

# City of Ketchum, Idaho

P.O. Box 2315 Ketchum, ID 83340 (208) 726-3841 Fax: (208) 726-8234



November 13, 2012

Mayor Hall and City Councilors  
City of Ketchum  
Ketchum, Idaho

Mayor Hall and City Councilors:

## **Issue Paper: Land Uses, Ketchum 200' Bike Path Right of Way**

### **Attachments**

- Attachment 1: Map of the 200' section of the Bike Path Right of Way
- Attachment 2: History of the Creation of the Wood River Trails
- Attachment 3: Legal Memo, Bike Path Right of Way

### Introduction/History

Councilmember's have asked for an issue paper exploring possible uses of the 200' bike path right of way.

Attachment 1 shows the bike path coming from the south and entering Ketchum. In West Ketchum, the Bike path right of way is wider for a length of 2,112 feet, for a total of 6.7 acres of land.

The creation of the Wood River Trail has a deep history. Attachment 2 outlines some key dates and milestones in the creation of the 22-mile paved trail that connects Bellevue up to Ketchum and Sun Valley. 200-300,000 users use the Wood River trail in summer months.

The Blaine County Recreation District has completed a recent audit of the Wood River Trail. Sections in Ketchum may need to be replaced/restored. They are also completing a full inventory of the legal easements of the full 22 miles of the Wood River Trail.

### Current Report

The land within the 200' wide section of bike path has been used as passive open space. Through the years; various ideas have surfaced regarding possible uses of this land. These ideas include affordable housing, recreation (tennis, soccer), gondola uses and community garden space. The question has also been raised as to whether the City has the ability to lease the land for open space purposes.

A memo from the City Attorney is attached to this report (Attachment 3). Not all of the conveyance documents have been located conveying the land from the railroad to the City, so there may be some unanswered questions.

### Financial Requirement/Impact

None at this time.

### Recommendation

There is no recommendation at this time, and no action requested of the Council.

Sincerely,

Lisa Horowitz  
Community and Economic Development Director



River Run Plaza

Legend

- City Boundary
- Trail Path

N

Big Wood River



Boxcar Bend in the mid Wood River Valley presented just one of many obstacles to the creation of the bike path.

## The Battle for the Bike Path

*Photos by Roland Lane*

The 130-year-old path that snakes through the Wood River Valley began with ore and sheep, was transformed by celebrities and eccentric millionaires, and it now belongs to bikes, feet and skis. Today it is one of the best things about this community. Jennifer Tuohy finds out how we all got to be so lucky.

It is a ten-foot-wide, 20-mile stretch of tarmac that winds along the Wood River Valley floor. It travels betwixt and between the dual arteries of Highway 75 and the Big Wood River, at times intersecting with, diving beneath or riding above these vital valley thoroughfares.

But to the communities it connects, the Wood River Trail is so much more than just a strip of asphalt. It is a slice of living history. From an invigorating and breathtaking route to work to a place to play come sun

Advert

or snow, the trail is not only a pivotal part of life here, it is a symbolic connector of the past, present and future that this community shares. Dubbed the "bike path" by local residents, the paved pathway sees far more action than just tires on tarmac. Be it hikers, bikers, equestrians and dog walkers or Nordic skiers, snowshoers and shearers, the path receives more than 300,000 visits a year, according to the Blaine County Recreation District.

While it seems as embedded in the valley as the river itself, the path wasn't always welcome. Unbelievably to today's residents, not only were there physical obstacles to its creation, there were also vocal opponents to the existence of a bike path. Bringing this favorite feature of valley life to fruition was not an easy task.

It began, as many great things do, with a dream. It was the early '70s, the valley was a free-for-all, full of young, enthusiastic people drawn to the area by a love of the outdoors. That enthusiasm conjured up many community-building ideas, one of which was to build a valley-wide non-motorized trail system connecting the main cities of Bellevue, Hailey, Ketchum and Sun Valley.

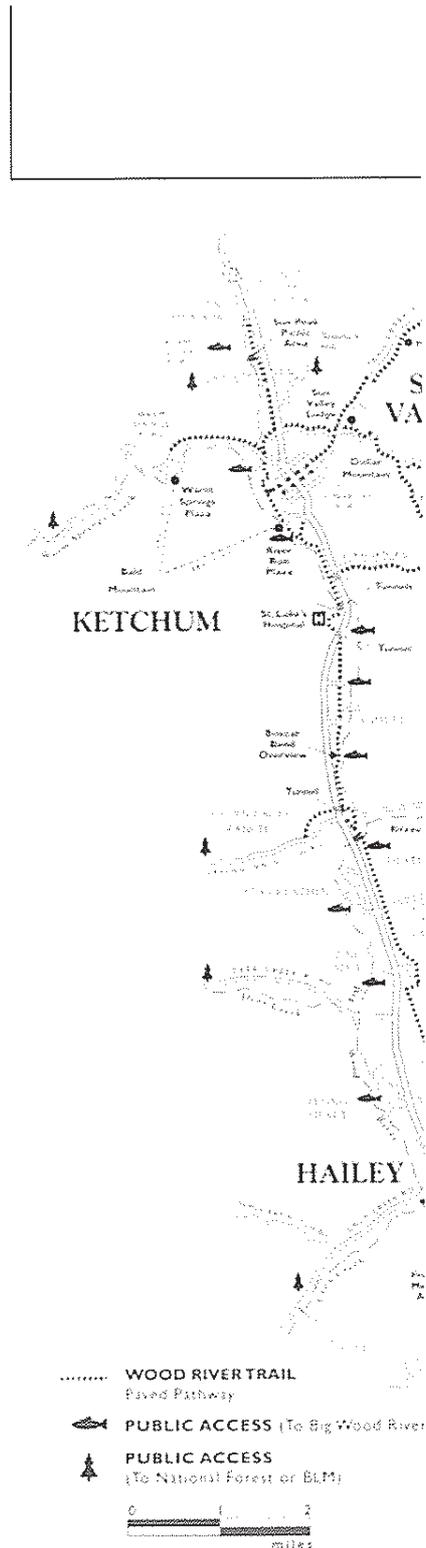
Handily, there was already a link between these towns: the Wood River branch railroad. A spur of the Oregon Short Line that connected Utah to Oregon, the railroad had been laid in 1883 from Shoshone to Hailey and later into Ketchum. Spurred into existence by the frenzy of mining activity, the line had helped transition the Wood River Valley economy from mining to agriculture by providing a convenient way to transport large numbers of sheep to market from their summer homes in the northern valley. Following the debut of Sun Valley Resort in the winter of 1935/6, sheep were supplanted by Hollywood celebrities and East Coast socialites.

Within 50 years however, the railroad had run its course. Regular service died out in the '60s, and by 1982 a flood that destroyed the historic trestle bridge at Trail Creek gave Union Pacific Railroad the final excuse it needed to wash its hands of the line.

But who was going to take over care of this swath of land that cut through the Wood River Valley? Enter the Blaine County Recreation District. Voted into being by area-residents in 1976 with the mandate to create, build and manage those trails, the district entered the 1980s having failed to get that vision off the ground. Now there was an abandoned path connecting the cities of the valley right at their feet. The Railroad Revitalization and Regulatory Reform Act, which passed in 1976, had included a little-noticed section setting up a rails-to-trails grant program, which eventually gave birth to a national rails-to-trails movement. The Wood River Valley's potential bike path was positioned to be at the forefront of the modernization of these unused railways.

It all sounded so easy. But it wasn't. "If it hadn't been done then, it couldn't be done today," said Mary Austin Crofts, universally recognized as the mother of the bike path. Crofts came to the valley in the late '70s and by 1984 had accepted a job as director of the Blaine County Recreation District.

"At that time the trail was still just a dream," she said. "There was a small group of people who embraced it, who did visioning about it, but mostly they were just hoping that something could happen." That band of visionaries, according to Crofts, included the recreation district's three board members, Butch Harper, Bob Rosso and Amy Mecham, land planner and lawyer Russ Pinto, attorney Jim Speck and engineer Dick



Fosbury. With a new focus for the bike path the group was tasked with piecing together the disparate rights of way littering that prospective route. They had their work cut out.

A right of way is a piece of ground that someone has a right to use, Crofts explained. "In this case, the railroad right of way provided the backbone of the existing bike path," she said. "The other right of way was the stock driveway, which was dedicated by the state of Idaho for use by sheep and cattle in the 1920s."

When Harper and Rosso first outlined the path at a community meeting in 1981, the stock driveway was the route they planned to follow. "But when it became clear that Union Pacific was going to abandon the rail line, we saw that we had this complete link from one end of the valley to the other," Harper said.

Technically the railroad right of way expired with the end of its use, but Crofts still had to secure the rights from the Idaho Transportation Department. She also faced stiff competition from private property owners whose land abutted the railway, and the stock driveway still intersected with the path's planned route, so permission to pave over parts of it was needed. (The sheep ranchers' agreement to let their right of way be used for the bike path is why bikers and walkers get to share the path with white, wooly mammals a few times a year.)

However, the state and the ranchers were just the beginning. "Each piece is different, it's not just all on the old railroad right of way—it was very complex, I spent most of my adult life working on that project," Crofts said. As her bulging file drawer was a testament to, more than 150 different rights of way littered the prospective path, each one "belonging" to different entities, including a reluctant Sun Valley Company.

In almost every case all the right of way ended up being gifted, in large part due to Crofts' intense efforts and skill at negotiating. "A lot of people gave [it] out of the goodness of their heart," she said.

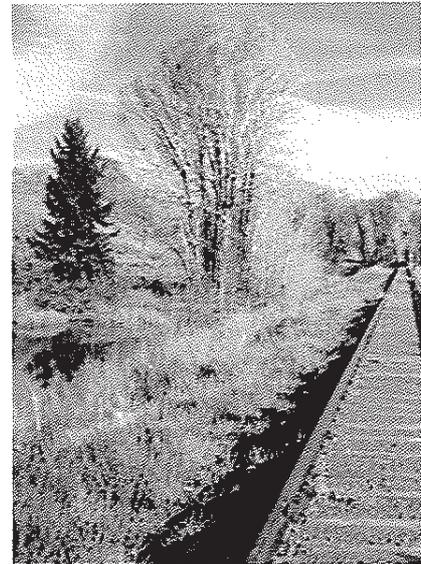
But that goodness of heart wasn't immediately evident. At first there was intense opposition to the idea of a bike path. "There was a lot of fear of having this right of way so close to people's homes. They didn't want to lose their privacy. They thought it would be an invitation to crime," Crofts said.

"There were several private landowners who, as private landowners do, thought it would devalue their property," Harper said. "But we knew what we wanted to do, and at one board meeting we just said 'Let's build it.' "We had one mile, one clean easement. It was the only mile in the county and we decided that we should just show people what it will be," he said.

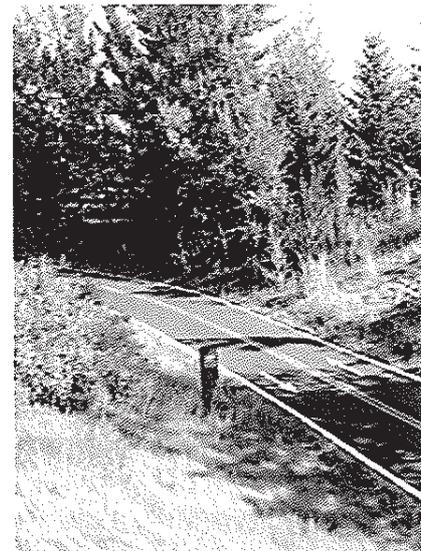
That mile, from the Hulen Meadows Bridge to Adams Gulch Road was paved in 1985. "It didn't go anywhere, but people loved it," Crofts said. "From that point on it just took off," Harper said. "People could see what they were going to get and now were clamoring for it to go past their homes."

The recreation district took this momentum directly to the public and in 1988 asked for a \$1.7 million bond to finish what it had started. The bond passed by 79 percent.

Over the next few years the recreation district was able to negotiate, finance and build 10 more miles of the 20-mile Wood River Trail that



The Wood River branch of the Oregon Short Line



Here is the same view today. The path was rebuilt in 2000. Look closely and you can see the

today travels from Bellevue north to Hulen Meadows. (The Warm Springs and Sun Valley/Elkhorn spurs were financed and built by their respective cities. Combined with the bike path, they make up the 32 miles of the Wood River Trails.)

But then came the hard part.

The residents of the Wood River Valley had been persuaded the bike path wasn't going to propagate muggers; the ranchers had been wooed into believing that bikers in bright spandex wouldn't be spooking their sheep; and the Idaho Transportation Department's wish for the potential of a super highway had been impolitely squished. But no one had consulted Mother Nature.

"Boxcar Bend. That was one major roadblock. Literally," Crofts said. "You see there actually wasn't any right of way left there. There wasn't any land. The river had taken it." In 1969, in an effort to divert the flow of the water and slow the rate of erosion, Union Pacific had put several railroad cars in the river (which are still there), hence the name Boxcar Bend. But it hadn't worked and now in order to have a bike path, they would have to move the Big Wood River. "It took talking a great number of people—including Blaine County and the Idaho Transportation Department—into re-engineering the river so it wouldn't continue to take out the land," Crofts said.

Finally, in 1991, six years and \$4 million after that first mile was paved, the Wood River Trail had its grand opening, but without its final half-mile. The last section to be completed was a stretch from the end of Ketchum's Second Avenue to Reinheimer Ranch just south of the city. It went straight through Sun Valley Company's River Run property. "They didn't want us to have the trail through the middle of their most expensive property in the world," Crofts said. In the end an agreement was reached that it would be moved if the company ever wanted to use it. So, Crofts got busy restoring the historic trestle railroad bridge over Trail Creek, the same bridge whose destruction a decade earlier had made the entire project possible.

In August 1994, the bike path was complete. Bikers, hikers, horses and recreationists of all non-motorized persuasions could pass unimpeded by traffic from Bellevue 20 clear miles north to Ketchum.

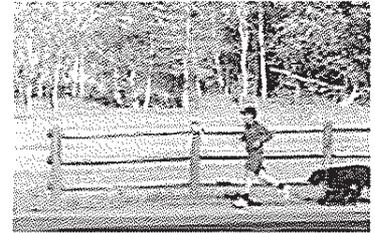
But Crofts and her band of visionaries weren't done. "We always thought really, really big for this. We were never done. I don't think we should be done today," she said. "The grand vision for the Wood River Trails system includes preserving the rights of way at every canyon, that the whole valley will connect not only north and south but east and west, and on the ridgelines, so that no matter where you live you can walk out of your house and be on a trail. So we're not done."

But what was done is remarkable. The first of its kind in the West, the bike path is routinely held up as a shining example in communities attempting to replicate its success. Today, the 130-year-old path is one of the strongest common denominators among the cities of Bellevue, Hailey, Ketchum and Sun Valley. On any given mile you may find a mother strolling with her baby, a jogger fitting in some early-morning exercise or a speeding road-biker calling out "On your left!".

"Conflicts are there for sure, but most of the time folks really engage and share the trails really well," said Jim Keating, current executive director of the Blaine County Recreation District.

"The bike path is one of the critical, wonderful assets of our whole

## *SUN VALLEY* **BIKE**



valley—we have a lot to be thankful for to the pioneers of this project," Keating said. "It's been a pivotal part of our community for a long time, and it will be for a long time to come. It's a physical connector for our entire community, but it's also a symbolic connector around key values our community shares—accessible, healthy, active recreation."

Next time you strap on a pair of Nordic skis, pick yourself up after a roller-blade tumble or take a gentle evening stroll with man's best friend along our bike path, think about what it took for this community to come together and create what you are standing on. Stop, take a minute, look around you, and whisper a thank you to that band of visionaries for bringing about one of the very best things this valley has to offer.

# MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AT LAW

BANNER BANK BUILDING  
950 W. BANNOCK STREET, SUITE 520, BOISE, ID 83702  
TELEPHONE: (208) 331-1800 FAX: (208) 331-1202

## MEMORANDUM

TO: Lisa Horowitz  
FROM: Paul Fitzer  
DATE: November 13, 2012  
RE: Viable land uses on bike path ROW

---

### ISSUE

What land uses may the City utilize the 200' bike path corridor immediately to the east of the bike path and south of Wood River Drive (hereinafter "subject property"); i.e. based upon the conveyance instruments and applicable law, may the City utilize the subject property for uses including but not limited to parking, housing, recreation, community gardens, or even as a lease for an adjacent tax credit housing project limited to "open space" purposes?<sup>1</sup>

### SHORT ANSWER

In the absence of being able to review the specific text wherein the railroads received the ROW property from the federal government, it is impossible to discern whether the City holds a fee simple interest in the property or merely an easement. However, it is relatively clear that the City may utilize the property for any public transportation purpose including any logical ancillary uses which would include parking, trails, park / garden use that is incidental to a public transportation system. Impermissible uses include housing, tennis courts, or other open space uses that cannot be tied to, or consistent with a public transportation system.

### ANALYSIS

---

<sup>1</sup> Supporting this memorandum is an analysis of:

1. Ben Worst's March 20, 2008 memorandum
2. Resolution 307
3. Quitclaim Deed 9551-3 from the Oregon Short Line Railroad dated 9/26/1986
4. Various Correspondence from Ed Lawson from 1995 and responses thereto.
5. Private warranty deed / easement from the Koenigs and Grabher regarding bike trail.

What is distinctly **absent** is the conveyance document from the United States to the Railroads pursuant to the 1875 Act.

**A. The City inherits the legal interest held by the railroads pursuant to the 1875 Act.**

**1. Fee Simple or Easement interest.**

In the State of Idaho, a deed conveys only the interest held by the conveyer at the time of the conveyance pursuant to the law in existence at the time of conveyance. As articulated in *Neider v Shaw*, 138 Idaho 503, 65 P.3d 525 (2003),

When construing an instrument that conveys an interest in land, courts seek to give effect to the intent of the parties to the transaction. The intent of the parties is determined by viewing the conveyance instrument as a whole. Interpretation of an unambiguous conveyance instrument is a question of law to be settled by its plain language. Interpretation of an ambiguous deed is a question of fact to be settled by the language in the conveyance instrument and the facts and circumstances of the transaction.

This analysis appears to be governed by the text and case law surrounding the General Rail Road Rights of Way Act of 1875, 43 U.S.C. §§ 934 *et seq.* (the “1875 Act”) wherein Congress granted a right-of-way through public lands. Pursuant to the stipulated facts in several 1985 U.S. District Court cases<sup>2</sup>, of the 1208 acres of rail road ROW in Blaine County, including the ROW in Ketchum, 985 acres were acquired pursuant to the 1875 Act. It seems relatively clear that the Oregon Short Line Rail Road Company (“OSL”) and the Union Pacific Rail Road Company (“UP”) obtained legal interest, whatever that is, pursuant to the 1875 Act. OSL and UP thereafter quitclaimed their legal interest in the subject property to the City of Ketchum on or about September 29, 1986. In that quitclaim deed, the railroads reference that the subject property was acquired under the 1875 Act. Further, given the width of the quitclaimed interest is the typical 200 foot ROW granted under the 1875, it appears reasonable to conclude that the conveyance was performed under the Act. This begets the question then as what interest did the UP and OSL obtain from the federal government under the Act and subsequently conveyed to the City of Ketchum.

To establish a rail road ROW under the 1875 Act, typically the rail road would survey the land and file the survey with the Department of the Interior. The Department of the Interior then notes the survey on its plats and the Secretary approves the survey by return letter to the rail road.<sup>3</sup> In this instance, we have neither the plat nor the letter, which is a crucial piece of evidence absent to our analysis since it is the examination of the specific text in the conveyance instrument that serves as the crucial distinction in countless rails to trails takings cases. Depending on the text of the conveyance instrument, a railroad might acquire one of at least six property interests: fee simple absolute, fee simple determinable, fee simple subject to a

---

<sup>2</sup> In each of the three decisions, *State of Idaho v. Oregon Short Line R. Co.*, 617 F. Supp. 213 (1985), *State of Idaho v. Oregon Short Line R. Co.*, 617 F. Supp. 207 (1985), and *State of Idaho v. Oregon Short Line R. Co.*, 617 F. Supp. 219 (1985), the trial court held that the rail road had not abandoned any of its railroad lines. We do not have copies of these decisions.

<sup>3</sup> The parties stipulated that OSL was approved as a territorial railroad in 1882. On or about June 30 and August 15, 1883, OSL filed profile maps with the Department of the interior for the Ketchum Branch running from Shoshone to Ketchum which was granted by the Secretary in September, 1883. However the letter confirming whatever interest was conveyed is distinctly absent.

condition subsequent, a general easement, limited easement, or a license. As stated, the resolution of this issue is often resolved on a case by case basis by examining the specific text of the conveyance instrument.<sup>4</sup>

In his memorandum, Mr. Worst cites to *Great Northern Rail Road Co. v. United States*, 315 U.S. 262 (1942) and *Hash v. United States*, 403 F.3d 1308 (C.A. Fed., Idaho, 2005) (“Hash II”)<sup>5</sup> to stand for the conclusion that as a matter of law the United States’ conveyance of a ROW

---

<sup>4</sup> For example in *Neider v Shaw*, 138 Idaho 503, 65 P.3d 525 (2003) the Court’s analysis focused on the text of the conveyance instruments distinguishing the facts therein from its earlier decision in *C&G, Inc. v. Rule*, 135 Idaho 763, 25 P.3d 76 (2001).

This Court recently ruled on the issue of whether a conveyance instrument granted a fee simple or easement to a railroad in *C & G, Inc. v. Rule*, 135 Idaho 763, 25 P.3d 76 (2001). In *C & G*, this Court held that the conveyance instrument unambiguously conveyed a fee simple, not an easement, because, while the instrument was entitled Right of Way Deed, none of the substantive provisions referred to a right-of-way. *Id.* at 767, 25 P.3d at 80. The conveyance instrument in *C & G* did not limit the use of the land to “railroad purposes” and it lacked any language indicating a reversionary interest in the grantors. *Id.*

138 Idaho at 508. Distinguishing its case from *C&G*, the court reasoned that the Bows only conveyed an easement thus created a reversionary interest in underlying land owner.

The conveyance instrument from the Bows to the Railroad contained some printed language and a handwritten provision stating that the “deed is made for *right of way*, station, and warehouse purposes.” While the printed language uses terms such as “grant,” “bargain,” and “sell,” the handwritten clause unambiguously reflects the Bows’ intent to convey only an easement to the Railroad. Further, the Railroad’s interest in the land was limited to railroad purposes by the handwritten clause. In this case, a substantive provision of the conveyance instrument, in handwriting, grants a “right of way” to the Railroad, which this Court has identified as language that creates an easement. The conveyance instrument from the Bows to the Railroad granted an easement to the Railroad rather than a fee simple. As a result, the Bows owned the land in which they dedicated public streets when recording the Bowmont plat. By virtue of the recorded plat, Neider was on notice of NHD’s interest in the roads dedicated in the Bowmont Plat. Therefore, NHD retains an interest in the roads.

*Id.* (Internal citations omitted).

<sup>5</sup> The challenge against the FGROW in *Hash* arose out of a typical trail-wide class action suit alleging it works a taking in all cases, regardless of the railroads’ property interests and the adjacent landowners’ interests. In this case, a portion of the trail at issue in Idaho was established on land that was originally granted to the railroad by an 1875 federal grant. The Pacific and Idaho Northern Railroad was constructed between 1899 and 1911, and discontinued in 1995 when it railbanked the 83-mile corridor and entered into a trail use agreement. The trial court held that there was no taking of adjacent landowners’ property when the corridor was railbanked for those landowners adjacent to FGROW because the federal government held the servient fee interest in the right-of-way. Because the government retained its servient fee interests, the landowners had no property rights in the corridor land and thus had no standing to challenge the conversion to a trail. Upon abandonment the FGROW would pass back to the federal government, and there was no taking if the government chose to retain it and allow trail use rather than dispose of its interest to adjacent landowners. The *Hash* plaintiffs, however, alleged that, as successors to homestead patentees, they had received the servient fee interest as part of the patent underlying the FGROW when the original patent was issued in the late nineteenth century. They based their argument on the fact that the reservations and exceptions provisions in the original patent merely excepted out the railroad’s interest in the right-of-way. Because the government did not also except out its servient fee interest in the FGROW, they claimed, that interest passed via the patent.

The issue is deceptively simple. If the railroad acquired only an easement from the federal grant, then the

---

servient fee interest was retained by the government. That interest was either conveyed by a subsequent patent to a homesteader, or excepted out of patents and retained by the government to be used or disposed of as the government saw fit. If the former, then the United States has no interest in the underlying fee of these FGROWs (though it might still have an interest in the right-of-way itself); if the latter, then land patentees have no interest in the underlying fee and Congress can amend its laws to dispose of or retain that interest as national transportation needs dictate. If the former, then land patentees will be able to acquire possession of FGROW land when the railroad abandons it; if the latter, then the government can authorize its use for other public municipal, highway, or trails purposes upon abandonment.

The landowners' argument raises a number of red flags, however. First, if the patent had issued prior to 1903 and the *Townsend* decision, the railroad would have been deemed to have had fee simple absolute title to the FGROW and no interest in the right-of-way would have passed via the patent. Similarly, if the patent issued between 1903 and 1942, when the government learned that the interests given to the railroads in FGROW were often defeasible fees, and that it had retained a reversionary interest, the government would most likely not have needed to explicitly retain that interest because reverter interests were generally nontransferable. Certainly, after 1942, when the government learned that it was actually granting easements, it should have reserved its servient fee interests when it issued patents-but of course by then most patents had been issued and federal policy toward homesteading had changed. Thus, because the Supreme Court changed its interpretation from a fee simple absolute, to a fee simple determinable, and then to an easement, the retained interests changed as well. And what neither the Supreme Court nor the *Hash* court acknowledged is that the differences in retained interests do matter when we consider whether or not exceptions and reservations in deeds cause the transfer of those interests. Yet the *Hash* court completely ignored dramatic shifts in property rights interpretation in 1903 and 1942. By holding that the failure to reserve the retained interest constituted a grant to the patentees, the court elided the important differences between reversionary interests and servient fee interests.

Besides eliding the differences in retained interests, the *Hash* court also relied on the wrong statute. In 1906, Congress passed 43 U.S.C. § 940, which provided that any railroad that received FGROW and failed to construct its road within five years would find its interests forfeited back to the United States. This is a statute dealing with forfeitures for breach of contract, not for abandonment. The abandonment statute, 43 U.S.C. § 912, clearly posits that once the FGROW has vested in the railroad, its interests can be defeated only upon a finding of abandonment by an act of Congress or court of competent jurisdiction. The *Hash* court calls section 912 merely a quiet title statute, requiring that the government dispose of its interests, if any, to adjacent landowners, but in doing so it misses the significance of the public highway and municipality provisions. If the servient fee had already transferred to patentees, then section 912 cannot cause the transfer of the government's interests in FGROW to municipalities or highway departments without being a taking as well. Either the patentees received the government's interest in all cases involving subsequent patents and the highway and municipality provisions are ineffective, or the latter are effective because the government's interests did not transfer to the patentees, and it is only a year after abandonment that adjacent landowners receive the government's servient fee interest.

Perhaps more troubling, however, is the fact that the *Hash* court did not address two critical issues to the case: abandonment and takings liability. The last paragraph of the section dealing with FGROW, which has acquired a life of its own, states:

We conclude that the land of Category 1 is owned in fee by the landowners, subject to the railway easement. The district court's contrary decision is reversed. On the railway's abandonment of its right-of-way these owners were disencumbered of the railway easement, and upon conversion of this land to a public trail, these owners' property interests were taken for public use, in accordance with the principles set forth in the *Preseault* cases. On remand the district court shall determine just compensation on the conditions that apply to these landowners.

The first problem is that, regardless of whether the federal interest had transferred to patentees, the court held that the railroad had indeed abandoned its FGROW in the absence of a showing that the railroad had obtained either an act of Congress or a decision of a court of competent jurisdiction as required by section 912. Second, the court failed to address whether the scope of a FGROW was sufficiently robust to allow a shift from railroad to trail use without

to a railroad pursuant to the 1875 transfers only an easement not fee title. This summary conclusion is not so simple and it is quite possible that the railroad held a fee simple interest in the ROW. Rather than a one-size fits all generic conclusion, the courts examine each case and each conveyance instrument on a case by case basis leaving, over the course of a century, a myriad of results.<sup>6</sup>

There has been much litigation over the nature of the interest conveyed by the federal government to the railroads and particularly, the disposition of federally granted rights of way (FGROW) upon cessation of railroad use. In 1922, Congress passed 43 U.S.C. § 912 to dispose of the federal government's retained interests in all FGROW in case of abandonment. Under this statute, any federally granted parcel in a railroad corridor continues to exist as a railroad right-of-way, usable only for railroad or other public highway purposes, until Congress adopts a statute transferring the title or until there is a judicial declaration of abandonment, whichever first occurs. If there is a judicial declaration of abandonment, § 912 provides on its face that the title vests in the person or entity owning the legal subdivision traversed by the FGROW in question, unless (a) the FGROW is in a municipality, in which case it goes to the municipality, or (b) a state or local government establishes a public highway on the FGROW parcel within one year of the judicial declaration of abandonment, in which case the government's interest is transferred to the state or local government. The courts have determined that 43 U.S.C. § 912 controls disposition of all FGROW, including the Civil War era grants, the 1875 Act grants, and the pre-Civil War state-mediated grants.

The policy of section 912 was clear: if the railroad corridor could be put to public highway or public municipal use, it should remain in the public domain; but if another public use was unlikely, then it should be returned to the owner of the land from whom it was taken after

---

working an abandonment. Ironically, both sides in *Hash* understood that the issue they appealed was merely the question of who owned the servient fee interest in FGROW. That was all they briefed and argued before the court, yet the court held that the railroad had abandoned its FGROW and ordered compensation for the adjacent landowners. Ordering compensation effectively found that the scope of the FGROW was not sufficiently large to encompass trail use, even though the congressional language of the federal grants clearly indicates that they are given for multiple transportation and telecommunications purposes.

There are four principle issues that require further discussion. The first is the homestead precedents ignored by the court. The second is the court's dismissal of section 912 and its reliance on section 940, the forfeiture statute rather than the abandonment statute in interpreting the government's retained interest. The third is the finding that abandonment had occurred without meeting the criteria of section 912 (act of Congress or determination of a court). Section 912 has been held to apply to both defeasible fee and easement FGROW when considering the question of abandonment, and the court's failure to require fact finding on abandonment was grossly improper. Fourth, the court ordered compensation, without argument or briefing, which completely reversed prior decisions holding that compensation is due only upon a determination that the scope of the easement is inadequate for trail use.

<sup>6</sup> The analysis can be more ably described as cited frequently under the Presault II standard. Under *Preseault v. United States*, 100 F.3d 1525 (Fed.Cir.1996) (*en banc*) ("*Preseault II*") the determinative issues for takings liability are (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).

the railroad use ceased and a determination was made that no subsequent public use was needed. That policy accurately reflected federal land policies throughout most of the twentieth century, but would prove inconsistent with the dawning awareness that publicly funded transportation corridors, once destroyed, would be virtually impossible to reassemble. Hence, in 1988, the National Trails System Act was amended to provide for the retention of the government's reversionary interests in these FGROWs. It now states that any railroad right-of-way, upon abandonment, would be retained by the federal government if not converted to a public highway within one year. These retained rights may be used for the location of recreational trails pursuant to a grant by the Secretary of the Interior. This provision also was necessitated by the awareness that the railbanking policy, which allowed corridors to remain intact for future reactivation, was contradicted by federal land policies that allowed the destruction of the very corridors Congress was trying to save.

All of this made perfect sense when one considers the Supreme Court's interpretations of the property rights granted under these federal right-of-way statutes at the time section 912 was passed. If they were fee simple absolute, then the federal government retained no interests and the railroad could freely sell the corridor for highway, trail, or any other private use; whereas if they were held as limited fees or defeasible fees, then the future interest retained by the government would ripen upon abandonment to fee ownership that could be transferred for use as a public highway or could be transferred to the patentee. After 1988, with the change in policy toward protecting railroad corridors and in support of the National Trails System Act, the reverted FGROW would be retained for purposes of public trail development, or shifted to use as a public highway, all in a manner consistent with the public character of these grants and with an eye toward retaining corridors intact for future transportation uses.

Mr. Worst's citation to *Great Northern* and *Hash* is ironic as the entire logic of section 912 was called into question when the Supreme Court reversed its consistent interpretation of rights-of-way in a series of cases involving challenges to control over mineral rights. In 1942, *Stringham* was reversed in *Great Northern Railway Co. v. United States (Great Northern)*, where the Court held that an 1875 grant to the Great Northern Railroad conveyed an easement and not a limited fee. This case is the first indication that federal rights-of-way might not be deemed fee interests, but rather mere easements<sup>7</sup> when claims to subsurface mineral rights were involved.<sup>8</sup>

---

<sup>7</sup> This change in interpretation was made possible in large part by the gradual recognition of a new property right, the robust exclusive railroad easement (as distinct from the common law non-exclusive easement that would have been inadequate for a railroad's needs). The Court also changed its interpretation of the railroad grant on the basis of changed legislative attitudes toward the railroads between 1871 and 1875, as signaled by the end of the checkerboard grants. The best way to think about the shift from fee to easement is to follow the Court's explanation in 1898 that this new railroad easement is substantially different from a common-law easement, so different that it looks like a fee simple, because it has the "attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property." In essence, the interest is a limited fee for railroad purposes (minerals are not a railroad purpose) that terminates upon discontinuation of railroad use. The unfortunate use of the term "easement," however, has proved to have far greater consequences than the Court foresaw in 1942.

<sup>8</sup> Indicative that the railroads held a fee simple interest in the Ketchum ROW, it should be noted that the railroad's conveyance to the City specifically excepted out of the conveyance its rights, title, and interest in all minerals and mineral rights which it conveyed to Union Pacific Land Resources Corporation. **THIS HIGHLY SUGGESTS A FEE SIMPLE INTEREST.**

To justify its decision of cutting back the railroad's property rights from a fee to an easement, the Court in *Great Northern* relied extensively on what it perceived to be a shift in federal policy from the relatively generous 1862-1871 land grants (that included the checkerboard grants-in-aid) to the relatively stingy 1875 Act (that merely gave rights-of-way). The Court assumed that the change in policy indicated a retrenchment of federal support consistent with a grant of an easement rather than a fee. The *Great Northern* Court did not discuss the issue of whether the 1862-1871 grants should also be deemed easements, nor did it seem concerned by the fact that the right-of-way provisions of all the statutes are virtually identical and that there is no legislative history indicating that a different property right was intended for the corridor land.<sup>9</sup>

The Court also failed to address the implications of its new decision on section 912. If the retained federal interest was now a servient fee and not a possibility of reverter, then there would be no reversion of the present estate in the federal government to trigger the application of section 912 when a railroad abandoned its FGROW grant. So a number of possibilities were left unresolved in *Great Northern*. Either section 912 (which spoke of vesting the government's interest in various transferees after abandonment) applies only to an FGROW held as fee simple determinable and not those now discovered to be held as easements, in which case the applicability of section 912 would be greatly diminished. Or, section 912 would continue to apply to both servient fee and reversionary interests, regardless of whether the FGROW was a defeasible fee or an easement, and federal rights in FGROW would not vest in anyone else until after abandonment and the removal of the railroad's use, thus maintaining federal control and not rendering a Congressional act irrelevant. Or, section 912 would apply only to FGROW lands that had not been patented out to homesteaders after the railroad grant but before the railroad abandoned, thus limiting its applicability to only those adjacent lands still retained in federal ownership. This last argument, which makes section 912 virtually meaningless, is the one adopted by the court in *Hash*, and makes no sense on numerous levels. In cases today involving the shift from railroad to interim trail use, courts often rely on the relatively narrow distinctions between railroad easements and defeasible fees, which arose in the mineral context, to create distinctions in property rights that frustrate the ability of railroads and local governments to shift transportation uses to comport with new needs and technologies.

In short, if the government's interests in 1875 Act corridors passed to homesteaders, then section 912 is inapplicable because the property rights had passed out of the government's hands before the railroad abandoned and the law became operational. If, however, the government's retained interests in 1875 Act lands did not pass to homesteaders, then they would be subject to disposal pursuant to section 912, and subsequent amendments. Because most courts have held that patentees did not receive the government's retained interest in FGROW, and as a result section 912 is applicable, the *Hash* court's refusal to engage any of these cases is particularly

---

<sup>9</sup> There are numerous inconsistencies with the *Great Northern* decision, not least of which is its failure to acknowledge the fact that all federal railroad grants of right-of-way across the public lands had used the same term-a "right-of-way"-and so it made little sense to identify some as fee simple absolute, some as fee simple determinable, and others as easements. To justify a finding that different property rights were intended despite use of the same property terminology, the Court had to rely on changing legislative attitudes that somehow could be characterized as evidencing intent to create three distinct property interests. But of course, there is no such legislative history, and the fact that Congress discontinued the checkerboard grants does not mean it intended to give a different property right to the railroads in their corridor grants, especially since Congress did know how to limit corridor grants to easements, which it routinely did in legislation pertaining to railroad access across Indian lands.

troubling. The Ninth Circuit, in *Vieux v. East Bay Regional Park District*, stated that section 912 "applies to grants both before and after 1871." The United States District Court for the District of Idaho, in *Idaho v. Oregon Short Line Railroad Co.*, held that "§§ 912 and 316 apply to 1875 Act rights-of-way." The Seventh Circuit stated that the "language of § 912 . . . plainly refers to all Congressional grants of public lands for railroad rights of way," in *Mauler v. Bayfield County*.

To sum this up then, the railroads acquired the Ketchum ROW pursuant to the 1875 Act. However, section 912 applies insofar as any federally granted parcel in a railroad corridor continues to exist as a railroad right-of-way, usable for public highway purposes unless and until Congress adopts a statute transferring the title or until there is a judicial declaration of abandonment, whichever first occurs. There has been no abandonment. In 1988, Congress modified the dispositional scheme of 43 U.S.C. § 912 as part of the National Trails System Act Amendments of 1988, 16 U.S.C. § 1248(c)-(g). The Trails Act Amendments of 1988 provides that unless a public highway is established on FGROW per 43 U.S.C. §§ 913 or 912 within one year of a judicial declaration of abandonment, the federal interest in FGROW "shall remain in the United States." 16 U.S.C. § 1248(c). Thereafter, as seen in the next section, the railroad could transfer its interest to the City of Ketchum to continue, at a minimum, utilizing the property for any public highway purpose.

## 2. Authority to Transfer the Railroad's Interest to Ketchum

Although Mr. Worst concludes that the Railroad's interest is in the nature of an easement, which may or may not be true, he correctly concludes that the railroads had the authority, at a minimum, to transfer its interest to the City of Ketchum pursuant to the Federal Highway Act contained in 23 U.S.C. § 316 (1921) which provides that the

Consent of the United States is given to any railroad ... to convey to the State transportation department..., or its nominee, any part of its right-of-way or other property in that State acquired by grant from the United States.

By Resolution 307, the City accepted the conveyance of the subject property specifically reference that it "has been nominated by the State of Idaho as its nominee to accept conveyance..." This is an obvious reference to the Federal Highway Act. As stated herein, further support for the conveyance to the City can be found in 43 U.S.C. § 316 which provides:

§ 913. Conveyance by land grant railroads of portions of rights of way to State, county, or municipality.

All railroad companies to which grants for rights of way through the public lands have been made by Congress, or their successors in interest or assigns, are authorized to convey to any State, county, or municipality any portion of such right of way to be used as a public highway or street: Provided, That no such conveyance shall have the effect to diminish the right of way of such railroad company to a less width than 50 feet on each side of the center of the main track of the railroad as now established and maintained.

3. The Scope of the Easement is unknown absent an examination of the conveyance instrument.

Mr. Worst concludes that the use of the ROW property for public housing exceeds the scope of the easement / fee simple determinable interest in the property. This is likely accurate. However, it leaves open what in fact are the allowable uses in a transportation corridor. Mr. Worst again cites to the *Great Northern Rail Road Co.* case which takes an exceptionally narrow view arguably reversed by subsequent congressional acts notably the rails to trails act, 16 U.S.C. § 1248(c).

Any sound interpretation of the interplay of the pre-1871 and 1875 Act railroad grants, the Homestead Act, section 912, and subsequent legislation must begin from the position that the goal of the railroad grants was to provide a system of public transportation and communications that was recognized as being of the highest public priority. And a final important issue is whether the scope of the 1875 Act federal railroad easement is sufficiently robust to permit railbanking and trail use without running afoul of the takings clause. Some states have held that railroad easements can be converted to trail uses without violating the scope of the easement. Others have held that trail use is beyond the scope and thus converting the corridor to a trail requires compensation. Although no court has yet ruled on the scope of these 1875 Act easements, the language of the grants and the purpose behind the grants support the conclusion that railbanking and trail use fit well within the parameters of the easement and that consequently no takings liability arises when trail use is made.

In support of an enlarged understanding of the scope of these easements is their similarity to fee interests. Numerous courts have rejected the stark distinction between the limited fee of *Townsend* and the easement of *Great Northern*, holding instead that the railroad easement is closer to a fee simple than to the common-law private easements with which it is often confused. The Supreme Court explained that a railroad easement is substantially different from a common-law easement, so different that it looks like a fee simple, when it stated that a railroad easement is "more than an ordinary easement" and has the "attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal property." The District Court of Idaho also explained:

[U]nder traditional rules, a simple easement carries with it no right to exclusive use and occupancy of the land. Even if the 1875 Act granted only an easement, as opposed to a higher right-of-way interest, Congress had authority, by virtue of its broad power over interstate commerce, to grant such easements subject to its own terms and conditions - which were to preserve a corridor of public transportation, particularly the railroad transportation, in order to facilitate the development of the "Western vastness." Congress could pre-empt or override common-law rules regarding easements, reversions, or other traditional real property interests. In other words, even if the 1875 Act granted only an easement, it does not necessarily follow that Congress would or did not intend to retain an interest in that easement. This is consistent with another well-settled rule of statutory construction which provides that conveyances by the Government will

be strictly interpreted against the grantee and in favor of the grantor.<sup>10</sup>

Many courts are grappling with the fact that the railroad easement is, in essence, a new estate in land that looks like a defeasible fee without mineral rights. Even though individual private parties may not create new estates, the federal government can. Just as the limited fee and the easement are not typical common-law real property interests, the government's retained interest is not a typical possibility of reverter or servient fee. As the court in *Idaho I* explained:

Congress clearly felt that it had some retained interest in railroad rights-of-way. The precise nature of that retained interest need not be shoe-horned into any specific category cognizable under the rules of real property law. . . . [C]ongressional committeemen in the early 1920's spoke of this retained interest in terms of an "implied condition of reverter." Regardless of the precise nature of this interest, Congress clearly believed that it had authority over 1875 Act railroad rights-of-way. [Section 912] evince[s] an intent to ensure that railroad rights-of-way would continue to be used for public transportation purposes, primarily for highway transportation.<sup>11</sup>

The renaming of the right-of-way in *Great Northern*, from a limited fee to an easement, concerns the balance of rights as between the federal government and the grantee railroad and should not indicate that the scope of activities that can be undertaken on the railroad's easement are dramatically less than could be undertaken on a limited fee.

Even if one were to adopt common law property rules that easements are mere servitudes on an underlying fee, while defeasible fee interests are corporeal hereditaments, any interpretation of the nature of the federally-granted rights-of-way must take into account the purpose of the grants. These right-of-way grants were not made simply to create a railroad, but were to create public transportation and communications arteries. The typical federal railroad grant would be titled: "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military, and other purposes." Even if the 1875 Act did not carry the same title, the grants of these federal rights-of-way did carry with them the obligation to allow the placement of telegraph lines, use for parcel post, and required free or reduced rates for military transportation. To imagine that the land granted to the railroads under the 1875 Act are mere railroad easements that terminate upon the cessation of rail use assumes that the federal government has no other interest in these corridors than providing subsidies for the railroads. Clearly, that is not the case. Regardless of what we call this "railroad easement," it must contain within it the entire array of transportation and communications uses.

Besides the integrated national defense and transportation policies behind the federal railroad grants, there must be implicit within them a retained interest in the government sufficient to protect these overall national policies. Thus, when the court in *Rice* stated that the "agency issuing the patent had neither the actual nor the apparent authority to convey the interest of the United States under the right of way, then, of course, the deed, although it purported so to do, did not convey that interest," it could only have meant that that retained interest was of such

---

<sup>10</sup> *Idaho I*, 617 F. Supp. 207, 212 (D. Idaho 1985) (citing *Union Pacific* and *Great Northern*)

<sup>11</sup> *Id. Accord* Marshall v. Chi. & Nw. Transp. Co., 31 F.3d 1028, 1032 (10th Cir. 1994) (following the *Idaho I* decision).

a quality that it could not be conveyed out of the government's possession because there were other important governmental purposes protected by the grant.

One of the most common challenges by opponents to rail-trail conversions is that trail use exceeds the scope of a railroad grant and, therefore, when a corridor is railbanked and interim trail use is made of the land pursuant to 16 U.S.C. § 1247(d), the federal government has taken the reversionary or underlying fee interest from the adjacent landowner and owes compensation. When the Supreme Court upheld the constitutionality of section 1247(d), it held that whether or not the statute worked a taking was to be determined in individual cases through a Tucker Act claim. After a number of decisions looking at the state-law property rights and the interplay of federal ICC jurisdiction, the Court of Appeals for the Federal Circuit eventually held that compensation was due in that particular case because the state-law railroad easements had terminated prior to the corridor's railbanking, and that the possession of the corridor land had returned to the landowner. Subsequent takings cases have found that whether compensation is due or not depends on whether the state law property rights have been unduly interfered with by the federal railbanking statute. Not surprisingly, in states in which the easement is robust and general, no compensation has been found due; and in states in which the easement is deemed to be narrowly drawn and specific to railroad use only, compensation has been ordered.

*Hash* is the first case to specifically address the compensation obligation with regard to FGROW, and not to state-law created railroad easements. But using the reasoning of the *Preseault* line of cases and the state-law cases, it should be clear that no taking has occurred when the federal government passes a law holding intact easements that were granted for multiple transportation and communication purposes when the railroad use ceases but other public uses continue. There are numerous reasons for this conclusion. First, FGROW are creatures of federal law and not state law and therefore we look to federal actions to determine the scope of the rights conveyed. Because these rights-of-way had multiple uses and served important postal and military needs, the scope must be deemed broader and infused with a greater public purpose than merely a grant to aid a railroad corporation. Also, because FGROW are creatures of federal law, federal laws can alter the property rights without running afoul of the constitutional protections on property so long as the rights are not vested, because no one has a vested right to a particular statutory scheme. Similarly, congressional actions, as in the passing of section 912, are relevant in interpreting the scope of federally granted property rights. The fact that Congress believed the government retained an interest in these FGROW that survived homestead patents is a good indication that Congress meant to dispose of the federal interest only after abandonment.

Furthermore, what the railbanking statute does is provide for a different disposition of federal interests in FGROW *before* the railroad abandons, because abandonment is the act that causes the vesting of landowner rights in corridor land. By amending section 912 through 16 U.S.C. § 1248(c), Congress chose to retain property that in the past it had chosen to give away because giving it away frustrated an important public purpose (preserving intact rail corridors), and it chose to retain only those properties that had not yet vested in landowners through abandonment. Thus, when the *Hash* court ordered compensation on the grounds that the railbanked corridor had been abandoned, it doubly erred. It erred by ignoring the issue of abandonment which is the heart of the railbanking statute. To the extent section 1247(d) holds

that railbanking is not abandonment, then how can a railbanked federal right-of-way be deemed abandoned? Such a finding shows that the court does not understand the interplay of abandonment and railbanking. Then when it further ordered compensation because the corridor is abandoned, it compounded its error. Because even if the corridor were abandoned (and not railbanked), it is entirely wrong to view the federal rights as so limited to railroad uses only that they could not accommodate shifting technologies and other public purposes. If the federal government gives to a railroad company a right-of-way for multiple public purposes, and then it determines that too many corridors are being destroyed which should instead be preserved, and thus it passes a law to preserve them, it makes no sense whatsoever to require the government pay again through compensation to landowners whose rights in the corridor land had not yet vested.

### **CONCLUSION**

The City of Ketchum has inherited whatever right was held by the railroads and the federal government. Whether viewed as an easement disguised as a fee or in fact a fee simple interest, the purpose of the conveyance is for the City to continue to utilize the property in question for the purpose of a public transportation system including any incidental uses appurtenant thereto, which should include park/trail system, gardening, parking lot, etc. but will not include tennis courts, or other ancillary open space requirements merely appurtenant another land use.