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SPECIAL FEATURES

RAILROADS ACROSS TRIBAL LANDS

Carye Cole Chapman*

The United States Supreme Court has been inconsistent in its interpretation of American Indian treaties and of the United States government's role in performing its obligations under the treaties.¹ More recently, the Supreme Court has taken a more defining role.² The Court and Congress have undertaken to correct some of the mistakes they made in the past. Although they have not been able to correct all the mistakes, they are correcting some of the larger problems.

The largest area of concern involves property issues. In the treaties with the Indian tribes, the government took ownership of the land from the tribes. In return, the government recognized the Indians' possessory control over their remaining land as if it were owned in fee. In most cases, however, the government retained the right of final approval over all further dealings with this Indian land. In particular, the government, anxious to promote expansion and fulfillment of "Manifest Destiny," gave the railroad easements over tribal lands.³ The easements were to last as long as the railroads needed the land. When a railroad no longer needed the line or abandoned the line, the land was to revert back to the Indians. Prior to 1871, the government read the easements as giving a limited fee which only included surface rights; it did not include any mineral rights. After 1871, Congress decided surface rights in limited fee gave too much control to the railroads, and instead, it began giving only easements which would revert back to the tribe. But, as usual, there has since been much litigation over what Congress "intended" to give the railroads. As a result some railroads, after abandoning the line, sold the land or used it for another purpose. Thus, the issue becomes who is the rightful owner of the land? Do abandoned easements revert back to the tribe, remain in control by the railroad, or does a third person now own the land?

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1. See, e.g., Charley Carpenter, Note, *Preempting Indian Preemption: Cotton Petroleum Corp. v. New Mexico*, 39 CATH. U. L. REV. 639 (1990); Mike Townsend, Note, *Congressional Abrogation of Indian Treaties: Reevaluation and Reform*, 98 YALE L.J. 793 (1989); William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1 (1987); James E. Lobsenz, "Dependent Indian Communities": A Search for a Twentieth Century Definition, 24 ARIZ. L. REV. 1 (1982); FELIX R. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 64 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

2. See *supra* note 1.

3. Act of July 26, 1866, ch. 240, 14 Stat. 236.

This feature will discuss one such situation which involves lands of the Choctaw and Chickasaw Tribes and the Chicago, Rock Island and Pacific Railway Co. (Rock Island). In 1873, Congress granted Rock Island an easement across tribal lands in southwestern Oklahoma. The railroad used the lines for over 100 years. As transportation evolved from the use of railways to the use of roadways, many railroads experienced financial difficulties. Rock Island was one of these railroads. On June 2, 1980, the District Court for the Northern District of Illinois ordered the total "systemwide abandonment of the Rock Island's lines and discontinuance of its service."⁴ Under the language of the treaty, when Chicago abandoned the line, the land was to revert back to the tribes. However, in the bankruptcy proceedings, Rock Island sold the railroad lines to the State of Oklahoma. The State then gave Sprint the right to lay fiber optic lines under the tracks. In addition, the trustee in the bankruptcy proceeding sold the mineral interests to a third party.

The problem came to light when subsequent purchasers of some of the tribal lands learned of the earlier sale to the State. These landowners want their land back.⁵ They bought this land knowing it was subject to the easements created by Treaty and by an Act of Congress. The landowners have taken the matter to court. However, because of the complications of certifying a class and the remedy sought, the landowners have been unsuccessful in their attempts to have the problem corrected. The State has argued that Rock Island did not abandon the lines and, therefore, the land has not reverted to the abutting landowners, but remains in the State's hands.

Because this feature inquires into the laws concerning American Indians, treaties, acts, and legislation must be viewed in light of their history and circumstances. The first section of this feature will discuss the general history of the westward move of the tribes. The second section will discuss the law regarding the interests granted to the railroads. The final section will summarize the possible scenarios for resolution of this problem.

The History

From the History Books

As the idea of "Manifest Destiny" and the population of the United States began to grow in the middle to late 1800s, people pushed Congress into opening up lands in the west for settlement. In response, Congress opened up vast areas for white settlement. Much of the lands Congress opened up had belonged to Indian tribes. However, Congress in its treaties with the tribes

4. Order of the District Court for the Northern District of Illinois (Feb. 11, 1981), *aff'd*, Order of the District Court for the Northern District of Illinois (Oct. 13, 1981).

5. *Price v. Oklahoma*, No. C-88-67 (District Ct. Jefferson County, Okla. June 11, 1990) (dismissed without prejudice).

had assumed control over this land. In return for land cessions, Congress gave the tribes new land and new homes in what is now the State of Oklahoma.

As reflected in many movies about the "Old West," settlers were concerned with sharing their land with Indians. Most people viewed Indians as uncivilized barbarians, and thus the popular idea of "civilizing" and assimilating the Indians spread like wildfire. American society was primarily concerned about tribal concepts of communal land ownership, a basic precept of Native American culture. Many felt that "a fundamental difference between barbarians and a civilized people is the difference between a herd and an individual."⁶ The popular view was that tribal lands should be broken up, allotted, and given to individual Indians in an effort to "civilize" them. Since the white man's concept of property and the Indians' concept were polar opposites, many believed that the place to start the process of civilization was with land.⁷

In the 1870s, some Commissioners of Indian Affairs, such as Edward P. Smith and J.Q. Smith, began advising allotment of tribal lands.⁸ The Commissioners voiced the opinions of the dominant society by pointing to the many benefits that accrued to both whites and Indians. Some of the benefits included giving each Indian his own homestead, promoting individualism, protecting the Indians, lifting governmental burdens, and freeing up immense amounts of land for settlement.⁹ Further, interspersing whites with Indians promoted cooperation and set an example for the Indians.

American society was also concerned that tribes were wasting land and natural resources by not developing and exploiting them. The white man argued that if the Indians were not developing the land, then they did not need the land. Therefore, Congress should give the land to people who would use it "properly" and make it profitable.¹⁰

Not everyone considered allotments as benefiting tribal civilization. The most important aspect people overlooked was that destroying the generally communal way of Plains Indian living, necessarily destroyed the culture of a people. Congress had already taken their traditional homelands; now it was taking back some of what they had promised as compensation for earlier treaty cessions. In some cases, allotment caused tribal governments to crumble, but destruction of tribal governments was not always the end result. The Five Civilized Tribes¹¹ were an example of how communal society could

6. D.S. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* 8-9 (Francis Paul Prucha ed., 1973).

7. *Id.* at 4-9.

8. EDWARD P. SMITH, *REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS* 245 (1873); J.Q. SMITH, *REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS* ix, xxv (1876).

9. *Id.* at 4-13.

10. *Id.* at 17-18.

11. The Five Civilized Tribes included the Choctaw, Creek, Seminole, Chickasaw, and Cherokee tribes, who were located in the Indian territory (new eastern Oklahoma). OTIS, *supra*

flourish. New systems of government and schools¹² were established, however, society did not applaud these accomplishments as today's society would applaud them.

On February 8, 1887, President Grover Cleveland signed the General Allotment Act of 1887 (commonly known as the Dawes Act) into law. The Act allotted tribal lands¹³ and opened up new "surplus" areas for settlement.¹⁴

Newly opened lands required ready access for potential settlers and railroads emerged as the most efficient and safest way to travel. Congress gave the railroad companies the land needed to build new access lines. Much of the land that Congress gave to the railroads required access over Indian lands. Thus, in several acts,¹⁵ Congress created railroad easements over these lands.

In the treaties¹⁶ Congress negotiated with the Five Civilized Tribes,¹⁷ the tribes consented to the building of roads over their land.¹⁸ In the beginning, the idea of railroads crossing tribal lands was not as bad an idea to some tribes as might be expected. Some viewed it as a means to industrialization and economic growth. Tribes also realized that cooperation and compromise would provide more control over encroachment than resistance would. In addition, they realized that if they resisted, Congress might seize control and grant the rights of way without consulting the tribes. The aftermath might destroy them.

The Indians were not as naive as many believed; many tribal leaders were well-educated and quite capable of understanding the ramifications of the coming of the railroads. The Five Civilized Tribes attempted to negotiate and

note 6, at 11.

12. *Id.* at 10-11.

13. The General Allotment Act opened up lands in the Oklahoma Territory and in the rest of the United States. The Act did not affect the Five Civilized Tribes. COHEN, *supra* note 1, at 130-31.

14. Many of the lands opened up in the Oklahoma Territory constituted the land for the land runs. *Id.* at 131.

15. *E.g.*, Act of July 25, 1866, ch. 240, 14 Stat. 236 (granting to the Union Pacific Railroad Co. Southern Branch) (now the Missouri-Kansas-Texas Railroad); Act of July 4, 1884, ch. 179, 23 Stat. 73 (granting to the Atchison, Topeka and Santa Fe Railway Co.); Act of Feb. 27, 1893, ch. 171, 27 Stat. 492 (granting to the Chicago, Rock Island and Pacific Railway Co.); Act of Mar. 30, 1896, ch. 82, 29 Stat. 80 (granting to the St. Louis-San Francisco Railway Co.); *see* W.F. SEMPLE, OKLAHOMA INDIAN LAND TITLES ANNOTATED 263-64 (1952).

16. Choctaw and Chickasaw Treaty, Apr. 28, 1866, 14 Stat. 769; Creek Treaty, June 14, 1866, 14 Stat. 785; Cherokee Treaty, July 19, 1866, 14 Stat. 799; Seminole Treaty; Mar. 21, 1866, 14 Stat. 759; *see* SEMPLE, *supra* note 15, at 259.

17. This feature will be limited to the Five Civilized Tribes, since covering all the tribes would be too involved.

18. SEMPLE, *supra* note 15, at 259.

develop plans that would give them some control over and some percentage of the railroads.¹⁹

Far from being forced into accepting one north-south and one east-west railroad right-of-way, the tribes pressed Washington to grant much greater privileges for railroad companies. Preliminary drafts submitted by tribal delegations and their attorneys included large land grants to the companies, sales of land with the proceeds going to buy railroad stock, and permission for railroads to build anywhere without consulting tribal legislatures.²⁰

The Cherokee wanted to negotiate two seats on the board of directors of one of the railroad companies.²¹ Two tribes even chartered their own railroad companies in an effort to create tribal railway systems that would provide transportation to all as well as benefit the tribes.²² These constituted some of the methods the tribes used to control their fate. William A. Phillips of Kansas eloquently summarized the overall sentiment of the tribes:

Tribal rights and industrial growth could both be served but only if the Indians were allowed to move and change at a rate that allowed them to prepare and to make solid the cultural transformation required We must not permit our wish, that they be civilized like us to run away with our judgment.²³

Not all of the tribes opened their arms to the railroads. The Cheyennes, Arapahos, Kiowas, and Comanches threatened war if the railroad crossed their lands. After several years of futile negotiations, the Five Civilized Tribes began to feel more like these tribes. The railroads had not accepted any of their offers. Congress and the Commissioner of Indian Affairs also discouraged many of the proposed plans.²⁴ In the areas in which Congress had already granted railroads easements, Congress did not involve the tribal governments in the decisions. In addition, the railroad companies also acted in disregard of certain provisions of the granting acts.²⁵ The tribes tried many different approaches²⁶ to gain control, but Congress and the Commissioner of Indian Affairs prevented these different measures.

19. H. Craig Miner, *"Little Houses on Wheels": Indian Response to the Railroads, Railroads in Oklahoma*, in *RAILROADS IN OKLAHOMA* 7-8 (Donovan L. Hotsommer, ed., 1982).

20. *Id.* at 9.

21. *Id.* at 11.

22. *Id.* at 14.

23. *Id.*

24. *Id.* at 13-15.

25. *Id.* at 13.

26. These approaches included "arguing over building materials, new rights-of-way, taxes, or any other area where Indian governments could assert their sovereign powers to gain some hand in determining the economic future." *Id.* at 15.

The Foundation of Indian Law

To truly understand the significance of the treaties, the reader must remember the historical factors at work in the treaty negotiations, including "relative bargaining strength, authority of the negotiators, tribal history and culture, and the intent and understanding, complicated by language problems of the signing parties."²⁷ Some commentators have likened Indian treaties and agreements to adhesion contracts.²⁸ Often the provisions were not fair to the tribes. Fortunately, the federal government bound itself to these agreements and the Supreme Court continues to interpret them as the supreme law of the land. From these treaties, the general notions of the law regarding the Indians derives its force.

One of President Andrew Jackson's first actions in office, in 1829, was to force tribes to move west to free the lands in the east for white settlement. Then, in 1830, Congress passed the Indian Removal Act.²⁹ Congress had authorized President Jackson to trade with the Indians: eastern lands with some of the land west of the Mississippi. The wording of the act appeared to be generous and allowed for voluntary removal by the tribes. The provision to move or lose federal protection influenced the Indians' real choice.³⁰ The actions of the military, which followed the passage of the act, also demonstrated that the migration was more of a forced move to the west.³¹

After the Civil War, the Union punished the Five Civilized Tribes living in Indian Territory for their allegiance to the Confederacy. In 1866, Congress forced the tribes to negotiate new treaties that ceded western portions of tribal territory, abolished slavery, granted rights-of-way for railroads, provided for eventual allotment of tribal lands, and authorized increased federal control.³² The other tribes, located in what is now Oklahoma, suffered the same fate.³³

In 1871 Congress decided that it would no longer deal with tribes through treaties. By using treaties, the federal government had dealt with the tribes as foreign or sovereign powers. Congress no longer wished to follow this view of the Indians. In 1869, the Commissioner of Indian Affairs expressed the current view concerning the new status of tribes:

The Indian tribes of the United States are not sovereign nations, capable of making treaties, as none of them have an organized government of such inherent strength as would secure a faithful obedience of its people in the observance of compacts of this

27. COHEN, *supra* note 1, at 48.

28. *Id.* at 222 n.43.

29. Ch. 148, 4 Stat. 411 (1830).

30. COHEN, *supra* note 1, at 81.

31. *Id.* at 91.

32. *Id.* at 104.

33. *Id.* at 104.

character. They are held to be the wards of the government and the only title the law concedes to them to the lands they occupy or claim is a mere possessory one They have become falsely impressed with the notion of national independence.³⁴

Although the government discontinued making treaties, it did not stop negotiating with the tribes. The government now used agreements and statutes.³⁵

The Scope and Effect of Indian Law

Indian treaties are enforced through the Supremacy Clause of the U.S. Constitution.³⁶ The Constitution accords the same standing to Indian treaties as it does to foreign treaties: treaties are to be considered superior to any state law or constitutional provision.³⁷ The unique circumstances of Indian treaties require a more careful consideration by courts.

As mentioned above, although treaties were often under duress and bribery, the law will not inquire beyond the words of the actual document. The courts construe treaties using special canons of construction,³⁸ and may give extra weight to certain considerations. Thus, the rules are that "treaties [are to] be liberally construed to favor Indians, that ambiguous expressions in treaties must be resolved in favor of the Indians, and that treaties should be construed as the Indians would have understood them."³⁹ The courts also hesitate to find the abrogation of a treaty unless Congress has shown a clear and specific intent to do so.⁴⁰

The Supremacy Clause provides that, in the event of conflict, federal law preempts state law.⁴¹ The question of preemption asks whether the federal government has used its power to act in an area. If the federal government has not legislated in a certain area, then the state has the authority to legislate in that area. This doctrine of law is particularly important in the area surrounding Indian law,⁴² since this field is governed by specific acts of Congress, through treaties, acts, agreements, executive orders, and statutes. In federal Indian law, the preemption question takes on a new angle. The federal government has used its power to regulate Indian affairs. The question then focuses on whether the federal government has given any of its residual power to the states to act in certain areas. In some areas, the federal

34. *Id.* at 106.

35. *Id.* at 107.

36. *Id.* at 207-12.

37. *Id.* at 62.

38. *Id.* at 62-63.

39. *Id.* at 222.

40. *Id.* at 223.

41. U.S. CONST. art. VI, cl. 2.

42. *Id.* at 270-71.

government has given the states power to act.⁴³ Through treaties and acts, the federal government has exercised all its power over ownership and use of Indian land. Under the acts and treaties discussed in this feature, the federal government has preempted the State of Oklahoma from using its laws to resolve the issue in question.

The Problems Begin

It did not take long for problems regarding the railroad grants to surface. As early as the 1930s, the tribes and landowners brought suit to determine the interest granted to the railroads.⁴⁴ The predominant issue concerned whether Congress granted the land in fee or merely an easement to the Indians.⁴⁵ If the grant was a fee, the railroads were entitled to use the rights-of-way in any manner they wanted, or freely transfer them; if the grant was an easement, it would revert to the servient estate upon abandonment. The dispute surrounded the interpretation of the language of the Act of July 26, 1866, and a determination of Congress' intent in the provisions granting the railroads rights-of-way.

The Supreme Court of the United States in *Great Northern Railway Co. v. United States*⁴⁶ partially resolved the interpretation problem by placing the issue within the time frame of the grants. The Court stated that Congress granted fees to the railroads in the Act of July 26, 1866 but had changed its policy of granting fees in 1871. The Court concluded that prior to 1871, Congress clearly intended to make outright grants of public lands.⁴⁷ Although *Great Northern* concerned public lands, the Supreme Court inferred from remarks made during Congressional debates that the acts passed after 1871 granting rights-of-ways to railroads were not outright grants.⁴⁸ In *Missouri-*

43. See, e.g., Pub. L. No. 83-280, 67 Stat. 588 (1953) (Public Law 280) (giving specific states jurisdiction over certain judicial matters).

44. See, e.g., *United States v. Magnolia Petroleum Co.*, 110 F.2d 212, 214 (10th Cir. 1939) (considering quiet title action for land granted to railroads); *Choctaw & Chickasaw Nations v. United States*, 75 Ct. Cl. 494 (1932) (considering suit by plaintiffs to recover damages for failure of the United States to collect rentals or to take forfeitures of land through Indian territory granted for railroad rights-of-way abandoned for such purposes).

45. See, e.g., *Missouri-Kansas-Texas R.R. v. Early*, 641 F.2d 856 (10th Cir. 1981); *Choctaw Nation v. Atchison, Topeka & Santa Fe Ry.*, 396 F.2d 578 (10th Cir. 1968); *Midwestern Devs., Inc. v. City of Tulsa*, 374 F.2d 683 (10th Cir. 1967); *St. Louis-San Francisco Ry. v. Walter*, 305 F.2d 90 (10th Cir. 1962); *E.G. Fitzgerald v. City of Ardmore*, 281 F.2d 717 (10th Cir. 1960); *City of Wilburton v. Swafford*, 253 F.2d 479 (10th Cir. 1958); *United States v. Magnolia Petroleum Co.*, 100 F.2d 212 (10th Cir. 1939); *Star Lake R.R. v. Lujan*, 737 F. Supp. 103 (D.D.C. 1990); *United States v. Chicago, Rock Island & Pacific Ry.*, 55 F.2d 345 (WD Okla. 1930); *Energy Transportation Sys. v. Kansas City Southern Ry.*, 638 P.2d 459 (Okla. 1981); *Vaughn v. Fitzgerald*, 511 P.2d 1148 (Okla. Ct. App. 1973).

46. 315 U.S. 262 (1942).

47. *Id.* at 274.

48. *Id.*

Kansas-Texas Railroad v. Early,⁴⁹ the Tenth Circuit Court of Appeals reiterated the Supreme Court's inference.

The Supreme Court in *Missouri-Kansas-Texas Railway v. Roberts*⁵⁰ and in *Missouri-Kansas-Texas Railway v. Oklahoma*⁵¹ construed the language of the Act of July 26, 1866 to grant a fee easement. The Court stated that although the lands were reserved by treaty for the tribes, Congress retained control over the fee interest.⁵² In both cases, the Court held that Congress granted a fee interest to the railroads even though they termed it a right-of-way.⁵³

The Problem with Chicago, Rock Island and Pacific Railway Company

Because of the enormous amount of information, acts, and treaties involved in fully discussing the legal analyses of each railroad company's interest with each of the Five Civilized Tribes, the remainder of the discussion will focus on a single case illustrating the issues in question. In 1873, Congress granted the Chicago, Rock Island and Pacific Railway Company (Rock Island) a right of way across the Choctaw and Chickasaw Tribal Lands in southwestern Oklahoma.⁵⁴ The railroad used the lines for over 100 years. As society moved from traveling by train to traveling by cars, many railroad companies experienced financial difficulties: Rock Island was among these troubled railroads. On June 2, 1980, the District Court for the Northern District of Illinois ordered the total "systemwide abandonment of the Rock Island's lines and discontinuance of its service."⁵⁵ Although Congress did not specifically approve the change of user, the lines are still in use by another railroad company under an agreement with Rock Island.

In the bankruptcy proceedings following the ordered abandonment, the trustee for Rock Island sold the land to the State of Oklahoma for \$55,000,000. The State in turn leased the land to Sprint Communications (Sprint). Sprint laid fiber optic lines under the railroad tracks.

Local landowners protested this sale to the State and the subsequent lease to Sprint. These owners were subsequent purchasers of tribal lands and argued that they were entitled to the land when Rock Island abandoned its lines. The State and Rock Island argued that Rock Island had not abandoned the lines, and therefore the land did not revert back to the tribe or subsequent landowners. Because of the complicated nature of certifying a class and the

49. 641 F.2d 856, 859 (10th Cir. 1981).

50. 152 U.S. 114 (1894).

51. 271 U.S. 303 (1926).

52. *Roberts*, 152 U.S. at 116-17.

53. See *supra* notes 50-51.

54. Act of Feb. 27, 1893, ch. 171, 27 Stat. 492.

55. Order of the District Court for the Northern District of Illinois (Feb. 11, 1981), *aff'd*, Order of the District Court for the Northern District of Illinois (Oct. 13, 1981).

remedy sought, the landowners have been unsuccessful in pursuing their action. Their problem presents an excellent case for analysis.

The Act of February 27, 1893

In the Act of February 27, 1893,⁵⁶ Congress granted the land in question and the right to Rock Island to build its railroad across Indian Territory. The section of the Act which granted Rock Island its easement reads as follows:

Sec. 2 That a right-of-way of one hundred feet in width through said Indian Territory is hereby granted to the Chicago Rock Island and Pacific Railway Company, and a strip of land two hundred feet in width, with a length of three thousand feet, in addition to the right-of-way, is granted for such stations as may be established but such grant shall be allowed but once for every ten miles of the road, no portion of which shall be sold or leased by the company, with the right to use such additional rounds where there are heavy cuts or fills as may be necessary, not exceeding one hundred feet in width on each side of said right-of-way, for the construction and maintenance of the roadbed or as much thereof as may be included in said cut or fill: Provided, that no part of the lands herein granted shall be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines, and when any portion thereof shall cease to be used such portion shall revert to the nation or tribe of Indians from which the same shall have been taken.⁵⁷

The clear language of the section reads as a grant of a right-of-way. Congress specifically refers to the grant as a right-of-way: "[A] strip of land two hundred feet in width . . . , in addition to the *right-of-way*, is granted for such stations"⁵⁸ Most notably, the section does not speak in legal terms associated with a fee. The grant does not use the general language associated with granting a fee: no mention is made of "successors and assigns." If Congress had included this language, the type of interest involved would be more clearly a fee. The language was left out. In the era prior to Congress' policy change, it used the terms "its successors and assigns" in its grant to the Union Pacific Railroad Company, Southern Branch (predecessor to the Missouri-Kansas-Texas Railroad Co.). Congress' action of omitting the successor language implies an intention to give only a right-of-way, not a fee.

56. Ch. 171, 27 Stat. 492.

57. Act of Feb. 27th, 1893, § 2, 27 Stat. at 492.

58. *Id.* (emphasis added).

The section further provides "no portion of which shall be sold or leased by the company."⁵⁹ Normally, Rock Island would have the right to freely alienate a fee interest. The limiting nature of the language strongly suggests that in granting the right-of-way, Congress specifically meant to limit Rock Island's alienation rights. Another example of the restrictive nature of the section concerns the portion that reads "*no part* of the lands herein granted shall be used except in such a manner and for such purposes *only* as shall be *necessary* for operation of said railroad" [emphasis added].⁶⁰ The language is explicit in its meaning that Rock Island was granted no authority nor the right to use the land in a manner inconsistent with the operation of a railroad. This exclusionary language specifically applies to any third parties, such as the State and to Sprint. The Act contains no exceptions for these restrictions.

Although the Act allows Rock Island to erect telegraph and telephone lines, these lines are only for the operation and construction of the railroad. Construing the language to allow third parties to use Rock Island's line in conjunction with Rock Island would extend the use of the right-of-way beyond its intended scope, causing an undue burden on the servient estate. Under general property concepts, if an easement is granted for a specific use, the lawful user, or someone acting through the user, cannot extend the use beyond what the original parties specified.⁶¹ Allowing Sprint to lay its own lines, even if it allowed Rock Island to also use them, would extend the use beyond the specified purpose. The purpose of allowing Rock Island to lay telegraph and telephone lines was for communication necessary for railroad operations. It was not intended to allow a third party to provide service to the general public, particularly where Rock Island no longer used the lines. If the lawful user exceeds the scope of the easement, the user may forfeit the use of the land. Such a situation would be solved between the parties involved.

The controlling language of the Act contains a reversionary clause which provides "when any portion thereof shall *cease* to be used such portion shall *revert* to the nation or tribe of Indians from which the same shall have been taken."⁶² This clause addresses the specific question involved in the landowners' controversy.⁶³ The obvious interpretation of the phrase requires that when Rock Island ceased to use the lines, the land reverted to the Choctaw and Chickasaw Tribes. The language is not specific as to whose use has to cease, but the implication from a reading of the rest of the section is that it is

59. COHEN, *supra* note 1, at 91.

60. *Id.*

61. See, e.g., *E.G. Fitzgerald v. City of Ardmore*, 281 F.2d 717 (10th Cir. 1960); *United States v. Drumb*, 152 F.2d 821 (10th Cir. 1946); *United States v. Magnolia Petroleum Co.*, 110 F.2d 212 (10th Cir. 1939).

62. Act of Feb. 27th, 1893, § 2, 27 Stat. at 492 (emphasis added).

63. Under this language, the land reverts back to the Choctaw and Chickasaw tribes. However, the section on rights of subsequent landowners will explain the progression from the tribes to owners of the legal subdivision.

Rock Island's use.⁶⁴ The section is addressed only to Rock Island and makes no reference to any third party. Reading it to mean that as long as the right-of-way is in use by any party, the right-of-way is in force, would unduly burden the scope of the easement. This interpretation clearly contravenes general property law and does not appear to be Congress' intent. Because Rock Island ceased using the lines, the land should have reverted back to the servient estate: the tribes and the subsequent landowners.

Defenses

If the Court concluded that the Rock Island had not abandoned the property, or that Rock Island had possession, the State could argue that it purchased the property in a bankruptcy proceeding and therefore received title only as good as Rock Island had. However, the court probably would not allow the State to proceed with this line of argument. If the State purchased lands that it knew it required verification of title, then the State deserves the result: loss of the land. The State probably bought the land with no warranty of title. Furthermore, the State cannot claim it was a bona fide purchaser for value. Although it did buy the land for value, it was on actual and constructive notice of acts of Congress concerning Indian Territory. It should be held to constructive knowledge as to the circumstances under which Rock Island acquired title, even if the State did not check the title or request a title opinion. These acts directly affected the Indian Territory.

The State argued that Rock Island did not abandon the lines, but rather that the lines were still in use by a railroad, and Rock Island did not voluntarily abandon the tracks. It is hard to imagine that a court would consider this line of reasoning valid. Whether Rock Island wanted to abandon the lines is not an issue. The result is the same: Rock Island abandoned the lines by decree of the district court.

Another fault in this defense is that use of the lines by a third party does not constitute use. The act specifically denies Rock Island the right to lease or sell the lines. By specifically defying the act, Rock Island breached its agreement with Congress. By breaching the easement agreement, the land reverted back to the servient estate.

General Property Law

Under general principles of property law, an easement or a right-of-way is an interest in land. The agreement between the dominant and servient estate holders must comply with the statute of frauds, which requires a memorialization in writing. With the interest in land comes benefits and burdens. As to benefits, the lawful user has exclusive possession of the land

64. Many of the original railroad grantees are not the current grantees, however, to make the change Congress had to authorize or approve. *SEMPLE, supra* note 15, at 264.

to use in the manner agreed upon. The user may alienate, lease, mortgage, or devise the land. However, the user has the burden of complying with all the provisions of the agreement, such as not to exceed the scope of the use. The result being that the dominant estate has the benefit of being superior to the servient estate.⁶⁵

A right-of-way may be extinguished by law if the user abandons the right-of-way. Once a right-of-way is abandoned or ceases to be used, the estate is extinguished and vests in the owner of the servient estate. To show abandonment, the owner of the servient estate must prove two elements. First, the owner must show a cessation of use and second, an intent to abandon.⁶⁶

In the case in point, Rock Island no longer uses the lines. The company does not exist as such anymore. The District Court for the Northern District of Illinois ordered Rock Island to shut down and abandon its lines.⁶⁷ The district court's order strongly shows the first element. In addition, another railroad company is using the lines. The second element is difficult to prove. Intent is difficult to show, but may be inferred from the circumstances. The company was declared insolvent in 1980, over fifteen years ago. If Rock Island had intended to continue its use, it should have done so by now. It has not.

Although this situation involves interpreting and applying federal statutes, the Tenth Circuit Court of Appeals has included this general property notion in its reasoning.⁶⁸ In the leading case of *United States v. Drumb*, the court stated, "It is a general principle of law, adhered to without exception, that when a railroad right-of-way easement is abandoned, the trace reverts by operation of law and becomes a part of the abutting or adjoining property."⁶⁹ The court went on to note that since federal policy was involved, Congress could "refuse to recognize this principle of law," however, the court did not find any intent by Congress to disregard general property law.⁷⁰

The Interest Acquired: Easement Versus Fee

As discussed above, the Supreme Court in *Missouri-Kansas-Texas Railway v. Roberts*,⁷¹ and in *Missouri-Kansas-Texas Railway v. Oklahoma*⁷² held that

65. ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 8.12, at 465 (1984).

66. *Id.*

67. COHEN, *supra* note 1, at 81.

68. See *Missouri-Kansas-Texas R.R. v. Early*, 641 F.2d 856 (10th Cir. 1981); *Kansas City S. Ry. v. Arkansas La. Gas Co.*, 476 F.2d 829 (10th Cir. 1973); *St. Louis-San Francisco Ry. v. Walter*, 305 F.2d 90 (10th Cir. 1962); *Fitzgerald v. City of Ardmore*, 281 F.2d 717 (10th Cir. 1960); *Chickasha Cotton Oil Co. v. Town of Maysville*, 249 F.2d 542 (10th Cir. 1957); *Seminole Nation v. White*, 224 F.2d 173 (10th Cir. 1955); *United States v. Drumb*, 152 F.2d 821 (10th Cir. 1946); *United States v. Magnolia Petroleum Co.*, 110 F.2d 212 (10th Cir. 1939).

69. *Drumb*, 152 F.2d at 824.

70. *Id.*

71. 152 U.S. 114 (1894).

72. 271 U.S. 303 (1926).

the railroad took only a fee not an easement. The Court interpreted Congress' intent in 1866, prior to its policy change, as giving a fee to the railroads. In 1871, Congress began granting only easements.⁷³ When Congress granted Rock Island its easement in 1893, Congress had already changed its policy. Congress, therefore, only intended to grant an easement to Chicago.

The case in point is not the first time Rock Island asked the court to interpret its interest. In 1930, the District Court for the Western District of Oklahoma determined that Rock Island's rights in the land were restricted by section 2 of the Act of February 27, 1893.⁷⁴ The court did not specifically state what interest Rock Island had, but it clearly stated that by leasing part of its right-of-way to a third party it exceeded its rights.⁷⁵ If the court found that leasing was beyond the scope of its rights, then selling the land would certainly also be beyond the scope.

As noted above, the Tenth Circuit on several occasions has construed the statutory language as granting only an easement.⁷⁶ In *St. Louis-San Francisco v. Town of Francis*, the Tenth Circuit Court of Appeals determined that the railroad received only an easement.⁷⁷ The court relied on its interpretation of the Act of Congress of March 30, 1896 which granted a right-of-way. The court found that the grant was for the purpose of a railroad and no other purpose. The court relied on the reasoning in *United States v. Magnolia Petroleum Co.*⁷⁸ in concluding that the nature of the railroad's interest was in an easement subject to the restrictive language in the granting act.⁷⁹

Use of the Subsurface

In *United States v. Chicago, Rock Island, and Pacific Railway Co.*,⁸⁰ the U.S. District Court for the Western District of Oklahoma restrained the railroad from leasing the easement to a milling company.⁸¹ The court's decision was grounded in the express language of section 2 of the Act, which provided that the railroad would not lease or sell any portion of the land.⁸² This decision further demonstrates the point that Rock Island only received an easement; not the right to freely transfer.

73. 43 U.S.C. §§ 934-939 (1994).

74. *United States v. Chicago, Rock Island & Pac. Ry.*, 55 P.2d 345, 346 (W.D. Okla. 1930) (holding Chicago had exceeded its rights subject to § 2 when it gave a lease to the Chickasha Milling Co.).

75. *Id.*

76. *See supra* note 68.

77. 249 F.2d 546, 547-48 (10th Cir. 1957).

78. 110 F.2d 212 (10th Cir. 1939).

79. *Id.* at 218.

80. 55 F.2d 345 (W.D. Okla. 1930).

81. *Id.* at 346.

82. *Id.*

In addition to ruling that the Act only created an easement, courts have also allowed the abutting landowners the right to use land area beneath the surface.⁸³ The court ruled that the railroad easement did not, nor

could not deprive the owner of the servient estate or those claiming through such owner from making use in the strata below the surface and below substrata which are used or needed by the railroad company and which in no way . . . interferes with the construction, and maintenance of the railroad.⁸⁴

The only stipulation that the courts have placed on the rights of the servient landowner is that the use does not interfere with the railroads use of the easement for railroad purposes.⁸⁵ The courts have allowed the servient landowners to grant third parties the right to put gas and coal pipelines underneath the lines.⁸⁶ These are substantial uses of the subsurface. These pipelines would be in the same spot as Sprint's fiber optic lines. From these cases, it appears that the servient landowner has the right to grant Sprint an easement, not Rock Island.

Mineral Interest

In 1957 in *St. Louis-San Francisco v. Town of Francis*,⁸⁷ it was clear that the railway was in fact still using the easement in question.⁸⁸ The court nevertheless held that the minerals were owned by the Town as owner of the servient estate.⁸⁹ In so holding, the court relied on *Chickasha Cotton Oil Co. v. Town of Maysville, Oklahoma*,⁹⁰ in which the easement was also being used by the railway. The court held that the railroad had failed to exercise its right to purchase the fee of the easement as provided in section 14 of the Act of 1906 before that right expired and so the minerals belonged to the town under section 14 of the Act of 1906.⁹¹

The case of *Town of Maysville, Oklahoma v. Magnolia Petroleum Co.*,⁹² struggled with the problem of whether the portion of the easement in question

83. See, e.g., *Kansas City S. Ry. v. Arkansas La. Gas Co.*, 476 F.2d 829 (10th Cir. 1973); *Energy Transp. Sys. v. Kansas City S. Ry.*, 638 P.2d 459 (Okla. 1981).

84. *Kansas City S. Ry.*, 476 F.2d at 835; see also, e.g., *Energy Transp. Sys. v. Kansas City S. Ry.*, 638 P.2d 459 (Okla. 1981).

85. *Energy Transportation Sys.*, 638 P.2d at 464.

86. *Id.*; *Kansas City S. Ry.*, 476 F.2d at 835.

87. 249 F.2d 546 (10th Cir. 1957).

88. *Id.* at 548.

89. *Id.*

90. 249 F.2d 542 (10th Cir. 1957).

91. *Id.* at 545-46.

92. 272 F.2d 806 (10th Cir. 1959).

lay within Maysville. The court's dicta suggested that if the easement was within Maysville, the law stated in *Chickasha Cotton Oil* would control.⁹³

*Midwestern Developments, Inc. v. City of Tulsa*⁹⁴ inferred that the servient estate included ownership of subsurface minerals by saying that the condemnation of the fee containing valuable minerals had been cited as a special circumstance entitling the servient owner to more than nominal damage where both the easement and the servient estate are both condemned.⁹⁵

In *Seminole Nation v. White*,⁹⁶ the court held that the minerals belonged to the allottee of the abutting land rather than to the tribe.⁹⁷ In its holding, the court

announced the general rule that the servient estate in a strip of land set apart for a railroad right-of-way or other similar purposes passes with a conveyance of the fee to the abutting legal subdivision or tract out of which the strip or small area was carved, even in the absence of express provision to that effect.⁹⁸

Subsequent Landowners

Under the Act of April 26, 1906, Congress allotted communal tribal lands to individual tribal members.⁹⁹ Congress had finally succumbed to the popular view of individual land ownership for the Indians. Realizing it had already granted a portion of allotment lands to the railroads, Congress included a provision to address the ownership of the reversionary interests. In section 14, Congress declared that the reversionary interests would vest in the owners of the legal subdivisions. Section 14 reads as follows:

. . . That the lands in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole nations . . . shall be conveyed to the person, corporation, or organization entitled thereto: . . . *Provided further*, That this section shall not apply to any land reserved from allotment because of the right of any railroad or railway company therein in the nature of an easement for right of way, depot, station grounds, waters stations, stock yards or other uses connected with the maintenance and operation of such company's railroad title to which tracts may be acquired by the railroad or railway company under rules and regulations to be prescribed by the Secretary of the

93. *Id.* at 813.

94. 374 F.2d 683 (10th Cir. 1967).

95. *Id.* at 688.

96. 224 F.2d 173 (10th Cir. 1955).

97. *Id.* at 175.

98. *Id.*

99. Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137.

interior at a valuation to be determined by him, but if any such company shall fail to make payment within the time prescribed by the regulations or shall cease to use such land for the purpose for which it was reserved title thereto shall thereupon vest in the owner of the legal subdivision of which the land so abandoned is a part, except lands within a municipality the title to which, upon abandonment, shall vest in such municipality.¹⁰⁰

From the clear language of the Act, the lands granted to the railroads have specific guidelines to determine the owner of the reverter interest. If the railroad did not pay for the land or ceases to use the land for railroad purposes, the land reverts to the owner of the legal subdivision. There is one exception which does not effect the outcome of the case in point. If the land is located within a municipality, then the land reverts to the municipality.

The Tenth Circuit Court of Appeals, in *United States v. Magnolia Petroleum Co.*, ruled that the plain language of section 14 requires the land to revert to the owner of the legal subdivision.¹⁰¹ The court reasoned that Congress did not intend for these small strips of land to become separate entities. The intent was to put them together with the servient estate to best serve the intended purpose of the land. People were to use this land for farming and ranching. These activities could not be productive if only a strip of land was provided. After allotment of the land, the individuals were to own the land in fee subject only to the railroads use of the surface.¹⁰²

In Rock Island's case, the record is unclear whether it paid for the easement by the set date.¹⁰³ Rock Island has never raised the issue in any of its proceedings. Presumably, since Rock Island has not raised it as a defense, it did not pay for the fee. Even if it had, the language provides that failure of payment or abandonment will cause the land to vest in the servient estate. Rock Island has clearly exceeded the bounds of its rights.¹⁰⁴

Title Problems

In addition to all the legal issues the case in point has raised, another important issue must be considered: title to the lands. Determining the owner of title to land is a meticulous process, but it is particularly difficult when Indian lands are involved. Treaties, acts and federal statutes must be reviewed and thoroughly examined.

100. *Id.* § 14, 37 Stat. at 142.

101. *United States v. Magnolia Petroleum Co.*, 110 F.2d 212, 217 (10th Cir. 1939).

102. *Id.* at 219.

103. The general date to pay for the fee was June 30, 1909. The Secretary of the Interior did give some railroads an extension.

104. *Magnolia Petroleum Co.*, 110 F.2d at 219.

Sharon Bell, an attorney in Tulsa, Oklahoma, wrote a helpful article on surviving Indian title problems.¹⁰⁵ First, the problem must be categorized as either procedural or legal. If the problem is procedural, such as transferring title to a mineral lease or the original conveyance of allotted lands, the Bureau of Indian Affairs is the authority. However, if the problem is legal, then the research begins. The laws regarding Indians are generally very specific to the tribe or area and require a thorough reading to understand the implications and effects. The Indians of Oklahoma have special legislation. In particular, each tribe has its own legislative provisions regarding disposition of the land and its alienation. In Rock Island's case, the problem is legal ownership of the title. The Treaty of April 28, 1866,¹⁰⁶ the Act of February 27, 1893¹⁰⁷ and the Act of April 26, 1906,¹⁰⁸ all must be researched and interpreted to present the total picture.

Second, the transaction in question must be placed in its "appropriate legislative time frame."¹⁰⁹ By considering the transaction at the time of its inception, the problems associated with Congress' 1871 policy change regarding the interest conveyed are avoided. The identity of the individual involved also must be considered along with placing the transaction in its time period. The restrictions on the original Indian owner's alienation rights can also be determined. If the alienation requirements were not met, the land will have a clouded title. Oklahoma title standards are high; extra care must be taken in assuring that all the information is correct and valid. Therefore, not only the time period in which the transaction occurred must be considered, but also the identity of the individual involved.

An additional consideration is the amount of material covering Indian lands. Most tribes have a treaty with the federal government as well as an act governing its lands and their disposition. Moreover, Indian nations are considered dependent sovereign nations: This unique status brings with it problems not usually considered in ordinary title examinations. Tribal sovereignty often poses unusual problems. General property law concepts do not always apply to tribal lands, often resulting in strange interpretations. In Rock Island's situation, federal acts and treaties control the outcome. Fortunately, in this instance, the results do not vary considerably from general property law.

By selling the land to the State, Rock Island created a long line of title problems. The estates that the State and Sprint possess are clouded; correcting the problem will be time consuming and costly. Rock Island did not have the

105. Sharon J. Bell, *Indian Title Problems: A Survival Primer*, PROP. & PROB., Sept./Oct. 1987, at 30.

106. United States-Choctaw Nation-Chickasaw Nation, 14 Stat. 769.

107. Ch. 171, 27 Stat. 492.

108. Ch. 1876, 34 Stat. 137.

109. Bell, *supra* note 105, at 33.

right to sell its right of way to the State. Hence, the State, holding no greater title than Rock Island possessed, did not have the authority to allow Sprint to use the lands.

Conclusion

The problem created by Rock Island's sale to the State of Oklahoma can be solved neatly and quickly in theory. The majority of the case law concerning the railroad's interest determined the interest to be an easement. This leads to the conclusion that Congress only granted an easement to Rock Island. Interpreting the Acts of February 27, 1893, and April 26, 1906, together, once the railroad ceased to use the lands for railroad purposes, the land reverted to the owner of the legal subdivision. The district court ordered Rock Island to abandon its lines. Therefore, the land should rightfully belong to the adjacent landowners.

In reality, the legal result is not so simple to implement. Sprint has been using these lands for several years. Pulling up the lines would involve a lot of time and money. In addition, neither party would be served. Sprint is not a bad actor. It bought land from the State. By losing its lines, it would also inevitably lose business, necessitating a search for another location for its lines, which requires more time and money. The landowners then would be unable to negotiate an agreement with Sprint that would be equitable to Sprint. Sprint is in a difficult bargaining position.

Several scenarios are possible to resolve the problem. The primary concern for most of the landowners is having title to their property returned. The landowners are entitled to their land and to compensation for its unlawful use. One solution permits the courts to require the State to pay for the fee land with a penalty for its bad actions. Although this proposal would compensate the landowners, they would still lose the land, which is their predominate concern. Additionally, although the State would have to pay a penalty fee, this fee would be offset by the income it received from Sprint. The State would still own the land and its agreement with Sprint would not be disrupted. The landowner would be left in the worst position. This proposal would not be fair to the injured party, the landowner.

A second solution the landowners might consider is trying to recover from Rock Island. The initial bad actor, Rock Island, no longer exists as such. It went through bankruptcy proceedings over fifteen years ago. Today, all the creditors have already taken what little money Rock Island possessed. The parties could go after the Trustees who sold the encumbered land. As a judge, the trustee should have been aware of the federal issues implicated. This avenue would be difficult to pursue because of the time that has elapsed since the original proceedings.

The most reasonable solution would be for the courts to quiet title in the landowner's name and require the State to pay damages. This proposal would prevent the State from receiving a windfall or alternatively, too harsh a penalty,

and the landowners would finally have the land back. By quieting title in the landowner's name, the title would then be clear for future transfers. Further, Sprint and the landowners could negotiate an agreement which would allow Sprint to continue to use its rights of way. It would also give individual landowners income from the use of the right of way crossing their property.

These proposed solutions may appear easy to enforce, but putting them into action will be difficult. From all sides of the issue, the courts should attempt to rectify the problem. The landowners are entitled to the land and to compensation for its taking. Sprint has been using the land for several years and should be allowed to continue since communication lines are of such vital importance to society. Both parties are innocent actors whose rights should be restored. The State and Rock Island are the bad actors. Both parties had actual knowledge of the rights granted to Rock Island by Congress. Rock Island did not have the right to transfer. Hence, the State did not have the right to receive the lands. Consequently, the State had no right to transfer the land. The landowners and Sprint should not have to suffer as a result of the actions of Rock Island and the State.