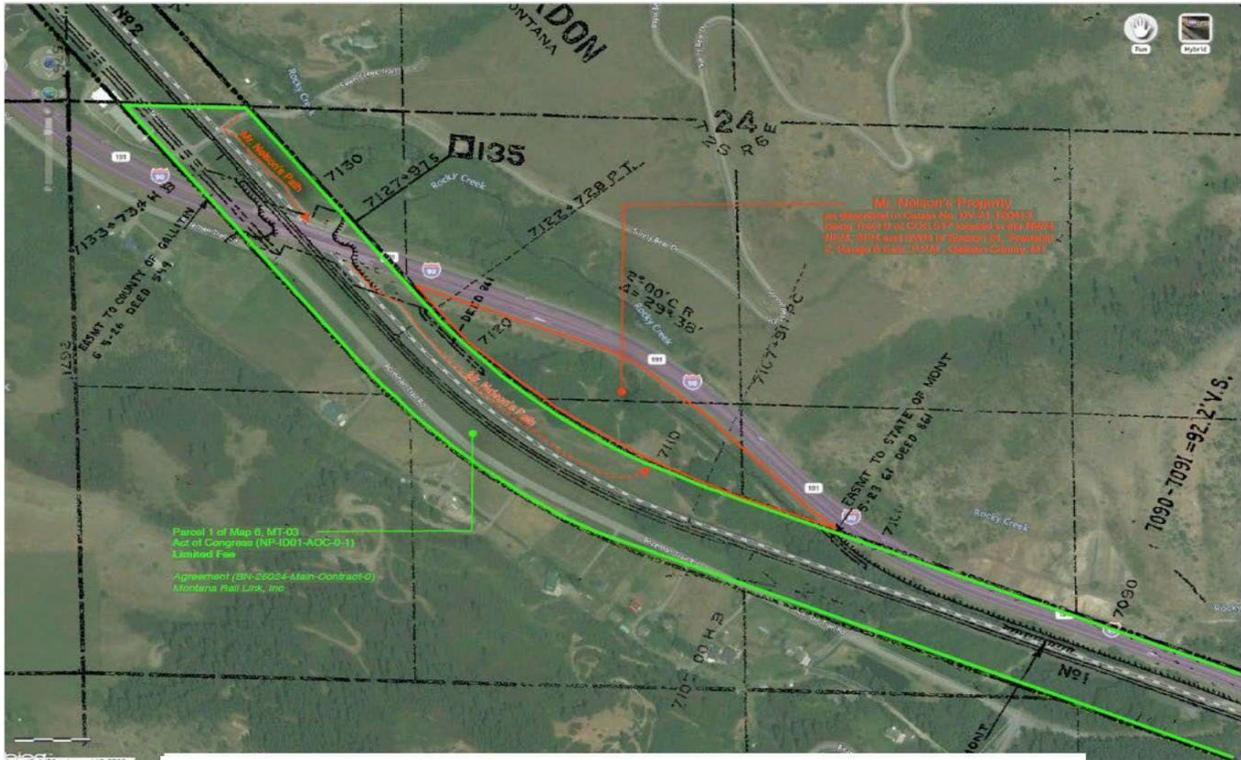


Cary Hutchings attached as Exhibit B to Respondents' Brief in Support of Motion for Summary Judgment ("Respondents' MSJ").



The subject ROW was obtained by Northern Pacific Railroad Company, BNSF's predecessor, pursuant to the Northern Pac. R.R. Co. Land Grant Act, 13 Stat. 365, also referred to as the Federal Land Grant Act of 1864 ("1864 Act"), attached as Exhibit A to Respondents' MSJ. Additional undisputed facts are set forth in the Court's analysis below as necessary.

SUMMARY JUDGMENT STANDARD

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c)(3), M.R.Civ.P. A party opposing summary judgment has the burden of proving genuine issues of material fact by

more than mere denial and speculation. Rule 56(e)(2), M.R.Civ.P.; *Kipfinger v. Great Falls Obstetrical & Gynecological Assocs.*, 2023 MT 44, ¶ 14.

LEGAL ANALYSIS

Nelson moved for summary judgment asserting entitlement to a prescriptive easement over the subject ROW as a matter of law. Respondents moved for summary judgment asserting Nelson’s claims are barred by federal land grant preclusion under the Northern Pac. R.R. Co. Land Grant Act, 13 Stat. 365. Respondents also assert Nelson’s claims are preempted under the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101-16106 (“ICCTA”). The Court determines Respondents’ federal land grant preclusion argument is determinative of this matter.

I. FEDERAL LAND GRANT RIGHTS OF WAY

Respondents assert federal land grant preclusion arguing that no property or possessory interest in the subject ROW can be obtained by prescription because BNSF’s predecessor railroad, the Northern Pacific Railroad Company, obtained a right to the exclusive use and occupancy of the ROW through the 1864 Act from the United States. Nelson opposes summary judgment asserting that he is not seeking adverse possession and that federal land grant ROWs can be subject to a nonpossessory interest, including as an easement by prescription.

The Montana Supreme Court has not decided this issue. In *Renner v. Nemitz*, 2001 MT 202, ¶ 15, 306 Mont. 292, 297, 33 P.3d 255, 259, the Court declined to address the threshold issue of “whether a prescriptive easement can run against property of a railroad in Montana” because the issue was not properly preserved by the Appellant. However, the United States Supreme Court has addressed the issue in the context of adverse possession, and the principles

are applicable here.

In *N. P. R. Co. v. Townsend*, 190 U.S. 267, 273 (1903), the United States Supreme Court held “the nature of the duties imposed by Congress upon the railroad company and the character of the title conferred by Congress in giving the right of way through the public domain are inconsistent with the power in an individual to acquire, for private purposes, by limitation, a portion of the right of way granted by Congress.” It based its decision on the nature of the grant:

On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. This being the nature of the title to the land granted for the special purpose named, it is evident that to give such efficacy to a statute of limitations of a State as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use, would be to allow that to be done by indirection which could not be done directly, for, as said in *Grand Trunk Railroad v. Richardson*, 91 U.S. 454, 468, "a railroad company is not at liberty to alienate any part of its roadway so as to interfere with the full exercise of the franchises granted." Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress, for, as said in *Northern Pacific Railroad Co. v. Smith*, 171 U.S. 261, 275, speaking of the very grant under consideration: "By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance." Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.

Id. at 271-72 (emphasis added).

The *Townsend* Court used the term “limited fee” to describe the interest in ROWs

granted to railroads by the federal government via the 1864 Act “because under the common law an easement . . . did not give an exclusive right of possession” while a “limited fee” did. *State of Wyoming v. Udall*, 379 F.2d 635, 640 (10th Cir. 1967). Thus, ROWs granted by the 1864 Act have “the attributes of a fee, that is perpetuity and exclusive use and possession.” *Stepan v. Northern Pac. Ry. Co.*, 263 P. 425, 427-28 (Mont. 1928).

Courts have relied on *Townsend* in construing analogous federal ROW grants. This Court finds *Wolf v. Cent. Or. & Pac. R.R., Inc.*, 216 P.3d 316, 323 (Or. App. 2009) instructive. In *Wolf*, the plaintiffs claimed a prescriptive easement that would allow them to continue use of a private railroad crossing to access a portion of their property that was bisected by railroad tracks. *Id.* at 317. That ROW was created by an 1866 act of Congress. *Id.* The plaintiffs and their predecessors in interest had used the crossing for “many years.” *Id.* at 319. In 2005, the defendant railroad chose to remove the paved grade crossing that the plaintiffs had been using, replaced it with gravel, and required the plaintiffs to enter into a license agreement to continue using the crossing. *Id.* That led the plaintiffs to file an action claiming a prescriptive right to cross the tracks and seeking damages from the asphalt removal.

The trial court granted summary judgment in the railroad’s favor ruling that “the law is government grant railroad property that its right of way cannot be adversely possessed or subject to a prescriptive easement.” *Id.* In upholding the grant of summary judgment on appeal, the appellate court explained while generally a private party can obtain an easement by prescription over a railroad ROW, a ROW “obtained as the result of a federal land grant is treated differently.” *Id.* at 321-22. The *Wolf* court concluded that while an easement by prescription is not a full possessory interest, it “is, nonetheless an interest in land,” and “[s]uch a property interest in the railroad’s right-of-way would appear, on its face, to conflict with the railroad’s

right to exclusive use and possession of the property for railroad purposes.” *Id.* at 323 (citing *Puett*, 752 P.2d at 216-17 (railroad’s right to exclusive use and possession does not contain a limitation allowing for private owner to use ROW without railroad’s consent in a way that does not interfere with railroad’s operations)). “Because an easement over a federally granted railroad right-of-way would interfere with a railroad company’s congressionally granted right of exclusive use and control,” the *Wolf* court concluded, “even when use of the easement did not impede the operation of the railway, we are of the view that such an easement cannot be obtained by prescription.” 216 P.3d at 323.

Wolf is not alone. For example, in *City of Commerce City v. BNSF*, 2017 CV 30308 (Adams Co. Dist. Ct. Colo. Sept. 17, 2017) (Order attached as Exhibit D to Respondents’ MSJ), a municipality sought numerous non-exclusive easements from the railroad for the purpose of improving a roadway running parallel to railroad tracks and within a federally granted ROW. Such easements, if found to exist, would be “longitudinal surface easements” akin to what Nelson seeks in this action. *Id.* at *9. The Court, relying on the *Townsend* line of cases, denied the municipality’s request concluding in part that the easements would interfere with the railroad’s “exclusive use and possession of the width of the right of way.” *Id.* The Court further concluded that allowing such permanent encroachments “would constitute second guessing of whether the [ROW] width granted by Congress . . . was more or less than it should have been.” *Id.* See also *Central Pac. Ry. Co. v. Droge*, 151 P. 663, 666 (Cal. 1915) (claim of adverse possession of portion of railroad ROW denied, noting that per *Townsend* railroad need not show entire ROW was necessary for public use).

As a practical matter this makes sense. The 1864 Act granted railroads "a limited fee" in a right of way, "made on an implied condition of reverter [back to the United States] in the event

that the company ceased to use or retain the land for the purpose for which it was granted." *Townsend*, 190 U.S. at 271. Just as an individual cannot divest the United States of its lands through adverse possession, "prescriptive rights cannot be obtained against the federal government." *United States v. Vasarajs*, 908 F.2d 443,446 n.3 (9th Cir 1990).

Based on these cases, private prescriptive easements over federally granted limited fee railroad ROWs cannot form because such easements necessarily interfere with the railroad's congressionally granted right of exclusive use and control and would impact the government's ownership on reverter. Nelson has failed to meaningfully distinguish the cases relied on by Respondents. Because the subject ROW was part of the 1864 Act, Nelson cannot be said to have adversely possessed any portion of the ROW and cannot, as a matter of law, obtain an easement by prescription.

The cases Nelson relies upon for the proposition that an easement can be granted in this case do not involve or analyze federally granted limited fee ROWs, are silent as to the grant, or are otherwise distinguishable. For example, the sole question in *Tumacacori Mission Land Dev., Ltd. v. Union Pac. R.R. Co.*, 263 P.3d 649, 651 (Ariz. App. 2011) was whether under Arizona law a "railway" qualifies as a "public highway" thereby precluding the establishment of a prescriptive easement. *Accord Miss. Exp. R.R. Co. v. Rouse*, 926 So.2d 218 (Miss. 2006) was similarly limited to Mississippi's interpretation of rail tracks as "public highways." Several of the cases relied on by Nelson involve land currently or previously owned by private parties (not federal land grant ROWs). See *Beres v. U.S.*, 143 Fed. Cl. 27 (2019); *Mobile & O. R. Co. v. Strain*, 88 So. 274 (Miss. 1921); *Wilmot v. Yazoo & M. V. R. Co.*, 24 So. 701 (Miss. 1898). In *Smith v. Southern Ry.-Carolina Division*, 118 S.E.2d 440 (S.C. 1961), the Court made no mention of ROW origin or analysis of federally granted ROWs. These cases do not aid in the

Court's analysis as they are inapposite to matters involving federally granted limited fee ROWs as in this matter.

In his reply brief, Nelson cited *Great Northern v. U.S.*, 315 U.S. 262 (1942). However, that case involved an 1875 Act of Congress, not the 1864 Act at issue in this case, and is therefore inapplicable. *Great Northern* made clear that Acts after 1871 are treated differently and are not grants of limited fee. The Supreme Court noted that beginning in 1850, Congress embarked on a policy of subsidizing railroad construction with lavish land grants from the public domain. *Id.* at 273. This included the 1864 Act. *Id.*, n.6. However, this policy was met with great public disfavor and after 1871, "outright grants of public lands to private railroad companies seem to have been discontinued." *Id.* at 273-74. Subsequent acts were passed, including the 1875 Act, which granted railroads only "the right of way" through public lands, which were deemed to be easements. *Id.* The Supreme Court distinguished pre- and post-1871 Acts: "Petitioner, seeking to obviate [the result that the land granted by the 1875 Act was an easement], relies on several cases in this court stating that railroads have a 'limited', 'base', or 'qualified' fee in their rights of way." *Id.* at 277. One of those cases was *Townsend*. *Id.* at n. 18. The Supreme Court noted:

All of those cases [except two, not including *Townsend*] deal with rights of way conveyed by land-grant acts before the shift in Congressional policy occurred in 1871. For that reason they are not controlling here. When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement in the right of way granted in the same act."

Id. at 277-78. The United States Supreme Court has made clear that after 1871, ROWs granted to railroads by the federal government no longer gave railroad companies a limited fee property interest and instead, congressional grants of rights of way were limited to easements. *Accord Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 134 S.Ct.

1257 (2014) (recounting the history of railroad land grants.) In this case, the subject ROW created by the 1864 Act was a limited fee grant, not an easement, which Nelson may not encumber by a prescriptive easement.

Finally, at the Summary Judgment Hearing, Counsel for Nelson argued that principles from *Townsend* were undermined by the Abandoned Railroad Right of Way Act, 43 U.S.C. § 912 (“ARRWA”), as described in *Avista Corp., Inc. v. Sanders County*, 485 F. Supp. 2d 1176, 2007. The ARRWA provided that “all right, title, interest and estate of the United States” in rights of way shall be “transferred to and vested in” the “successors in title and interest to whom or to which title of the United States may have been or may be granted” if the railroad company’s “use and occupancy of such lands . . . has ceased or shall hereafter cease . . . by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress.” 43 U.S.C. § 912. There was an exception for that portion of right of way that becomes a public highway within one year of the decree. *Id.*

The Court understands Nelson’s argument to be that due to the ARRWA, the federal government no longer maintains a reversionary interest in federally granted ROWs and the policy supporting a prohibition of easements on federally granted ROWs, such as addressed in *Townsend*, no longer exists.

However, even if the Court accepts Nelson’s novel reading of *Avista* and application of the ARRWA to the principles in *Townsend*, Nelson’s argument is not applicable. On October 4, 1988, the ARRWA was succeeded by the National Trails System Improvement Act (“Rails to Trails Act”), which states, in relevant part,

Commencing upon the date of enactment of this subsection [enacted Oct. 4, 1988], any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in the Act of March 8, 1922 (43 U.S.C.

912), shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such Act.

16 USCS § 1248 (c).

Respondents' ROW was not abandoned prior to October 4, 1988. Accordingly, it is subject to the Rails to Trails act, not the ARROW. If it is abandoned at any time in the future, the ROW reverts to the United States (unless it comes within the public-highway provision). Therefore, the policy behind *Townsend* and its progeny remains.

Respondents have met their burden of showing that as a matter of law, Nelson cannot obtain a prescriptive easement over Respondents' federally granted ROW. Nelson has failed to counter with a genuine issue of material fact.

II. PREEMPTION UNDER THE ICCTA

Respondents request that should the Court *not* grant summary judgment based on federal land grant preclusion, it should find that Nelson's claim also fails because any state law claims are preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101-16106 ("ICCTA"). Specifically, Respondents contend that Nelson's claimed prescriptive easement is preempted, both categorically and "as applied," by the ICCTA's express preemption provision, which grants exclusive jurisdiction to the Surface Transportation Board ("STB") and preempts state law remedies with respect to the "regulation of rail transportation." 49 U.S.C. § 10501 (b).

Having determined that Nelson's prescriptive easement claim fails as a matter of law under the federal land grant analysis, this Court need not address whether that prescriptive

easement would also be preempted by the ICCTA. The Court declines to assess ICCTA preemption.

CONCLUSION

Samuel Nelson accessed his property for years by traversing the Respondents' ROW. Under slightly different facts, he may have acquired a perpetual right to do so by prescriptive easement. But the Supreme Court of the United States has spoken. When Congress bestowed upon the railroad its "lavish" grant of the limited fee right of way under the 1864 Act, it conferred a right to exclusive use and control inconsistent with Nelson's claim to prescriptive easement. To hold otherwise would allow Nelson to encumber property to which the United States holds a reversionary right. Summary judgment for Respondents is granted. Summary judgment for Nelson is denied.

DATED AND SIGNED ELECTRONICALLY BELOW

cc: Alanah Griffith/John Kirby
Michelle T. Friend