scope of this powerful case, covering an incredible number of miles of RR R/W passing through 6 of our largest states (FN 1) is especially well outlined by Judge Kussman of Los Angeles, making this 81 page opinion one of the most lucid and penetrating statements of the law to appear within the realm of land rights in recent years. This CCOA opinion, lengthy as it must necessarily be, in order to thoroughly cover the relevant issues, is a model of well conceived thought organization, which advances through an entirely logical progression, making it highly understandable, even for those who may be novices at reading the law, and it is in no sense tedious or overblown. Herein, we will initially trace the key points specified in the judicial narrative outlining the essential events that comprise the backstory, before examining the vital legal analysis and conclusions leading to the decision itself, and ultimately we will take note of the potentially major ramifications this battle may hold within the arena of title law. As is always the case, the reader is advised to strive to maintain an objective perspective, discarding any personal biases, inclinations or preferences, while recognizing the particular parties for what they are, mere players on a stage, in whose shoes as litigants a myriad of others have stood before.

As the Civil War drew to a close, a renewed national focus upon populating the west, and fully utilizing the valuable resources therein, lifted the national expansion effort to a position of elevated priority. Many of our western states were not yet formed of course, and the west was substantially comprised of public domain, land which was subject to use or disposal by the federal government. Railroads, representing a still relatively new form of technology at that time, were poised to aid mightily in the opening of the west, and this was recognized by all, leading to legislation which was intended to exploit that technology in the subjugation of the vast and remote expanses stretching to the Pacific Ocean. Even before and during the Civil War the value of the rapid new form of transportation provided by railroads, for both military and national expansion purposes, became clear to leaders at the federal level. During the 1850s & 1860s the US Congress issued various railroad grants, most notably the Pacific Railroad Act of 1862, amended in 1864, under which the creation of RR R/W upon the public domain was authorized, and which also bestowed title to countless sections of that land, although much of it was as yet unsurveyed, upon numerous railroads. In hindsight, the wisdom of such grants may be questionable, and certainly

as we now know, their lack of linguistic specificity was destined to precipitate untold numbers of controversies, but the grants were clearly not absolute in nature, and quite significantly, as noted by the CCOA, mineral rights were expressly excluded and reserved unto the US.

Even at the time of the earliest grants, the true or exact nature of the legal interest embodied and conveyed in those grants was at least somewhat unclear, and there is scant if any evidence that any deep thought or concern was given to that matter. National urgency was present and seemingly boundless opportunities beckoned, so legal technicalities were definitely not the foremost considerations of the day, thus the railroad work went furiously forward, based at least in part upon the unsound notion that the railroads had been legally endowed with full control over all RR R/W. During the 1870s however, serious concerns relating to the land rights associated with RR R/W began to arise, in effect the tremendous power of the railroads became clear to all, and settlers began to realize that they were effectively competing with the railroads for valuable lands, so many of them came to view the railroads as enemies. The political impetus generated by this swing in the public perception of railroads motivated the General Right-of-Way Act of 1875, widely regarded as the most important nineteenth century Act of it's kind, which was enacted with the objective of limiting such grants going forward. Aside from less relevant matters, the Act of 1875, as well as many subsequent Acts which were modeled upon it and were enacted in the same spirit, clarified that all RR R/W created thereafter upon the public domain was to be granted to the railroads only as an easement interest, while the fee interest in the lands bearing the railroads was retained by the US, for subsequent disposal to settlers.

Reams have been devoted to railroad title controversies set in every western state, and the resultant litigation and legislation that came to pass during the late 1800s and early 1900s, yet much more still could be written on that subject, particularly on the matter of railroad abandonment and it's legal consequences, but that separate pathway leads to the aforementioned Brandt case. For the sake of brevity here, we will observe only, as did the CCOA, that during the first century of railroad construction and development in this country the US Congress "passed laws governing subsurface oil and gas pipelines through federal lands, providing for annual rental payments to the government" (FN 2) while pointing out that such federal action was fully consistent with the federal retention of existing subsurface interests such as mineral rights, under all prior federal laws pertaining to RR R/W. As all experienced land rights professionals know, the intent of a grantor always represents a powerful factor, whenever disputes over land rights arise, and as this case richly demonstrates, when the US is the grantor that rule is only amplified in significance. Having thus set the stage for the players, we next turn to the portion of this saga outlining the acts of the parties themselves, commencing with the relevant acts of their predecessors, in whose shoes the present litigants stand.

In the relevant areas, Southern Pacific was a predecessor of UP, and was evidently the holder of the RR R/W at issue, operating trains thereupon, during the 1950s. SF already had an existing corporate relationship with Southern Pacific, the two entities were legally sisters, subsidiaries or branches of the same organization, functioning as partners, and presumably some SF facilities already existed within the relevant RR R/W, so their relationship was genuinely close and mutually beneficial at the time of it's advent. With the national economy humming along during the post war boom, and the need for further development of rail and pipeline delivery services plain to see, the original pipeline easement and rental agreement, which would later prove to be so problematic, was forged. Also during the 1950s however, trouble was already brewing elsewhere for UP, as a federal case originating in Wyoming, and quite ironically involving UP itself, played out (US v UP - 353 US 112) in which the Supreme Court of the United States (SCOTUS) clarified that the land rights held by railroads under all federal grants were limited in scope to those uses which could be properly characterized as serving railroad purposes. As of that date, it appears at least possible that no issues or violations had arisen as a consequence of the land use being made by SF in California within the RR R/W, since the two entities were in legal effect unified, so the operations of either one were closely tied in a mutually contributory manner to the operations of the other. The seeds of future difficulty for UP had already been judicially planted however, as the myth that RR R/W typically constitutes a fee interest had just been conclusively exploded.

The ensuing period of 3 decades, starting in the early 1950s, apparently saw a continuation of the primarily amicable and harmonious relationship between the pipeline operations and the rail operations, and presumably both expansion of services and mutual profitability marked this period, leading to an unspecified number of additional easements being granted to SF. Through a series of corporate machinations however, the close relationship of the rail and pipeline companies ended in 1983, and henceforward the two entities were thus compelled to deal with each other at arms length, as typical separate and distinct corporate operations. The initial

action in this regard was a new master agreement pertaining to the presence of the pipeline within the rail corridor, and the rental payments were obviously a major aspect of this agreement. This 1983 agreement apparently proved to be workable for at least a few years, but in 1988 Rio Grande acquired the railroad interest, and for unknown reasons things evidently began to turn sour. In 1991 corporate attorneys first engaged, in an unspecified California courtroom, setting in motion the extensive chain of litigation which has persisted to this day. As noted by the CCOA, the motivating factor at that point in time was the desire of the railroad executives to raise the rent being paid by the pipeline company, and with that objective counsel for the railroad made the fateful decision to file an action against SF, seeking to have the 1983 agreement judicially rescinded, for the purpose of revising the agreed rental rate.

The 1991 litigation proceeded for a few years, evidently without resolution, until a settlement agreement was entered by the combatants in 1994. This settlement dealt with the issue of past rent and anticipated a new rental rate, which was to apply for a 10 year period, perpetuating this corporate collaboration at least to that extent. Some level of financial discontent with their relationship evidently persisted however, and thus matters apparently stood, with the parties embroiled in a smoldering dispute, when UP acquired the railroad interest in 1996. By that time, each side had already invested millions of dollars in resolving their issues, but even more millions of dollars were at stake under the rental agreement, so they continued to pour funds into litigation focused exclusively on the financial component of their arrangement. Questions regarding the validity and scope of the land rights interest actually held by the railroad were raised at some point, but they were summarily dismissed at the trial court level, and they continued to be treated as an ancillary or peripheral matter at the appellate level, during the remainder of the 1990s and on through the first decade of this century. Thus the proverbial elephant figuratively occupied the courtroom for several years, silently watching as exorbitant expenses were piled up by both opponents, during the potentially pointless proceedings, in the absence of judicial recognition that the land rights component of the controversy posed a genuine threshold issue.

Early in 2014 UP emerged victorious from a Los Angeles County Superior Court, in the context of the rental dispute, having obtained a $100 million dollar award, leading to the present appeal brought by SF. At this point in time, the pipeline system occupies more than 1800 miles of RR R/W, all of which was at issue for rental purposes, apparently classified or designated by the parties as comprising over 1000 unspecified "pipeline segments" (FN 3). An unknown amount of that RR R/W exists solely by virtue of federal grants, and is located either upon land which remains public domain today, or upon land which was patented out of the public domain subject to the RR R/W, and thus now represents some form of privately held title. Portions of the RR R/W have evidently been either sold or abandoned over the years, but no details pertaining to any such locations are provided in the text of the CCOA opinion, since the core title issue to be addressed and resolved is the original nature of the land rights that were acquired to create the RR R/W, rather than the subsequent fate of those rights. As Judge Kussman very poignantly, and very ominously for UP, stated at the outset: "A recurrent, yet heretofore unresolved, theme permeating this and prior cases between the parties is the nature of the Railroad's interest in the property through which the pipelines run ... The absence of a determination on this issue undermines the judgment." (FN 4). Reversal was coming, the only question was how intensively the CCOA would examine the frail platform upon which the alleged property rights of UP were perched.

The immense potential gravity of the inadequately addressed title factor in this complex legal equation would soon become quite apparent, as the primary legal question, which had naturally been repeatedly suppressed by UP, and had been judicially treated as a "third rail" until 2014, finally became the focal point of this conflict. That question of course was very simply whether or not the land being utilized by SF for pipeline purposes was really ever property of UP or not. Thus were the parties notified by the CCOA that arguably at least, none of their prior agreements are ripe for financial enforcement, since those agreements may have no valid legal basis in the context of title, making their ceaseless debate over financial valuation entirely useless and meaningless, with respect to a large portion of the RR R/W at issue, if not all of it. Of course it is quite possible, and probably even likely, that some portions of the contested RR R/W were acquired by UP or it's predecessors in fee simple, presumably by means of a typical deed from John Doe or any other fee land owner, independent of the aforementioned federal grants. In such locations, a perfectly legitimate relationship may exist between UP and SF, as fee land holder and easement holder respectively, so the current land use and rental agreement between these parties is presumably applicable to some locations, in which the federal land grant issue is irrelevant, thus their current agreement could not simply be entirely set aside, the CCOA determined, it required judicial scrutiny.

Moving on from the historical scenario, related above, to the legal analysis performed by the CCOA with

reference to title, the first pivotal issue addressed by the CCOA is highly elementary in nature, establishing the definition and meaning of the word "property" in the relevant context. This was necessary because the location of the rights acquired by SF from UP and it's predecessors were expressly described in their agreement as being on or within the "property" of UP, suggesting that when they composed the contractual language the parties simply presumed that all RR R/W is comprised of the land upon which it rests, thereby acting upon a very common misconception. In the course of addressing this issue, the CCOA initially clarified that "land is not property" (FN 5) highlighting the fact that the terms "land" and "property" are not synonymous, so they cannot properly be used as if they were identical in meaning, since property rights are most definitely not limited to land and can consist of many intangible things, such as a R/W easement, which is a right that blankets land, but is clearly not equivalent to land itself. Thus the CCOA had taken judicial notice of a key flaw in the contractual language that had been either employed by UP or agreed to by UP, which held the potential to devastate the landlord position taken by UP, and the CCOA set out to ascertain and define the legal consequences of that major linguistic defect.

In electing to focus upon this issue, relating to the manner in which the location of the relevant SF facilities had been described by the parties in their agreement, the CCOA declined to take the shortcut that was taken during all prior judicial efforts to resolve this rental dispute, and pass directly to the rent valuation issue. Instead, the CCOA treated the locational issue raised by the use of the word "property" in a descriptive manner as a threshold issue, which had to be dealt with before moving on to tackle the valuation issue, in order to determine which SF facilities were really within the scope of the existing contractual agreement. It was obviously unnecessary to engage in any valuation assessment, the CCOA understood, with reference to any locations in which UP had no valid basis upon which to control the activities of SF, so an enormous portion of the pipeline mileage at issue, perhaps the vast majority of it, stood to be dismissed from consideration, if the scope of the agreement were to be limited to SF facilities that actually utilized property of UP. For the past 20 years, throughout all of the prior litigation, the CCOA pointed out, those charged with reviewing this controversy had "essentially decided not to decide" (FN 6) the property rights issue, perhaps deliberately steering a course around it on the grounds that it was an issue of such complexity as to be unfathomable. In addition, judicial attention had evidently been wrongly diverted from the title issue, the CCOA noted, by expert witnesses who misleadingly treated, or even expressly identified, the RR R/W as land held in fee by UP, which the CCOA naturally deemed to be wholly unsatisfactory, since that position is clearly unsupportable under the law.

Undoubtedly, the CCOA knew and acknowledged, UP holds some form of property right associated with each portion of the RR R/W, the core issue however is the physical extent of that right in the vertical dimension, because unless the rights of UP extend below the surface, those rights bear no direct relationship to the subsurface land use being made by SF in all typical locations. In other words, the litigants may be merely holders of vertically parallel rights, which do not physically intersect at all, in those locations where the pipe is below the surface, and that in turn obviously calls the alleged right of UP to issue subsurface easements or charge SF any amount of money, based solely upon the presence of an underground pipeline, into serious question. Fee simple title extends earthward and skyward indefinitely, but the same is definitely not true of easements, since they are all axiomatically limited to a specific purpose or set of purposes, which can operate to define the easement's physical extent and limitations, in a manner that allows the easement to fully serve the intended purpose, yet pose no greater burden than is truly necessary upon the servient land. While the rights of UP to the surface within the RR R/W are undeniable, and may even be properly classified as exclusive, that fact is legally insufficient to justify UP, the CCOA found, in exerting control over all subsurface land use. Thus the distinction between fee and easement interests was truly critical, the CCOA well realized, to the determination of the relative rights of the parties to occupy vertically separated corridors with their respective facilities, and the judicial failure to fully address that issue in the prior proceedings was potentially fatal to the monetary triumph of UP.

On the crucial property definition issue, the CCOA held that the parties must be bound by the full legal implications of the language which they selected for use in their contractual agreement, thus there can be no justification for any financial transactions, such as the disputed rental payments, with respect to any locations where it can be shown that the SF facilities are not spatially situated upon or within the property of UP. Under this holding, the easement and rental agreement may be largely if not wholly void, which would mean that SF holds no valid easement grants protecting substantial portions it's pipeline, and no such easements can be granted by UP, if in fact UP holds no interest in the land itself. Moreover, since only a fee title holder can create a valid easement upon or within his land by means of a grant, and no party can grant an easement in land owned by others, the litigants are effectively powerless to rectify the fallacious premise upon which their agreement is founded without the participation of untold numbers of other parties, at least one of those necessary parties being the US itself. The

rights of UP, as viewed by the CCOA, in accord with the relevant decisions of SCOTUS, may very well be limited to the surface, and amount to nothing more than a blanket covering the R/W, with no element of depth, unless it can be proven that fee title to land itself is truly necessary to accomplish the specific mission for which the RR R/W was created. It is noteworthy that if the agreement document had been written to cover all pipelines "within and/or below the R/W", using purely locational terminology, no title issue would have arisen, but because the agreement employed the word "property" the presence or absence of title was inescapably implicated, presenting a classic example of the fact that every word used in a contract must be very thoughtfully chosen.

To all appearances, the reality of the situation is that the word "property" was improperly used by the parties, in a poorly considered and shorthand manner, when documenting their agreement, they really meant that SF was agreeing to pay UP rent for any SF line or lines that were situated under the RR R/W, which in the misguided view of both parties were thus protectively blanketed by the RR R/W. Such an agreement could of course be characterized as a very foolish one on the part of SF on one hand, at least at first glance, since it would arguably appear that SF thereby voluntarily and unnecessarily subjugated itself to UP. On the other hand however, the agreement had the practical effect of shielding SF from the need to deal with any other parties, specifically the fee owners of the land in which the SF lines were installed, as long as those parties remained ignorant of their land rights, so in that respect it was a distinctly beneficial arrangement for SF as well as UP. In addition, the implicit deception regarding the title status of the land occupied by the RR R/W, which was manifest in the agreement, could have been attacked at any point in time on the grounds that it amounted to a conspiracy between UP and SF, to defraud the owners of the lands underlying the RR R/W, or at least to leverage their ignorance of their land rights, as a way of unjustly excluding them from any financial benefit derived from the combined industrial venture. The truth of the matter however, is far more likely to be that the entire land use agreement was simply a product of plain ignorance on the part of both UP and SF, as to the true nature and extent of the title held by UP constituting the RR R/W, in which event it was a monumental but innocent blunder.

Quite interestingly in this same vein, as noted above, the problematic agreement originated in the 1950s, when the railroad and pipeline interests were in legal effect unified through close partnership, so it was definitely a mutually beneficial arrangement serving a genuinely common purpose at that time. That close relationship had been severed however, also as previously noted, which had a dual effect, not only turning the parties into adversaries, but also importantly placing them upon distinctly separate corporate platforms, with distinctly different objectives, which meant that they were no longer working in unison, as one entity with a common purpose, the great legal significance of which we will soon observe. Throughout the prior litigation, UP had maintained that the title issue was irrelevant, because there was never any controversy over which SF line or lines were subject to the contested agreement, and SF had contractually agreed to pay rent to UP in all of the relevant locations, without any regard to the title held by UP, so there was no need to embark upon an investigation of the nature or quality of any of the title held by UP. In addition, UP could have built a reasonable argument that the use of the word "property" in the agreement was simply a mutual mistake, and thus sought reformation of the agreement to eliminate and replace that word with words which better defined the location of the SF facilities, in accord with the true intent of the parties. Finding no justification for bypassing the title issue however, the CCOA deemed it necessary to squarely address that issue and proceeded to do so, potentially awakening the many sleeping servient land owners to their opportunity to assault SF for making unauthorized use of their land.

One exceedingly important element in this legal resolution process, at least, was abundantly clear, and that was the fact that all RR R/W created by means of the federal RR R/W grants was intended solely to serve railroad purposes. Defining the full or proper meaning of the phrase "railroad purpose" therefore logically became the second issue of controlling significance to be addressed by the CCOA. Mindful that the federal grants in contention were not merely typical conveyances, they were federal laws, the CCOA reminded the litigants that like all other laws the meaning of such granting language is dictated solely by the will and the intent of Congress at the time the enactment was made. The well documented Congressional intent clearly demonstrated that the Act of 1875, and all of the relevant subsequent Acts, provided the railroads with only an exclusive easement running no deeper than the surface, the CCOA found, while observing that the Congressional intent regarding the land rights or property rights conveyed by the earlier Acts were not as clearly defined. Nonetheless, the CCOA concluded, there can be no question that UP held no fee interest in any portions of the RR R/W descending unto UP from the 1875 Act or any later Acts, because "the 1875 Act granted the railroad substantial rights to the surface ... but it did not make the subsurface the property of the railroad" (FN 7) since granting fee title to the subsurface to any railroad company was clearly deemed to be both unnecessary and inappropriate by Congress in formulating those Acts.

Having thus specified that any RR R/W acquisitions made after 1875, by virtue of federal grants, were not within the scope of the land use agreement between the litigants, and therefore required no valuation, the CCOA moved on to evaluate the rights of UP under the earlier federal grants, which contain no stipulation that the granted RR R/W consists of an easement. Once again, the decisive factor in ascertaining the scope of the title which vested in the railroads under those early Acts was the intent of Congress in using the phrase "railroad purpose", the CCOA emphasized. If any profitable endeavor in which any railroad might engage qualifies as an activity serving a railroad purpose, then UP could prevail, but approving such a policy would in legal effect give all railroads the capacity to define what constitutes a railroad purpose on their own terms, leaving that phrase virtually meaningless, and entirely useless as a limitation mechanism, the CCOA recognized. At this key juncture, the CCOA opted to view the restrictive nature of the 1875 Act in the manner of a clarification issued by Congress, rather than a complete reversal of intent on the part of Congress. Since every action taken by Congress since 1875 had been restrictive toward railroad rights, the CCOA logically viewed this as a strong indication that Congress had in fact never intended to grant any title in fee simple absolute to the railroads. This position appears to be quite sound, given the fact that it fully accords with the long line of RR R/W cases decided by SCOTUS, leading up to the Brandt decision of 2014, all of which deny the proposition that railroads were ever endowed, by means of any federal grants, with any authority to extract value of any kind from the subsurface beneath any RR R/W.

The ultimate question then, to be answered in resolving the title component of this case, is exactly how to define the title held by UP under the early federal Acts, in terms of physical extent in the vertical plane, in a manner which accords with the intended scope of the land use that was envisioned or embodied in the early federal RR R/W grants. The CCOA has answered that question by balancing the apparent intent of Congress to endow the railroads with a title sufficient to carry out their basic mission, as a mode of transportation, with the equally apparent federal intent to reserve all land rights not truly needed by the railroad companies unto the people of the US. The property rights obtained by the railroads for RR R/W use under the early federal grants, the CCOA held, were more than an easement but less than a grant in fee simple, and in fact it is well settled that a fee title which is less than absolute in many respects can be legally created and conveyed. The railroads acquired a distinctly limited fee interest in the relevant portions of the RR R/W, under the early federal grants, the CCOA surmised, noting in so doing that SCOTUS has long approved the limited fee concept, in the specific context of RR R/W, and that the rights thus acquired were also limited in duration, being subject to reversion upon falling into a state of permanent disuse, with respect to the specified RR R/W purpose. Such an acquisition, made for any purpose requiring only surface use, carries no rights to make use of the subsurface for profit, the CCOA decided, it carries no more than a right to prevent any subsurface activity that would render otherwise useful ground useless by physically undermining the surface.

Citing numerous respected federal decisions relevant to the matter at hand, the CCOA poignantly illustrated the weakness inherent in the position espoused by UP, that any land use beneficial to a railroad company qualifies as a legitimate "railroad purpose". As Judge Kussman expressed it "rights-of-way must be used for railroad purposes ... the right-of-way ... must be used to construct and operate a railroad ... The rental agreement between the parties is a private arrangement that serves each company's own interest, not the public interest for which the Railroad's rights-of-way were granted ... Renting out the subsurface to a third party from a different industry for private gain cannot reasonably be considered a railroad purpose." (FN 8). Thus the CCOA informed the parties that the only right held by UP extending below the surface of the RR R/W is the well known and time honored right of subsurface support, in other words, the right to preserve the surface in a useful state or condition by barring any underground activities that would damage the surface. Rarely has the legal significance of putting land to use for it's intended purpose, being cognizant of the precise legal limitations upon that use, and understanding the principle that an expressly specified purpose can control the physical extent of title, been so clearly displayed. Under this ruling of the CCOA, UP does have subsurface rights, but they are narrowly limited to support for the surface, thus only underground activities that harm the surface in a manner which leaves it unsuitable or unsafe for railroad tracks can be prohibited by UP, under the authority vested by any of the federal RR R/W grants.

The seemingly insignificant fact that the combatants were once corporate sisters in legal contemplation, as previously outlined herein, when their agreement was initiated, but are now strangers for all legal and contractual purposes, proved to be quite relevant, as can now readily be seen. If there were ever any validity in the premise that the pipeline operation was fundamentally part of the railroad operation, because the railroad drew fuel directly from it during the early decades of the arrangement, that premise was no longer of any assistance to UP, in the eyes of the CCOA. The SF facilities could not be successfully characterized as a "railroad purpose" Judge Kussman opined, because "one would have to engage in a terrible distortion of law and logic to find that somehow the

railroad ... obtained the rights to the subsurface underneath it's rights-of-way to do with as it saw fit ... there is nothing ... suggesting that Congress intended to give the Railroad the right to use the land under it's rights-of-way for non-railroad purposes, like renting it out to third parties." (FN 9). Whether or not it can fairly be said that UP should have known better than to grant easements and charge rent for the use of land to which it held only an ambiguous, speculative or undefined fee title, perhaps really amounting to no more than color of title, if even that, with regard to the underlying land, is an open question. In failing to recognize the physical limits of that title however, UP can be found guilty of no error that has not been made by countless others in completing comparable transactions involving RR R/W, and therein lies the true gravity of the outcome suggested by this CCOA decision.

Having thus clearly communicated their conclusion on the portion of the conflict relating to the title issue, for the edification of both the litigants and the trial court, the members of the CCOA panel went on to address the valuation issue as well, since that matter would also be relevant upon remand. Quite possibly, portions of the corridor at issue pass through sections of land which are in fact owned in fee simple by UP, and if in fact the tracks cross any such sections then technically no RR R/W exists within those areas, since no party or entity can hold an easement situated upon or within their own fee property. The presence of such lands along the corridor, upon which no RR R/W exists, could well explain why the parties made the fateful decision to describe the lands which they intended to be subject to their agreement using the generic term "property" rather than the more specific phrase "RR R/W". Nevertheless, as a fee simple owner UP has the right to grant easements across any such sections, or any other lands in which UP holds a right of full legal control embracing the subsurface, and if SF facilities exist within such sections, the agreement in contention would be applicable to those sections, so valuation would be relevant in those areas. Pages 43 through 78 of the CCOA opinion are devoted to the monetary issues, and are thus outside the scope of this review, which is focused solely upon title issues, but it is notable that within this valuation discussion the CCOA suggests that the agreement may prove to be applicable to about one third of the land which is now being mutually utilized by the litigants (FN 10).

The parties were thus left to cogitate upon what their strategy might be going forward, and perhaps to ponder entering yet another settlement agreement, in preference to potentially opening Pandora's Box, by setting out to litigate each problematic portion of the RR R/W as an independent quiet title action. The wide variety of land acquisition methods, which might be leveraged by UP if necessary, enumerated by the CCOA, including prior condemnation actions, prior quiet title actions or other court decrees relevant to title, existing state laws pertaining to marketable title, and potentially even adverse possession, make it clear that the outcome of the present action could precipitate numerous subsequent actions. Yet whether or not UP, as a railroad operator, truly acquired and holds the subsurface in fee in any such areas defined as RR R/W, in addition to the surface, remains very much an open question, and will remain so until fully adjudicated, which could well make it clear to legal counsel for UP and UP executives that any effort to secure such rights unto UP through further litigation could be one which would simply not be cost effective. Were the sum at stake in the present action not so huge, there can be little doubt that rational people would just drop the whole matter, but if the litigation does continue, and it proceeds down the track pointed out here by the CCOA, our nation stands to greatly benefit from this ongoing struggle, provided that it ultimately produces conclusive clarification of the true title status of all existing federally created RR R/W.

As an interesting sidebar item, not vital to the core title issue, which relates to the nature and legal status of the RR R/W as a direct function of the origin of that R/W, yet highly relevant to the overall valuation equation, the CCOA also addressed the assertion made by UP that even some lands which had been sold by UP, through which SF facilities passed, were subject to the contested agreement, even though now owned by various other parties, as grantees of UP. In other words, UP maintained that by virtue of reservation, in numerous conveyances made by UP over the decades, UP had deliberately and expressly retained a right of control over the SF facilities in such locations for rental purposes. Not surprisingly, given it's position on the core title issue previously documented herein, the CCOA was not receptive to this assertion by UP, and proceeded to foreclose it, while pointing out the fallacy embodied in it. "Congress clearly intended that a railroad's interest in it's rights-of-way would terminate once it no longer used or occupied the land. Continuing to have an interest in the land, and to generate revenue from it, would run directly counter to the legislative intent." (FN 11). UP certainly can reserve easements when selling land, just as can any legitimate grantor, but no such reservation can be valid if the grantor had no such land right or property interest to retain. Thus it would appear that a very severe burden of proof, regarding the validity of any such reservations made by UP, will descend upon UP, should UP decide to continue to pursue this element of the overall controversy upon remand, presuming that the CCOA ruling remains in effect. Moreover, should UP either fail in that effort or simply abandon it, the ongoing land use being made by SF will then be exposed to potential legal assault by the grantees of UP or others, potentially adding liability issues, stemming from the creation and

recording of invalid easements, to the imposing list of concerns confronting UP.

In producing this truly exhaustive and wonderfully erudite opinion on a highly problematic subject, Judge Kussman and his colleagues elected to emphatically apply the fundamental principle, with reference to the federal land grants at issue, that no land rights which have not been very clearly and expressly stated in conveyance documentation can be successfully asserted by a grantee, specifically UP in this instance. Although there are a multitude of exceptions to this principle, such as the passage of unrecited appurtenant easements for example, the principle of grant limitation based upon purpose is universally recognized as valid, being wisely counterbalanced as it is, at law and in equity, by the equally powerful principle that everything truly essential to the enjoyment of any grant legally passes with it. Most if not all jurisdictions within the US have historically accepted and honored the rule that in the context of any R/W grant, there can be no presumption that a fee simple title was conveyed, and in some states that principle has even been codified, resulting in the broadly applied presumption at law that every R/W represents an easement, unless a contrary intent can be proven. In addition, the principle of grant limitation has long been upheld with particular reference to grants issued by a sovereign, and often with specific reference to R/W, in a wide variety of forms, so the relevance of that principle to this scenario would appear to be especially strong, making it's application fully justifiable, as the CCOA undoubtedly realized. Thus here all of the pieces were in place to demolish the arcane facade which has so long shielded the allegedly absolute nature of the land rights held by railroads in the context of federal R/W grants, and the CCOA was up to the task of hurling the proverbial hammer of the gods toward that fragile and illusory protective bubble.

The three prongs of the trident upon which UP was impaled, presuming that this decision of the CCOA stands, can be readily identified. The first prong was the ambiguity inherent in the highly general granting language used by Congress when creating land rights, which has made such rights a subject of perpetual controversy and confusion for well over a century. The second prong was the lack of respect historically demonstrated by virtually all railroads for the power of the principle of grant limitation, which is most often exhibited when railroads quitclaim land in which they actually hold no title that can be conveyed to anyone for use as anything other than a RR R/W, since this practice has historically enabled the perpetration of many devious schemes devised by land sharks to extort innocently ignorant land owners. The third and final prong was the ill advised reference to property rights embedded in the disputed land use and rental agreement, since that reference invited intense judicial scrutiny of the unclear title held by UP, with which the CCOA so astutely dismantled that agreement. The predecessors of UP acquired nothing more in the way of land rights for RR R/W purposes by means of their federal grants than was minimally required to create, build and operate a railroad, the CCOA has postulated, and no right to further burden the land through the execution of any other ventures, however profitable or attractive they might be, was incorporated into any such grants. Although the granted RR R/W was apparently adequately defined in terms of horizontal extent, presumably with a simple width dimension, dependent upon the track position, the vertical extent of such RR R/W was established only through case law spanning several decades. Such RR R/W has never been judicially deemed to possess the depth component of a fee simple conveyance, the CCOA has now illustrated, thereby depriving the unwisely created subsurface easements of validity.

All of the easements executed by UP and held by SF, in all of those locations where any federal land grants represent the source of the real property rights held by UP, may very well be void, even after standing upon the public record for decades, due to a lack of authority in UP to grant any such rights in the relevant lands. To that extent, this high profile battle represents nothing more than a greatly magnified repetition of the same fundamental title controversy which has plagued literally thousands upon thousands of innocent citizens, whose lands are traversed, or were once traversed, by railroads, or whose lands adjoin either active railroads or former railroads. American land owners are entitled to complete legal clarity upon this matter, which rather than diminishing in significance over the past century, has risen to a higher level of urgency, due to an increased public desire to utilize former RR R/W for other activities, along with rising property values. In that regard, it is noteworthy that while the direction suggested by the CCOA emphasizes the retention of land rights by the US in making the contested land grants, it does nothing to aid the cause of Rails-to-Trails proponents, since the CCOA position concedes that those rights which were reserved by the US passed to the federal patentees of the relevant lands, as confirmed by SCOTUS in the 2014 Brandt case. Nevertheless, regardless of who eventually wins or loses in the present litigation, the matter of utmost importance is simply obtaining clarity and certainty of title, so that the true status of all title can be readily known to all parties, and for that reason it must be hoped that this conflict ultimately serves the interests of the American people, by producing such finality.

How the parties to this legal action will respond to the outcome of this CCOA decision is unknown of course,

all that is known as this article is composed is that the parties have evidently decided to pursue this litigation further. Specifically, the Supreme Court of California will be asked to review the CCOA decision, and that request may be either accepted or denied. If that request is denied, the CCOA decision effectively becomes final, if on the other hand the requested review is performed, then the California Supreme Court will presumably either expressly uphold or expressly reject the detailed position on RR R/W title that has been set forth by the CCOA. In such event, the California position on the relevant title issue will achieve finality in that manner, but even if that point is reached, still further action on this case in California seems inevitable, since it appears certain to require additional attention at the trial court level. Indeed, along with the reversal of the lower court on the title issues, as noted herein, the CCOA remanded the case to the trial court for further proceedings on both the title issues and the financial issues, before the case was re-directed to the California Supreme Court as described just above. Nonetheless, presuming that this potent treatise provided by the CCOA stands and is not undone, given the depth to which the core title issue was very adroitly examined by the CCOA, the California position on that issue is quite likely to be gradually recognized and adopted as sound precedent by other western states.

In any event, once the California position on the true nature of the title interest in RR R/W derived through federal grants is solidified, this controversy appears likely to spread to other states, or to the federal court system, and if it is perceived as rising to the level of a significant national concern, it could conceivably reach SCOTUS at some point in the future. While reaching that point would most likely take several years, and only then would true and complete finality at law be obtained, just how this decision, provided that it stands in some form, will be regarded or leveraged by railroads, pipeline operators and other utilities in the interim will be very interesting to observe. At one extreme, chaotic title conditions could ensue, which would be evidenced by a rash or flurry of title litigation involving RR R/W interests over the next few years. Any such development would of course be very likely to produce a panoply of results all across the legal spectrum, as the matter is addressed in different jurisdictions, by attorneys of varying competence, before judges with varying levels of knowledge regarding title issues. On the other hand however, it is at least equally possible that in most locations throughout the west, where the legal consequences of this decision would be most impactful, the relevant corporate entities may well elect to simply take the "see no evil, hear no evil" approach, and deliberately refrain from embarking upon any litigation that might call unwanted attention to their specific title issues.

As far as the present parties, UP and SF, are concerned, this affair could eventually prove to be equally problematic for both of them. Superficially, this CCOA decision has the obvious appearance of a victory for SF and a defeat for UP, since it has the potential to save SF a great deal of money in the short term, by preventing UP from collecting certain rent from SF, which UP has long expected to get, and has invested very substantial funds in securing. But while the downside for UP, and by extension other railroads finding themselves in a similar position elsewhere, is quite clear, the downside for SF and other comparable utility operators may also prove to be highly significant. Although this decision has the potential to lift an immediate financial burden from SF, it certainly does not indicate that SF has no need to pay anyone to maintain the line or lines which are involved in this case, unless SF proves that it holds adverse or prescriptive rights in each location, which could well be prohibitively costly, even where it may be likely to be successful, and of course no such assertion could shield any SF facilities situated within the boundaries of any federal land. Ultimately, SF and any other utility operators who may find that they owe nothing to the railroads for the use of the land beneath any RR R/W of the relevant type, may learn to their great chagrin that they are now beholding to a landlord, or perhaps even a multitude of landlords, with genuine control over land which bears various fragments of their utility lines. Those parties, based on financial motivation, may be even less inclined to be cooperative with SF than UP has been, and such parties may very well be free to lodge serious demands for compensation upon utility companies, in exchange for the ongoing use of their fee property (FN 12).

In summary, this case holds the potential to bring about highly beneficial legal clarification of the true status of all RR R/W title of federal origin, which has long been sorely needed and would hold great value for an immense number of parties, both public and private. The fact that all of the parties associated with this case in any manner, the litigants, the attorneys, the judges, the expert witnesses, and even the underlying land owners, have demonstrated that they stand in a state of high uncertainty, if not outright ignorance or confusion, over how to properly regard and handle RR R/W is more than ample evidence of the need for clarity upon this ubiquitous title issue. But of course that will not happen unless either this case or another case spawned from it is eventually placed upon the doorstep of SCOTUS, and accepted as being worthy of the highest judicial attention. That could well occur, particularly if federal courts become engaged upon this issue going forward, but it is unlikely until such time as a clear split in judicial thought on this matter at the appellate level can be pointed out, and broad if not

nationwide interest in this matter becomes manifest. In the meantime, if a superb example was needed to demonstrate the monumental importance and great value of exhaustive research into the true origin of any R/W, whether it be public or private in character, and whether it be merely alleged or actively contested, performed by the prudent and diligent professionals populating the land rights industry, this case most certainly fills that need.

FN 1
The states bearing the RR R/W directly impacted by this specific battle are Arizona, California, Nevada, New Mexico, Oregon and Texas. A CCOA ruling obviously does not control the law outside California, but every other state in which federally granted RR R/W exists will be likely to observe the outcome of this contest in California, and view the California position on this matter with high regard.

FN 2
See page 7 of the published decision, which is available to the public on the web.

FN 3
See page 7 of the published decision.

FN 4
See pages 3 & 4.

FN 5
See page 17.

FN 6
See page 20.

FN 7
See page 27.

FN 8
See pages 29 through 34.

FN 9
See pages 38 & 42.

FN 10
See page 57 - "32 percent is claimed to be held in fee".

FN 11
See page 65, the full discussion of this issue begins on page 60.

FN 12
"Meet the new boss, same as the old boss ..." (Pete Townsend)

(The author, Brian Portwood, is a licensed professional land surveyor who has been recognized as a leader in the advanced education of professionals working in the land rights industry.)