



# United States Department of the Interior

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IN REPLY REFER TO:

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## Memorandum

To: Secretary  
Assistant Secretary for Land and Minerals Management  
Assistant Secretary for Water and Science  
Director, Bureau of Land Management

From: Solicitor

Subject: Partial Withdrawal of M-36964—*Proposed Installation of MCI Fiber Optic Communications Line Within Southern Pacific Transportation Co.'s Railroad Right-of-Way*

This memorandum addresses the scope of a railroad's authority to authorize activities within a right-of-way ("ROW") granted pursuant to the General Railroad Right-of-Way Act of March 3, 1875, 18 Stat. 482 ("1875 Act"). This issue was most recently addressed in Solicitor's Opinion M-36964—*Proposed Installation of MCI Fiber Optic Communications Line Within Southern Pacific Transportation Co.'s Railroad Right-of-Way*, 96 I.D. 439 (1989) ("Opinion M-36964")—which opined upon what approvals, if any, a telecommunications company must obtain from the Bureau of Land Management ("BLM") in order to install a fiber optic communications line and associated facilities within existing railroad ROWs granted pursuant to: (i) the Act of July 27, 1866, 14 Stat. 292; (ii) the Act of March 3, 1871, 16 Stat. 573; and (iii) the 1875 Act. While addressing that specific question, Opinion M-36964 also opined more generally about a railroad's authority to authorize activities within those ROWs.

Our review of Opinion M-36964 responds to (1) criticisms of the 1875 Act portion of Opinion M-36964 by a federal District Court in *Home on the Range v. AT&T Corporation*, 386 F. Supp. 2d 999 (D. Ind. 2005), and (2) concerns raised in connection with a proposal by Cadiz, Inc., to construct the Cadiz Water Conservation & Storage Project ("Cadiz Project"), which includes the construction of a 42-mile water conveyance pipeline in the Mojave Desert within the Arizona & California Railroad Company's ("ARZC") 1875 Act ROW.<sup>1</sup> The Acting Assistant Secretary, Water and Science, relied on Opinion M-36964 in 2009 to conclude that the ARZC "may allow others to use. [its 1875 Act] ROW for any purpose without the involvement of the

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<sup>1</sup> See also Cong. Research Service, "Property Rights Related to Railroad Rights of Way Granted to Arizona & California Railroad Company," at 3-4 (Jun. 17, 2009) (questioning Opinion M-36964's conclusions regarding the scope of a railroad's authority within an 1875 Act ROW).

BLM and that no federal authorization or analysis would be required for the construction of the [Cadiz Project's] pipeline" within ARZC's ROW across BLM-administered lands.<sup>2</sup>

For the reasons set forth below, this memorandum withdraws the guidance provided by Opinion M-36964 as it relates to a railroad's rights within an 1875 Act ROW based on our findings that:

- Opinion M-36964's conclusions with respect to the activities that a railroad may undertake, or authorize others to undertake, within an 1875 Act ROW are not consistent with the Act, the relevant legislative history, prior interpretations of the Act, or the established rule that railroad ROW grants are liberally construed in favor of the purposes for which they were enacted, but otherwise are subject to the general rule that any ambiguities in grants of lands from the public domain are to be resolved in favor of the Federal government; and
- Within an 1875 Act ROW, a railroad's authority to undertake or authorize activities is limited to those activities that derive from or further a railroad purpose, which allows a railroad to undertake, or authorize others to undertake, activities that have both railroad and commercial purposes, but does not permit a railroad to authorize activities that bear no relationship to the construction or operation of a railroad.<sup>3</sup>

## I. BACKGROUND

### A. The 1875 Act

A railroad ROW is a unique property right; it is "a very substantial thing," that has "the attributes of the fee, perpetuity and exclusive use and possession." *Western Union Telegraph Co. v. Pennsylvania R.R.*, 195 U.S. 540, 570 (1904) (internal citations omitted).<sup>4</sup> Railroad ROW grants were created by Congress beginning in the 1850s to encourage railroad construction and, by extension, the settlement of the west. *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 273 (1942). The nature of individual ROW grants, however, is not uniform and depends upon the specific statute authorizing a particular grant. Initially, Congressional policy was to provide lavish grants of lands from the public domain; however, by 1872 this policy "incurred great public disfavor" causing Congress to provide more limited grants to facilitate railroad construction. *Id.* at 273-74. The 1875 Act provides in pertinent part:

Sec. 1. That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any

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<sup>2</sup> The Acting Assistant Secretary's conclusion was contained in a letter, dated January 13, 2009, which responded to a letter from Senator Feinstein of California inquiring about what federal approvals or environmental analyses would be necessary to allow the construction, operation and maintenance of the Cadiz Project. On June 30, 2009, Senator Feinstein requested that the Department review Opinion M-36964.

<sup>3</sup> Neither this memorandum nor Opinion M-36964 addresses the questions of: (i) what interest the United States retains in railroad ROWs granted pursuant to the 1875 Act, or (ii) what happens to such ROWs after they are no longer in active use. The focus of this memorandum is on a railroad's rights within an active 1875 ROW.

<sup>4</sup> The Court in *Western Union Telegraph* looked at the interrelationship between a railroad ROW act and an act giving certain eminent domain authorities to telegraph companies, not the scope of the 1875 Act.

State or Territory ... or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Sec. 2. That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. ...

Sec. 4. That any railroad-company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way ...

18 Stat. at 482-83.

#### **B. Canon Of Construction Applicable To Railroad ROW Grants**

The established rule governing the interpretation of grants of federal lands holds that “public grants are construed strictly against the grantees” and that any doubts “are resolved for the Government, and not against.” *Leo Sheep Co. v. United States*, 440 U.S. 668, 682 (1979). However, the Supreme Court has cautioned that this canon does not “apply ... in its full vigor to grants under the railroad acts.” *Id.* Due to the unique nature of those grants, the Supreme Court has articulated a modified version of this familiar canon which states:

When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more *liberal construction in favor of the purposes for which it was enacted.*

*Id.* at 683 (emphasis added). Nevertheless, while railroad ROW grants are to be liberally construed to carry out their purpose, they are still “subject to the general rule of construction that

any ambiguity in a grant is to be resolved favorably to a sovereign grantor – ‘nothing passes but what is conveyed in clear and explicit language.’” *Great Northern*, 315 U.S. at 272 (internal citations omitted); see also *United States v. Union Pacific*, 353 U.S. 112, 116 (1957) (“land grants are construed favorably to the Government, [such] that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.”).

### C. Prior Interpretations Of The 1875 Act

Consistent with the approach to statutory interpretation outlined above, the Supreme Court concluded that the 1875 Act “clearly grants only an easement, and not a fee [interest].” *Great Northern*, 315 U.S. at 271.<sup>5</sup> The Court observed that the purpose of the 1875 Act was to “permit the construction of railroads through the public lands and thus enhance their value and hasten their settlement,” but expressly noted that “[t]he achievement of that purpose does not compel a construction of the right of way grant as conveying a fee title to the land ... [as] a railroad may be operated though its right of way be but an easement.” *Id.* at 272. The Court based its conclusion that the 1875 Act granted only an easement on two considerations.

*First*, the *Great Northern* Court looked to the text of the 1875 Act itself. It observed that “Section 1 [of the Act] indicates that the right is one of passage since it grants ‘the,’ not a, ‘right of way’ through the public lands.” *Id.* at 271. Similarly, the Court observed that Section 2 also supported the conclusion that the right conveyed by the 1875 Act was “one of use and occupancy only, rather than the land itself” based on its declaration “that any railroad whose right of way passes through a canyon, pass or defile ‘shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located.’” *Id.* (emphasis in original). Finally, the Court found “especially persuasive,” the statement in Section 4 that “all such lands *over* which such right of way shall pass shall be disposed of *subject to* such right of way.” *Id.* (emphasis in original). The Court concluded that “[a]fter words to indicate the intent to convey an easement would be difficult to find,” because the “reserved right to dispose of the lands subject to the right of way is wholly inconsistent with the grant of a fee.” *Id.*<sup>6</sup> The text of Section 4 is noteworthy because the railroad ROW statutes that preceded the 1875 Act contained no such provision. *Id.* at 278.

*Second*, the Court considered the legislative and policy changes that occurred contemporaneously with the passage of the 1875 Act. *Id.* at 272-77. The Court explained that prior to 1871 Congressional policy was geared towards “subsidizing railroad construction by lavish grants from the public domain.” *Id.* at 273. As a result, courts interpreting those pre-1871

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<sup>5</sup> See also *Himonas v. Denver & R.G.W.R. Co.*, 179 F.2d 171 (10th Cir. 1949) (same). The dispute in *Great Northern* was whether the railroad or the United States retained the rights to the mineral estate underlying an 1875 Act ROW. The Supreme Court held that those rights were retained by the United States, based in part on its conclusion that an 1875 Act ROW was merely an easement. Prior to *Great Northern*, the Supreme Court had indicated that the 1875 Act conveyed a limited fee. *Rio Grande W. Ry. Co. v. Stringham*, 239 U.S. 44, 47 (1915). However, *Great Northern* explicitly overruled this interpretation, concluding that the *Stringham* decision was “inconsistent with the language of the [1875] Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation.” *Great Northern*, 315 U.S. at 279.

<sup>6</sup> This interpretation is also consistent with the Act’s legislative history. *Great Northern*, 315 U.S. at 272 n3 (citing Cong. Globe, 42d Cong., 2d Sess., 2137 (1872)) (the 1875 Act “grants no land to any railroad company”).

railroad ROW statutes have concluded that they granted “limited fee” interests in the lands described by the ROWs. By the 1870s, however, “[t]his policy incurred great public disfavor,” and in 1872 the House adopted a resolution, dated March 11, 1872, which stated:

*Resolved*, That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law.

*Id.* at 273-74 (citing Cong. Globe, 42d Cong., 2d Sess., 1585 (1872)). Based on this change, after 1871 “outright grants of public lands to private railroad companies seem to have been discontinued.” *Id.* at 274. In its place, post-1871, Congress encouraged the “development[] of the Western vastnesses” through the 1875 Act by “grant[ing] rights to lay track across the public domain,” *Id.* at 274-75, but that the “right[s] granted ... [were] of use and occupancy only.” *Id.* at 270 (observing that Section 2 of the 1875 Act confirms this conclusion) and 275 (“It is improbable that Congress intended by [the 1875 Act] to grant more than a right of passage.”).<sup>7</sup>

The *Great Northern* Court also observed that its conclusion about the nature of the 1875 ROW grants was confirmed by the Department’s first interpretation of the Act, contained in the general ROW circular of January 13, 1888, 12 L.D. 423. *Id.* at 276. That circular concluded that “[t]he act of March 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee, either in the ‘right of way’ or the grounds selected for depot purposes. It is a *right of use only*, the title still remaining in the United States.” 12 L.D. at 428 (emphasis added). This interpretation was confirmed in regulations adopted by the Department on May 21, 1909. 37 L.D. 787, 788 (“A railroad company to which a right of way is granted [under the 1875 Act] does not secure a full and complete title to the land on which the right of way is located. It obtains only the right to use the land for the purposes for which it is granted and for no other purpose.”).<sup>8</sup> Lower courts have recently affirmed the more limited nature of the 1875 Act ROW grants. See *Home on the Range*, 386 F. Supp. 2d at 1017 (observing that Section 4 of the 1875 Act is wholly inconsistent with the grant of a fee interest); *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) (same).<sup>9</sup> And while the Supreme Court has questioned the need for *Great*

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<sup>7</sup> *Wyoming v. Andrus*, 602 F.2d 1379, 1382 (10th Cir. 1979) (“The 1875 Act is ... significant in that it reduced the quality of the grant to the railroads.”).

<sup>8</sup> The *Great Northern* court did note that there had been a shift in the regulatory interpretation of the 1875 Act towards “describe[ing] the right as a ‘base or qualified fee’.” 315 U.S. at 276. The Court, however, dismissed that subsequent interpretation and did not “regard [it] ... as binding on the Department ... since it was impelled by what ... [the court] regard[ed] as inaccurate statements in [*Rio Grande W. Ry. Co. v. Stringham*, 239 U.S. 44, 47 (1915)].”.

<sup>9</sup> Unlike the ROWs at issue in Opinion M-36964 and *Home on the Range*, the ROW at issue in *Hash* was found by the court to have been abandoned. See *Hash*, 403 F.3d at 1318; *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1370 (Fed. Cir. 2009). As a result, one of the questions addressed by the court in *Hash* was what interest was retained by the United States in the 1875 Act ROW at issue there. While that specific question is outside the scope of this opinion, see note 3, the Federal Circuit has narrowed the reach of the holding in *Hash* to the specific facts of that case. See *Ellamae Phillips*, 564 F.3d at 1373-74. As noted below, other courts confronted with the same question as the Federal Circuit in *Hash* and *Ellamae Phillips* have concluded that the United States retains a reversionary interest in an 1875 Act ROW. See, e.g., *Idaho v. Oregon Short Line R.R. Co.*, 617 F. Supp. 207, 212 (D. Idaho 1985); *Marshall v. Chicago & Northwestern Transp. Co.*, 31 F.3d 1028, 1032 (10th Cir. 1994).

*Northern's* "easement" versus "limited fee" distinction, it has only done so in the context of resolving the question of which party held title to the mineral estate under a ROW granted pursuant to the Act of July 1, 1862, 12 Stat. 489. See *Union Pacific*, 353 U.S. at 119. After the *Union Pacific* decision, *Great Northern's* distinction between pre-1871 and 1875 Act ROWs remains relevant to determining what rights a railroad received under the 1875 Act relative to the government grantor.<sup>10</sup>

Based on the preceding, we conclude that the rights conveyed by the 1875 Act are narrower than the pre-1871 acts, contrary to Opinion M-36964's conclusion that a railroad received "an interest tantamount to fee ownership" in the 1875 Act ROWs. The implication of this conclusion and analysis of the rights that accompany an 1875 Act ROW are discussed in Section II below.

## II. ANALYSIS

### A. The Conclusions In Opinion M-36964 With Respect To The 1875 Act Are Inconsistent With The Act, Its Legislative History, Prior Interpretations, And The Applicable Canons of Statutory Construction

Opinion M-36964 addressed the specific question of whether MCI Telecommunications Corporation ("MCI") had to obtain a ROW grant or permit from the BLM in order to install a fiber optic communications line and associated equipment shelters within existing railroad ROWs granted to the Southern Pacific Transportation Co. ("Southern Pacific"), or its predecessors, under various railroad ROW acts.<sup>11</sup> Although Opinion M-36964 addresses the specific question presented by MCI and Southern Pacific, per its terms "it is intended to provide general guidance in similar situations." 96 I.D. at 439.

Opinion M-36964 concluded that railroad ROWs granted pursuant to the two pre-1871 railroad acts at issue "conveyed a 'limited fee' interest in the [ROW],"<sup>12</sup> and as such that those pre-1871 ROWs were "privately owned, except for reserved minerals, [and] not subject to the administrative jurisdiction of th[e] Department." 96 I.D. at 444-45, 450.<sup>13</sup> With respect to the 1875 Act grants, Opinion M-36964 concluded that those grants carried with them "the right to

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<sup>10</sup> Similarly, while the significance of the shift in Congressional policy identified in *Great Northern* has been questioned in the academic literature, see, e.g., Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's "1871 Shift"*, 82 U. COLO. L. REV. 85 (2011), the *Great Northern* court's analysis has not been rejected or questioned by subsequent courts.

<sup>11</sup> While MCI's line was primarily a commercial trunk line, a portion of its capacity was dedicated to the railroad.

<sup>12</sup> The limitations on the "limited fee" created by the pre-1871 grants are (i) that the mineral rights underlying them were reserved to the United States, and (ii) that they were subject to an "implied condition of reverter in the event that the company ceased to use or retain the land" for railroad purposes. 96 I.D. at 444.

<sup>13</sup> Given the multitude of railroad ROW acts, especially pre-1871, it should be noted that the key factor in determining what rights a railroad has within a particular ROW is not determined by the date the ROW grant was issued, but rather by the terms and interpretation of the act establishing the grant. For purposes of this analysis, we do not disagree with the conclusions articulated by Opinion M-36964 with respect to the pre-1871 grants at issue there, but note that courts have found certain other pre-1871 grants to convey lesser interests. See, e.g., *Energy Transp. Sys., Inc. v. Union Pac. R.R. Co.*, 606 F.2d 934, 936-38 (10th Cir. 1979) ("*ETSI P*") (concluding that Section 2 of the Pacific Railroad Act of 1862 and 1864 conveyed a ROW only, while Section 3 conveyed a fee interest); *Energy Transp. Sys., Inc. v. Union Pac. R.R. Co.*, 619 F.2d 696 (8th Cir. 1980) ("*ETSI IP*") (same).



exclusive use and occupancy of the land,” such that the rights conveyed by those grants were “unlike an ordinary common-law easement ... [and were] tantamount to fee ownership.” According to Opinion M-36964, the interest conveyed under the 1875 Act includes the right to authorize others to use the surface, subsurface, and airspace when not inconsistent with railroad operations, analogous to the authority available to the holders of the pre-1871 ROWs at issue. *Id.* at 447, 450, 451 (internal citation omitted). In reaching those conclusions, Opinion M-36964 overruled a July 5, 1985, memorandum and a February 24, 1986, letter by the Associate Solicitor, Energy and Resources, addressing a proposal by U.S. Telecom, Inc., to install a buried communications cable within railroad ROWs granted under the Act of July 1, 1862, and the 1875 Act. 96 I.D. at 440-41. The Associate Solicitor’s 1985 memorandum had opined that such ROWs were surface easements; that the subsoil was unappropriated public land; and that the railroad could not authorize third parties to install buried systems in the subsoil, especially where such systems were not railroad-related. 96 I.D. at 440-41.

Opinion M-36964’s conclusion with respect to the scope of an 1875 Act ROW grant has been the subject of some debate since its issuance, and was specifically criticized by the *Home on the Range* court. In that case, the court found that Opinion M-36964 “did not cite any law for th[e] proposition” that 1875 Act grants were tantamount to fee ownership and faulted the Opinion for “effectively ignor[ing] the Supreme Court’s decision in *Great Northern*, which took pains to distinguish between the ‘limited fee’ granted by the pre-1871 statutes and the easements granted by later statutes.” See *Home on the Range*, 386 F. Supp. 2d at 1022. To support its conclusions regarding the 1875 Act, Opinion M-36964 cited only two cases – *Great Northern*, 315 U.S. 262 and *Idaho v. Oregon Short Line R.R. Co.*, 617 F. Supp. 207 (D. Idaho 1985). Opinion M-36964’s interpretation of those cases is incorrect.

Opinion M-36964 asserts that the Supreme Court in *Great Northern* confirmed “the significant rights of the 1875 Act grantees, i.e., use and occupancy ... [and] did not limit the grantees’ rights to those of a *common-law* easement.” 96 I.D. at 447 (emphasis in original). While we agree with the observation that an 1875 Act ROW is not akin to a common law easement, that observation does not, as M-Opinion 36964 concludes, mean that the rights in a ROW conveyed by the 1875 Act are the same as those conveyed by the pre-1871 railroad ROW acts. Without any analysis, Opinion M-36964 relies on *Great Northern*’s acknowledgment that a railroad ROW is a unique property right to support the proposition that the 1875 Act grants an interest tantamount to a fee. 96 I.D. at 447. This leap is directly at odds with one of the express holdings of the case, namely that the 1875 Act conveys an easement and not a fee interest.

Opinion M-36964’s reliance on *Oregon Short Line* is also misplaced. As the *Home on the Range* court explained, the *Oregon Short Line* case did not deal with the question of the scope of an 1875 ROW; rather, it addressed “only the use of the ... [ROW] itself.” *Home on the Range*, 386 F. Supp. 2d. at 1019. The court in *Oregon Short Line* was asked to determine whether the United States retained a reversionary interest in an 1875 Act ROW pursuant to 43 U.S.C. § 912. In concluding that the United States retained such an interest, the court also affirmed that the 1875 Act did not “convey to the railroads a fee interest,” but rather a ROW “suitable for railroad purposes,” *Oregon Short Line*, 617 F. Supp at 212. This holding is at odds with Opinion M-36964’s characterization of the case as supporting its conclusion that the 1875 Act conveyed an interest “tantamount to a fee.” 96 I.D. at 447.

Opinion M-36964 also relies on the following statement by Justice Frankfurter in his dissent in *Union Pacific* to support its analysis of the 1875 Act:

*[Northern Pacific Ry. v. Townsend, 190 U.S. 267 (1903)] ... also serves to refute the suggestion that the railroad in its use of the right of way is confined to what in 1957 is narrowly conceived to be "a railroad purpose" . . . The Court [in Townsend] recognized that the land could revert to the grantor only in the event that it was used in a manner inconsistent with the operation of the railroad . . . Had Congress desired to make a more restrictive grant of the right of way, there would have been no difficulty in making the contingency for the land's reversion its use for any purpose other than one appropriately specified.*

96 I.D. at 446 (emphasis in original) (*quoting Union Pacific*, 353 U.S. at 131-32). While Justice Frankfurter's statement in isolation suggests that railroad ROW grants are broad, it was made in the dissent in reference to a pre-1871 ROW grant, as Opinion M-36964 acknowledges. 96 I.D. at 446. Moreover, in the same dissent, Justice Frankfurter observed that the 1875 Act "was significantly different from the Act of 1862 and its companions" in terms of what they granted a railroad. *Union Pacific*, 353 U.S. at 127-130; *see also Home on the Range*, 386 F. Supp. 2d. at 1022. Thus, Justice Frankfurter's dissent does not provide even implicit support for Opinion M-36964's conclusion with respect to the 1875 Act.

Finally, in addition to being unsupported by the case law, Opinion M-36964's construction of the 1875 Act is also inconsistent with the canons of construction holding that while railroad ROW grants are to be liberally construed with the respect to the purpose for which they were enacted, they are nevertheless still subject to the general rule that any ambiguities in grants of federal lands are to be resolved in favor of the United States. Opinion M-36964 reasoned that because 1875 Act grants carried with them "the right to exclusive use and occupancy of the land" that was "unlike an ordinary common-law easement," they therefore conveyed a property right "tantamount to fee ownership." 96 I.D. at 447, 450 (internal citation omitted). Opinion M-36964's interpretation of the scope of a railroad's "exclusive use and occupancy" of the surface and non-mineral subsurface of an 1875 Act ROW is inappropriate for two reasons. First, it impermissibly extends the scope of such ROW grants beyond the purposes for which the 1875 Act was enacted, namely the "construction of ... [a] railroad." 18 Stat. at 482. Second, Opinion M-36964's conclusion that a railroad's "exclusive use and occupancy" of an 1875 Act ROW allows it to undertake or authorize *any* activity that is *not inconsistent* with railroad purposes ignores judicial precedent which establishes that the railroad's "exclusive use and occupancy" is more limited – i.e., it extends only to activities that derive from or further a railroad purpose. By interpreting the 1875 Act as granting such broad rights, Opinion M-36964 construed it in a manner that is not favorable to the government in direct contradiction to the rule that grants of federal lands are to be construed strictly against the grantees. Moreover, Opinion M-36964's construction is inconsistent with the Act's text and legislative history. *See* Section I(C) above.

Based on the foregoing, we conclude that Opinion M-36964's interpretation of the 1875 Act is inconsistent with the Act itself, the applicable legislative history, Supreme Court precedents, and the applicable canons of statutory construction. As explained above, the purpose of the 1875 Act was to provide a ROW for "railroad purposes." Construing the 1875 Act, as we



must, in a manner most favorable to both the purposes for which it was enacted and to the Government, leads to the conclusion that a railroad's exclusive use and occupancy of such ROWs includes all those activities that either derive from or further a *railroad purpose* (see Section I above), but does not include, as Opinion M-36964 opines, rights that are "tantamount to a fee." See *Home on the Range*, 386 F. Supp. 2d at 1024. Therefore, we withdraw that portion of Opinion M-36964 that relates to the scope of the 1875 Act. The implications of this conclusion are addressed in the next section.

**B. A Railroad's Authority To Authorize Other Activities Within An 1875 Act ROW Is Limited To Those Activities That Derive From or Further A Railroad Purpose**

While the *Home on the Range* court confirmed that the scope of an 1875 Act ROW grant is limited to those activities that are "derived from or further a railroad purpose," 386 F. Supp. 2d at 1024, it did not attempt to define "railroad purpose." Section 1 of the Act sets forth a list of the rights accompanying the grant, including the "right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side tracks, turn-outs, and water-stations." 18 Stat. at 482. While the general canon of statutory construction for grants of federal land would conclude that activities not expressly identified in that list would be prohibited, under the more liberal canon applied to railroad ROW grants courts have concluded that railroads were given as part of their authorization to construct, the right to conduct whatever activities would be necessary to construct and operate said railroad. Therefore, courts confronted with such questions examine the activity in question to determine whether it "derive[s] from or further[s] a railroad purpose"<sup>14</sup> to determine whether it is within the scope of the ROW grant. *Home on the Range*, 386 F. Supp. 2d at 1024. Some courts and commentators refer to this inquiry as the "incidental use doctrine." See, e.g., *Mellon v. S. Pac. Transp. Co.*, 750 F. Supp. 226, 230 (D. Tex. 1990).

This inquiry starts with the basic premise that a railroad has the exclusive right to utilize the entirety of its ROW for the purposes of operating a railroad, which means "the free and perfect use of the surface of the land ... and ... as much above and below its surface as may be needed [to] ... further[] the business of the railroad." 65 AM JUR 2D RAILROADS § 75;<sup>15</sup> *Mellon*, 750 F. Supp. at 230 ("[A] railroad may make many uses of its right-of-way including the building of side tracks, building, telegraph lines, and other structures necessary for its business.")

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<sup>14</sup> This is in contrast to ROWs granted under Title V of the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1761, *et seq.*, where the scope of the grant is explicitly defined in the ROW grant itself.

<sup>15</sup> Railroad operations include "the right to tunnel the land, to cut embankments, to grade and make roadbeds, and to operate and maintain a railroad with one or more lines of track with proper stations, depots, turnouts, and other appurtenances of a railroad," unless a particular activity is specifically prohibited under the terms of the grant. 65 AM JUR 2D RAILROADS § 75; see also 10-78A POWELL ON REAL PROPERTY § 78A.14; see also Section 1 of the 1875 Act, 18 Stat. 482. They also include the right to take material, earth, stone, and timber from the public lands adjacent to the roadbed that are necessary for the construction of the railroad. See, e.g., 18 Stat. at 482. And, while generally such ROWs included exclusivity of use, there are limitations on that exclusivity in the 1875 Act context. See Section 2 of the 1875 Act, 18 Stat. at 482 (stating that a railroad with a ROW through a canyon, pass, or defile, "shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile.").

(internal citations omitted);<sup>16</sup> *Union Pac. Ry. v. Chicago, R.I. & P. Ry.*, 163 U.S. 564, 581 (1896); *ETSI v. Union Pacific R.R.*, 435 F. Supp. 313, 317 (D. Wyo. 1977), *aff'd*, 606 F.2d 934 (10<sup>th</sup> Cir. 1979) (a railroad may use its ROW for “all uses incidental to railroad purposes”). Determining whether an activity “derives from or furthers a railroad purpose” requires a fact specific case-by-case inquiry. Courts conducting such inquires have allowed railroads to:

1. Run telephone lines (and previously telegraph lines) to “provide for communications between stations.” 10-78A POWELL ON REAL PROPERTY § 78A.14; *Home on the Range*, 386 F. Supp. 2d at 1021 (observing in dicta that an 1875 Act ROW included the right to install “telegraph or other communication technology for the purpose of facilitating the operation of the railroad itself.”);<sup>17</sup> *see, e.g., St. Louis, Iron Mountain & S. Ry. Co. v. Cape Girardeau Bell Tel. Co.*, 114 S.W. 586, 587 (Mo. Ct. App. 1908) (same);<sup>18</sup> *Grand Trunk R.R. Co. v. Richardson*, 91 U.S. 454, 468 (1876) (observing that it does not matter if the activity in question “may also be for the convenience of others” in addition to the railroad);<sup>19</sup>
2. Construct structures, such as commercial warehouses, where convenient, to facilitate the delivery of freight that may ultimately be shipped on the railroad. *See, e.g., Miss. Inv. Inc. v. New Orleans & N.E.R. Co.*, 188 F.2d 245, 247 (5th Cir. 1951) (concluding that a warehouse for receiving freight constructed within a railroad ROW easement was “consistent with the purposes for which the easements were acquired [i.e., railroad purposes].”);<sup>20</sup>

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<sup>16</sup> The court in *Mellon* addressed a challenge to another segment of the same MCI fiber optic line at issue in Opinion M-36964. While the court in *Mellon* did not specifically characterize the nature of the railroad ROW grant at issue there, it held that the railroad had the authority to authorize the installation of the fiber optic line within its ROW because the line was incidental to railroad operations as it was used, in part, to provide communication capacity to the railroad. *See generally Mellon*, 750 F. Supp. at 230; *see also Long Beach v. Pac. Elec. Ry. Co.*, 283 P.2d 1036, 1038 (Cal. 1955) (“railroads may use their rights of way for certain commercial activities,” so long as “they contribute to the railroad’s business.”) (internal citations omitted).

<sup>17</sup> It should be noted that in *Home on the Range*, the court specifically observed that AT&T offered no evidence to suggest that its fiber optic line in any way furthered the purpose of the railroad itself. 386 F. Supp. 2d at 1021.

<sup>18</sup> The court in *Cape Girardeau*, construing a railroad’s rights within a state railroad ROW that had been deemed to grant an easement, stated that “telegraph and telephone are conveniences so essential, if not indispensable to the purposes of a railroad, that a railroad company may establish and construct one or both along the line of its right of way, to be used in the prosecution of its business in operating the road, and such use, essential as it is, is not an additional servitude upon the fee,” *Cape Girardeau*, 114 S.W. at 587, and that “the mere commercial use of the telephone under the circumstances mentioned, is entirely consistent and in no manner interferes with the railroad ... easement.” *Id.* at 590.

<sup>19</sup> Compare *The Am. Tel. & Tel. Co. of Baltimore City v. Pearce*, 18 A. 910, 912 (Md. 1889) (“a line of telegraph on a railroad right of way is an *additional burden*, unless constructed for the use of the railroad company in the operation of its road and dispatch of its business.”) (internal citations omitted; emphasis in original), and *W. Union Tel. Co. v. Nashville, C. & St. L., Ry. Co.*, 237 S.W. 64, 89 (Tenn. 1921) (observing that a railroad company operating within a ROW easement was not “entitled to operate a commercial telegraph along its right of way entirely disconnected from its own business.”).

<sup>20</sup> *Grand Trunk*, 91 U.S. at 468; *Or. Short Line R. Co. v. Ada County*, 18 F. Supp. 842 (D. Idaho 1937) (same); *see also Solicitor’s Opinion M-36016, Lease of Railroad’s Station Grounds at Parker, Arizona* (1949) (recognizing that warehouses for receiving freight constitute a use incidental to railroad purposes); Railroad Right of Way – Lease for

3. String power lines. *Long Beach v. Pac. Elec., Ry. Co.*, 283 P.2d 1036 (Cal. 1955) (power lines necessary for operation of electric railroad);<sup>21</sup> and
4. Construct combined bulk and retail oil facilities. *Mitchell v. Ill. Cent. R.R. Co.*, 51 N.E.2d 271 (Ill. 1943) (affirming construction of a facility within a railroad ROW easement for the receipt and shipment of bulk oil via the railroad, where such facility also sold oil to retail customers).

These precedents establish that railroads have the right to undertake a range of activities within their ROWs, including commercial activities, so long as the activity is derived from or furthers a railroad purpose consistent with the discussion above. A railroad's right to undertake activities within an 1875 Act ROW includes the right to authorize other parties to undertake those same activities. *See, e.g., Grand Trunk*, 91 U.S. at 468 (“[I]f the [railroad] ... might have put up the buildings, why might it not license others to do the same thing for the same object ...?”). For example, in *Grand Trunk* the freight warehouse that was determined to be related to a railroad purpose was constructed by a third party under a license from the railroad. *See also Miss. Inv. Inc.*, 188 F.2d at 247 (a third party warehouse authorized by the railroad was “not so foreign to railroad purposes as to constitute [an] ... additional servitude not permissible under the right ... acquired for railroad purposes.”).<sup>22</sup> Consistent with these cases, Opinion M-36964 affirmed that a railroad can authorize a third party to undertake any activity within a railroad ROW that the railroad itself would be able to undertake. 96 I.D. at 446;<sup>23</sup> *see also* Section II(C) below.

Based on the preceding, we conclude that Opinion M-36964's assertion that a railroad has the broad authority to approve any activity within an 1875 Act ROW so long as it is not inconsistent with railroad operations, 96 I.D. at 450-51, is incorrect because it does not require a demonstration that such activities derive from or further a railroad purpose. Therefore, Opinion M-36964's conclusion about the types of activities that may be authorized by a railroad in an 1875 Act railroad ROW is hereby withdrawn consistent with the analysis above. As a result, any activity undertaken or authorized by a railroad on public lands within an 1875 Act ROW that does not derive from or further a railroad purpose would require authorization from the Department.<sup>24</sup>

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Warehouse Purposes, 29 L.D. 569 (1900) (same); *Garry v. Atchison Topeka and Santa Fe Ry. Co.*, 378 P.2d 609 (NM 1889).

<sup>21</sup> Compare with *Tompkins v. Atl. Coast Line. R. Co.*, 79 S.E.2d 41, 47 (Ga. Ct. App. 1953) (“The grant of an easement for railroad purposes does not include an easement for an electric-power transmission line, unconnected with the operation of the railroad.”) (internal citations omitted); *Muncie Elec. Light Co. v. Joliff*, 109 N.E. 433 (Ind. Ct. App. 1915) (same).

<sup>22</sup> *See also Hartford Ins. Co. v. Chicago, M. & S.P. Ry.*, 175 U.S. 91, 99 (1899); *Chicago, R.I. & P. Ry.*, 163 U.S. at 581; *Mitchell*, 51 N.E.2d at 275.

<sup>23</sup> Opinion M-36964's conclusion with respect to the authorization of third party activities by a railroad is not affected by this withdrawal of the 1875 Act portion of that Opinion.

<sup>24</sup> *See, e.g., infra* notes 19 and 21; *see also ETSI II*, 619 F.2d at 700 (concluding that the State of Nebraska's interest in the subsurface of the servient estate underlying a railroad ROW was sufficient to “permit the state to convey to ETSI a pipeline easement” underneath the railroad ROW). We would note that in circumstances where the authority to undertake or authorize a specific activity lies with the servient estate owner, and not the railroad, such an activity

### **C. Implications Of This Memorandum For The Activities Specifically Referenced In Opinion M-36964**

Based on this withdrawal of Opinion M-36964's conclusion with respect to the 1875 Act, we analyze the implications of the withdrawal on the activities specifically addressed in Opinion M-36964. As noted above, Opinion M-36964 considered the specific question of what approvals, if any, MCI had to obtain from the BLM in order to install a fiber optic communications line and associated facilities along Southern Pacific's railroad ROWs across BLM-administered lands, including ROWs granted pursuant to: (i) the Act of July 27, 1866, 14 Stat. 292; (ii) the Act of March 3, 1871, 16 Stat. 573; and (iii) the 1875 Act. As explained above, this Opinion does not alter the conclusions of Opinion M-36964 with respect to the 1866 or 1871 act ROWs.

With respect to the fiber optic line installed along Southern Pacific's 1875 ROW, we find that the outcome reached by Opinion M-36964 was correct, namely that the installation of the line was within the scope of the railroad's authority to authorize, but that the basis given for that conclusion, as set forth above, was incorrect. MCI demonstrated that its fiber optic line, in addition to providing commercial communication services, also furthered railroad operations. Prior to the issuance of Opinion M-36964, MCI provided a letter to the Department from Southern Pacific which stated that Southern Pacific "will use the fiber optic capacity it receives from MCI to improve the efficiency of its own communications systems, and thereby improve the safety of its operations."<sup>25</sup> Such evidence demonstrates that MCI's line furthered, at least in part, a railroad purpose, as required by the incidental use doctrine, and therefore, Southern Pacific had the authority to approve the installation of MCI's line in its ROW across BLM-administered lands without approval from the Department.

### **III. CONCLUSION**

Based on the foregoing analysis, we withdraw that portion of Opinion M-36964 containing conclusions with respect to the scope of a railroad's authority within an 1875 ROW.<sup>26</sup> This withdrawal is based on our findings that:

- Opinion M-36964's conclusions with respect to the activities that a railroad may undertake, or authorize others to undertake, within an 1875 Act ROW are not consistent with the Act, the relevant legislative history, prior interpretations of the Act, or the

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cannot interfere with the railroad's use of the ROW for railroad purposes. *See, e.g., ETSI I*, 606 F. 2d at 938; *ETSI II*, 619 F.2d at 696 n. 4, 697.

<sup>25</sup> Letter from Southern Pacific Transportation Company, Roger W. Pearson, to Steven P. Quarles, Crowell & Moring, counsel for MCI, dated Mar. 28, 1988; Memorandum from S. Quarles, Crowell & Moring, on Behalf of MCI, to the Solicitor of the Department of the Interior, "MCI's Buried Fiber Optic Line Use of the Southern Pacific Right-of-Way Requires No FLPMA Permit from Interior" (undated) (on file with author) (arguing, in part, that MCI's fiber optic line is allowed without BLM approval under the incidental use doctrine); *see also* 96 I.D. at 439 (observing that the MCI line "furthered railroad purposes").

<sup>26</sup> The subsurface/surface distinction in the Associate Solicitor's 1985 memorandum, which had been overruled by the 1875 Act portion of Opinion M-36964, has not been reinstated by this memorandum, because that distinction is not relevant to determining what can, or cannot, be undertaken within an 1875 Act ROW. As stated above, the key question is whether or not the activity in question has a railroad purpose or is derived from or furthers such a purpose.

established rules that railroad ROW grants are liberally construed in favor of the purposes for which they were enacted, but otherwise are subject to the general rule that grants of lands from the public domain are construed strictly against the grantee and that any doubts as to the scope of the grant are resolved for, and not against, the Government; and

- A railroad's authority to undertake or authorize activities within an 1875 Act ROW is limited to those activities that derive from or further a railroad purpose.

The BLM should exercise its discretion under Title V of FLPMA to determine the extent to which development actions within 1875 Act ROWs have been taken in reliance on Opinion M-36964. The BLM should, in light of this Opinion, evaluate those prior actions on a case-by-case basis. Such evaluations should consider the relationship of those prior actions to railroad purposes, as outlined above, in order to determine what actions, if any, need to be taken with respect to such ROW activities. BLM may prioritize these evaluations through its ongoing inventory of resources on the public lands.<sup>27</sup>

  
Hilary C. Tompkins

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<sup>27</sup> This Opinion was prepared with the substantial assistance of Dylan Fuge and Michael Hickey in the Solicitor's Office.