
IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA 23-0569

SAMUEL J. NELSON, individually and as Trustee of the SAMUEL J. NELSON REVOCABLE TRUST DATED FEBRUARY 11, 2011,

Petitioner-Appellant,

v.

MONTANA RAIL LINK, INC., a Montana Corporation, and BURLINGTON NORTHERN SANTA FE RAILWAY CO., a Texas Corporation,

Respondents-Appellees.

On Appeal from the Eighteenth Judicial District Court,
Gallatin County Cause No. DV-21-1204B
Judge Rienne H. McElya

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STATEMENT OF ISSUES

Did the District Court correctly grant Appellees’ Montana Rail Link, Inc., and BNSF Railway Co’s ¹ Motion for Summary Judgment finding that Appellant Nelson could not establish a private prescriptive easement over railroad right of way property granted by the Federal Land Grant Act of 1864?

STATEMENT OF THE CASE

Appellant Samuel Nelson, individually and as Trustee of Samuel J. Nelson Revokable Trust (“Nelson”) filed a Petition for Declaratory Judgment seeking to obtain private easement rights over a pathway located longitudinally on Appellees’ Right of Way (“ROW”) and running parallel within feet of active railroad tracks in Gallatin County. At the time of the District Court’s Order, the ROW was operated by Montana Rail Link (“MRL”) pursuant to lease from BNSF Railway Company (“BNSF”). ²

The parties filed cross-motions for summary judgment. BNSF and MRL moved for summary judgment asserting Nelson’s claims are barred by federal land

¹ BNSF Railway Co. is incorrectly referred to as Burlington Northern Santa Fe Railway Co. in the caption.

² At the time of this lawsuit, MRL leased and operated mainline tracks between Huntley, Montana, and Sandpoint, Idaho, including the right of way now at issue. As of January 1, 2024, BNSF resumed operations of the prior MRL territory and MRL employees became BNSF employees.

grant preclusion under the Northern Pac. R.R. Co. Land Grant Act, 13 Stat. 365 (“1864 Act”). The 1864 Act granted a BNSF predecessor railroad, the Northern Pacific Railroad Company, the land at issue by limited fee on an implied condition of reverter. In doing so, the federal government conclusively determined that the entirety of the ROW was necessary for railroad operations and the railroad is not at liberty to alienate any part of the ROW that might interfere with its full use. Therefore, no property or possessory interest in that ROW can be obtained by prescription because the limited fee grant provides the railroads the right to exclusive use and occupancy of the entire ROW for a designated purpose. Moreover, the ROW reverts to the federal government upon abandonment further precluding the establishment of the private prescriptive easement Nelson seeks.

BNSF and MRL also moved for summary judgment on the basis that Nelson’s claims are preempted under the Interstate Commerce Commission Termination Act, 49 U.S.C. §§ 10101-16106 (“ICCTA”) gives the Surface Transportation Board exclusive jurisdiction over “transportation by rail” and “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities.” 49 U.S.C. § 10501 (b)(2). BNSF and MRL argued that any prescriptive easement would unreasonably interfere with the use of railroad property for transportation, requiring a finding of preemption.

Nelson moved for summary judgment asserting entitlement to a prescriptive easement over the subject ROW as a matter of law. He argued alternatively that he acquired an easement by necessity or implied from existing use. However, at the motions hearing, Nelson specifically abandoned these alternative claims, acknowledging: “we’d only have an easement by necessity against the highway cuz (sic) they’re the one that severed the continuity. So we can’t get an easement by necessity from the Railroad. And that has long passed.” Hrg. Tr., p. 40:16-20.

BNSF and MRL opposed Nelson’s motion, first moving to strike Nelson’s unsupported claims and inadmissible evidence pursuant to Rule 56(e)(1), M.R.Civ.P., and *Smith v. Burlington N. & Santa Fe Ry. Co.*, 2008 MT 225, 344 Mont. 278, 187 P.3d 639. (Resp. Brf. Opp. Summ. Jud., Dist. Ct. Doc. 25, pp. 2-4). BNSF and MRL also opposed Nelson’s motion based on the arguments above as well as on the ground that the use of railroad ROWs is permissive as a matter of law. Finally, BNSF and MRL opposed Nelson’s motion on the grounds that even Nelson’s purported facts themselves, if they were to be considered, created material issues of facts and failed to prove a prescriptive easement by clear and convincing evidence.

The District Court found the first issue raised in BNSF and MRL’s motion dispositive and ruled that Nelson’s claims were barred by federal land grant preclusion under the 1864 Act. Thus, the District Court did not reach the merits of

the ICCTA argument, nor did it address whether there were material fact issues or whether Nelson could prove a prescriptive easement by clear and convincing evidence. This appeal follows.

STATEMENT OF FACTS

The undisputed facts conclusively demonstrate that Nelson cannot establish a private prescriptive easement as a matter of law. Even taking every fact alleged by Nelson as true, none creates a material issue of fact as they cannot change the nature of the limited fee grant for a designated purpose by which the ROW was established and the resulting inability to establish a private prescriptive easement.

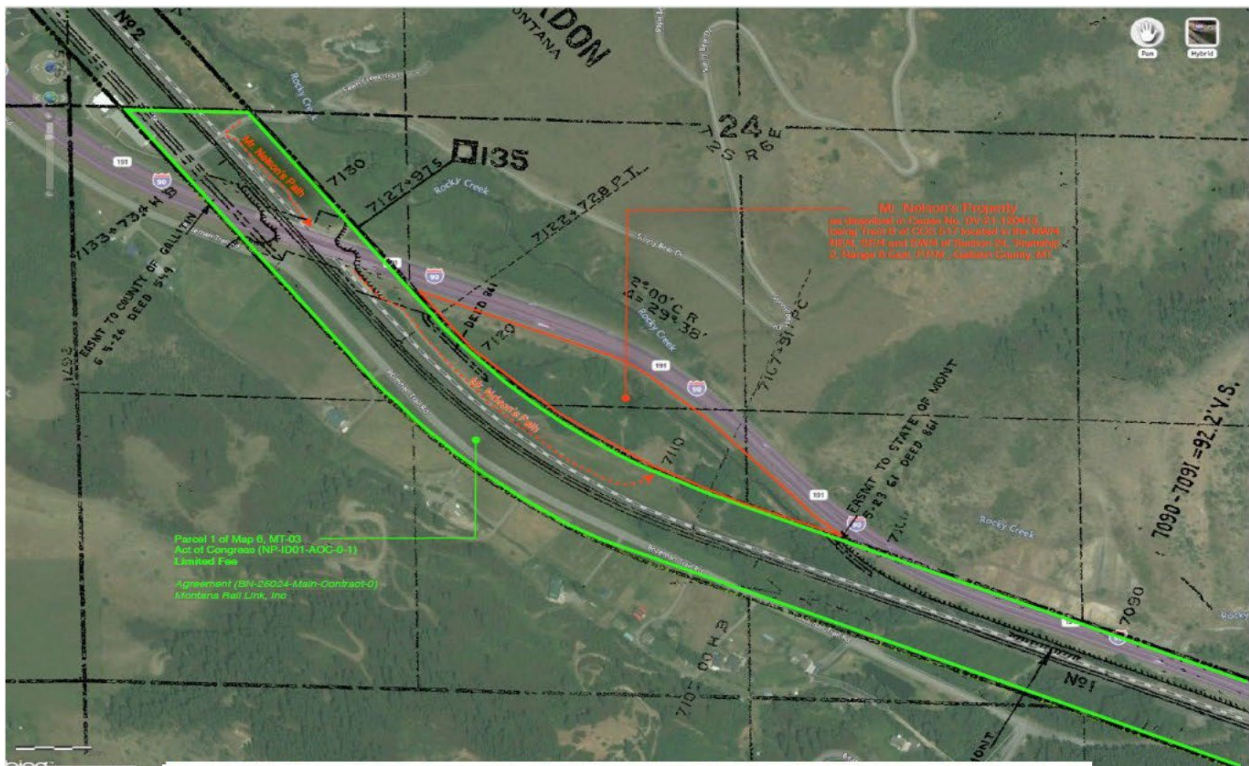
The subject ROW was obtained by Northern Pacific Railroad Company, BNSF's predecessor, pursuant to the 1864 Act. Dec. Cary Hutchings ¶ 3 & Ex. "A" (Dec. 16, 2022) (Dist. Ct. Doc. 20, Ex. "B"; Appx. "1"). As described by the United States District Court for the District of Montana:

In 1864, Congress passed the Northern Pacific Railroad Company Land Grant Act, 13 Stat. 365 ("1864 Act"), which established the Northern Pacific Railroad for purposes of building and maintaining a railroad from Lake Superior to Puget Sound. Section 2 of the 1864 Act granted the railroad a 400-foot wide right of way, extending "200 feet in width on each side of said railroad where it may pass through the public domain."

Avista Corp., Inc. v. Sanders Cty., 485 F. Supp. 2d 1176, 1178 (D. Mont. 2007) *overruled on other grounds by Avista Corp., Inc. v. Wolfe*, 549 F.3d 1239 (9th Cir. 2008); Northern Pac. R.R. Co. Land Grant Act, 13 Stat. 365; Dec. Hutchings ¶ 3 &

Ex. “A” (Dist. Ct. Doc. 20, Ex. “B”; Appx. “1”). Nelson agrees that the subject ROW is part of the 1864 Act and that the alleged prescriptive easement sits entirely within the subject ROW. App. Brf. at 7.

Nelson’s parcel is located between the subject ROW and Interstate 90 in Gallatin County as shown below with the parcel outlined in red and the ROW in green:



Aerial Picture (Dist. Ct. Doc. 20, Ex. “B”; Hrg. Tr. 5:11 – 6:7; Appx. “2”). The parcel became landlocked with the creation of Interstate 90. Hrg. Tr. at 6:17-19; 36:5-8.

In 1987, BNSF’s predecessor entered into a lease of the subject ROW with MRL, which continued to operate trains on the tracks running within it until January

1, 2024, when BNSF resumed operations. See <https://www.montanarail.com/>; <https://www.bnsf.com/news-media/railtalk/service/Montana-Rail-Link.html>.

Although MRL and Nelson had multiple discussions about entering into an agricultural lease/ permit for access to his property across the subject ROW for a nominal amount, any such lease—by the very nature of railroad operations—was terminable by MRL. Nelson Appx. Ex. “6” (offering lease for \$97 per year). This apparently was unacceptable to Nelson and he refused to enter into any such agreement. *Id.*

As the nature of the railroad business progressed, MRL determined that granting Nelson access was unsafe and inconsistent with railroad use. Dec. Randy Gustin ¶¶ 2-6 (Dec. 14, 2022) (Dist. Ct. Doc. 20, Ex. “C”; Appx. “3”). Factors in this decision include that the track immediately adjacent to purported easement is at a 1 % grade with trains traveling at 40 miles per hour with limited sight lines near Bozeman Pass. This impacts a train crew's ability to identify hazards and react in time to avoid collisions and makes the location of the alleged easement particularly unsafe. *Id.* Also, the subject dirt road parallel to the track is well within a minimum safe distance of 50 feet from the track, unduly placing both rail and automobile/pedestrian traffic at risk of collision. *Id.* Further, the road comes perilously close to the tracks at the point the road and track travel under the Interstate 90 overpass further increasing the likelihood of an accident. *Id.* The photographs

provided by Nelson further demonstrate the precarious position of Nelson's claimed easement in relation to the tracks. Nelson Appx. Ex. "7". Finally, should an easement be deemed to exist at the location of the dirt road it would also complicate, if not outright prevent, the ability to expand the current single mainline track to double mainline track or make other track improvements as rail traffic increases, which it has over the past decade. Dec. Gustin at ¶¶ 2-5 (Dist. Ct. Doc. 20, Ex. "C"; Appx. "3").

In essence, due to potential rail traffic increase, train speed, the terrain, track geometry including curvature of the track, limited sight distances, and the proximity of the claimed easement to the track, the perpetual easement claimed by Nelson would impede rail operations and pose undue safety risks to the operations of MRL (now BNSF). MRL then began to block Nelson's access to the ROW leading to the filing of his declaratory judgment action.

STANDARD OF REVIEW

The Montana Supreme Court reviews a District Court's Order granting summary judgment *de novo*. *Krajacich v. Great Falls Clinic, LLP*, 2012 MT 82, ¶ 8, 364 Mont. 455, 276 P.3d 922 (citation omitted). 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, 411 Mont. 269, 525 P.3d 1183.

Mere disagreement about the interpretation of facts does not create a genuine issue of material fact. *Sprunk v. First Bank Sys.*, 252 Mont. 463, 466, 830 P.2d 103, 105 (1992). Additionally, a “material fact” is one that “involves the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact.” *Kuszmaul v. Sterling Life Ins. Co.*, 2012 MT 154, ¶ 18, 365 Mont. 390, 282 P.3d 665 (quotation omitted). “A genuine issue of material fact exists only if the Rule 56 factual record manifests a non-speculative record fact that is materially inconsistent with proof of an essential element of an asserted claim or defense at issue.” *Kostelecky v. Peas in a Pod LLC*, 2022 MT 195, ¶ 17, 410 Mont. 239, 518 P.3d 840.

A District Court’s legal conclusions are reviewed for correctness.

Krajacich, ¶ 8 (citation omitted).

SUMMARY OF ARGUMENT

A person may not obtain a private prescriptive easement on property owned by a railroad in Montana that was conveyed to the railroad pursuant to the 1864 Act. This is a matter of first impression for this Court. In *Renner v. Nemitz*, 2001 MT

202, ¶ 5, 306 Mont. 292, 33 P.3d 255, this Court declined “to address the threshold issue of whether a private prescriptive easement can run against property of a railroad in Montana” as it was not properly preserved on appeal. Here, that issue is properly before the Court, albeit in much narrower form.³ This case focuses specifically on whether a private prescriptive easement can run against property of a railroad in Montana conveyed pursuant to the 1864 Act. The answer is clear that it cannot.

The 1864 Act, as recognized by the Supreme Court of the United States, conveyed a limited fee for the exclusive use and possession of the railroad for railroad purposes only, subject to a condition of reverter to the United States in the event of abandonment. *N. P. R. Co. v. Townsend*, 190 U.S. 267, 271-72, 23 S. Ct. 671, 672-73 (1903). This precludes any adverse interest or use that might interfere with railroad activities from being acquired over such property.

Consistent with Supreme Court of the United States’ precedent of over one hundred years, the District Court correctly determined that Nelson could not acquire a private prescriptive easement due to the nature of the granted limited fee railroad ROW. The following undisputed facts are the only facts material to this

³ By this case, BNSF is not arguing that one can never have a private prescriptive easement over a railroad ROW regardless of its origin. That is an issue for another day.

determination: 1) the ROW was created from the 1864 Act; 2) the ROW is still actively used for transportation; and 3) Nelson's claimed private prescriptive easement sits entirely within the ROW. The 1864 Act conveyed to BNSF's predecessor a limited fee for the exclusive use and designated purpose of transportation by rail. Several other courts have examined this exact issue and found the 1864 Act precluded private prescriptive easements, consistent with the District Court's ruling.

Moreover, Nelson's claimed easement would not only interfere with BNSF's exclusive right of use for railroad operations, but it would improperly impact the federal government's ownership on reverter. At end, a private prescriptive easement cannot run against property of a railroad, in Montana or anywhere else, when it was acquired pursuant to the 1864 Act.

Additionally, Nelson raises new arguments on appeal which should not be considered. Specifically, for the first time on appeal, Nelson alleges the Rails to Trails Act, 16 U.S.C. § 1248, allows for a private prescriptive easement. This was contrary to the argument raised before the District Court. Furthermore, the Rails to Trails Act does not allow for Nelson's purported prescriptive easement in any event, and Nelson cites no case law for such a broad and sweeping claim.

Nelson's arguments before the District Court and raised here on appeal are without merit. The District Court's decision granting summary judgment was correct and should be affirmed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT PRIVATE PRESCRIPTIVE EASEMENTS OVER 1864 ACT RAILROAD RIGHTS OF WAY CANNOT FORM.

The roots of this case date back to the mid-19th century when "Congress began granting private railroad companies rights of way over public lands to encourage the settlement and development of the West." *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 95, 134 S. Ct. 1257, 1260, 188 L. Ed. 2d 272 (2014). In 1860, President Lincoln decreed that a transcontinental railroad was vital to the country and that the federal government should render aid for its construction. *Id.* at 96 (quoting J. Ely, *Railroads and American Law* 51 (2001)). This aid came in the form of rights of way through outright grants of land to railroads. *Id.* at 96-97 (citing P. Gates, *History of Public Land Law Development* 362-368 (1968)).

In furtherance of the United States' development, on July 2, 1864, the Northern Pacific Railroad Company ("Northern Pacific"), predecessor of BNSF, was chartered by an act of Congress to build a railroad from Lake Superior to the Pacific and received a grant of public lands to aid in the construction thereof. 13 Stat. 635;

Dec. Hutchings at ¶ 3, Ex. “A” (Dist. Ct. Doc. 20, Ex. “B”; Appx. “1”). It is undisputed and agreed that the subject ROW is part of the 1864 Act. App. Brf. at 7; Dec. Hutchings at ¶ 3 (Dist. Ct. Doc. 20, Ex. “B”; Appx. “1”).

In interpreting the 1864 Act, the United States Supreme Court in *Townsend* held that “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.” 190 U.S. at 273, 23 S. Ct. at 673.

In describing the nature of the grant, the Supreme Court held:

[T]he 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.

Townsend, 190 U.S. at 271, 23 S. Ct. at 672 (emphasis added). The Court went on to explain that “a railroad company is not at liberty to alienate any part of it so as to interfere with the full exercise of the franchise granted,” and that “[b]y 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.”⁴ *Id.*, 190 U.S. at 271-72, 23 S. Ct. at 672-73 (citation omitted).

This Court, in previously examining a federal land grant railroad ROW, similarly held:

However, this grant is more than an easement; it is a base, qualified, or limited fee, and has the attributes of a fee, that is, perpetuity and exclusive use and possession (citations omitted), and the grant itself is a conclusive legislative determination of the reasonable and necessary quantity of land to be dedicated to this public use, and carries with it the right to possession in the grantee and the use of the full width of the right of way thus granted, and the railroad company is not limited to so much thereof as it occupies or what is actually necessary for the use for which the grant was made (citations omitted).

Stepan v. Northern Pac. Ry. Co., 81 Mont. 361, 263 P. 425, 427-28 (1928).

Relying on *Townsend* and subsequent cases interpreting that decision, the District Court correctly determined that “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

⁴ Congress does allow railroads to convey to any state, county or municipality any portion of the right of way to be used as a public highway or street so long as the highway or street is not within 50 feet of the centerline of the track. 43 U.S.C. § 913. This provision highlights two important points: (1) a railroad’s use of federal land grant ROWs is strictly limited to what Congress allows railroads to do with said ROWs; and (2) the importance of maintaining at least 50 feet of clearance on either side of the track to safely operate a railroad. Nelson’s proposed prescriptive easement is within 50 feet of the track. Dec. Gustin at ¶ 4 (Dist. Ct. Doc. 20, Ex. “C”; Appx. “3”).

use and control and would impact the federal government’s ownership on reverter.”
Order on Summ. Judg., 7 (Aug. 25, 2023) (Dist. Ct. Doc. 36; Nelson Appx. at 1).

A. The 1864 Act Conveyed a Limited Fee for an Exclusive, Designated Purpose to BNSF’s Predecessor Railroad.

1. Limited fee for an exclusive, designated purpose.

As discussed above, the 1864 Act granted “limited fee” property to railroads for a “designated purpose;” specifically, “the perpetual use of the land for the legitimate purposes of the railroad.” *Townsend*, 190 U.S. at 271, 23 S. Ct. at 672. The whole of the ROW was, and continues to be, deemed necessary for railroad purposes:

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.

Id., 190 U.S. at 272, 23 S. Ct. at 673 (citing *Northern Pacific Railroad Co. v. Smith*, 171 U.S. 260, 275 (1898)). The Supreme Court more recently reaffirmed that pre-1871 acts granted railroads limited fee with the implied condition of reverter. *Marvin M. Brandt Revocable Tr.*, 572 U.S. 93 at 102, 134 S. Ct. 1257 at 1264.

Perhaps the best way to demonstrate the uniqueness and exclusivity of possession guaranteed by the 1864 Act is to compare it to later land grant acts which did not provide such broad property rights. In doing so, it becomes apparent that not only did Congress grant the ROW to BNSF’s predecessor for the specific and limited

use of building and operating a railroad, but the railroad was also provided exclusive use and possession of the ROW land.

After the conveyance of land for railroad ROWs in the 1860's, public sentiments changed against these outright grants of land with the last checkerboard land grant statute enacted in 1871. *Id.*, 572 U.S. 93 at 97–98, 134 S. Ct. 1257, 1261–62. Subsequent Acts of Congress granted railroads rights of way but without any accompanying land subsidy. *Id.* (citing *Great Northern R. Co. v. United States*, 315 U.S. 262, 274, and n. 9, 62 S.Ct. 529, 86 L.Ed. 836 (1942)). This congressional change in policy ultimately resulted in the General Railroad Right-of-Way Act of 1875, 18 Stat. 482, 43 U.S.C. §§ 934–939, which “clearly grants only an easement, and not a fee.” *Great Northern R. Co.*, 315 U.S. at 271, 275, 62 S.Ct. 529. This conveyed “a fundamentally different interest in the rights of way than did the predecessor statutes.” *Barahona v. Union Pac. R.R. Co.*, 881 F.3d 1122, 1127–29 (9th Cir. 2018).

Thus, there is a sharp line drawn between ROW grants of limited fee, such as the 1864 Act, and subsequent grants equivalent to easements, such as the 1875 Act. The limited fee at issue here granted MRL and BNSF the right to exclusive use and possession of the ROW in perpetuity:

“The pre-1871 rights-of-way were unquestionably *exclusive*. See *New Mexico v. U.S. Tr. Co.*, 172 U.S. 171, 183, 19 S.Ct. 128, 43 L.Ed. 407 (1898) (holding that the railroad's right-of-way is “more than an ordinary easement” because it has the “attributes of the fee, *perpetuity*

and exclusive use and possession”); *W. Union Tel. Co. v. Pa. R.R. Co.*, 195 U.S. 540, 570, 25 S.Ct. 133, 49 L.Ed. 312 (1904) (“A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement [and] ... ‘whatever it may be called, it is, in substance, an interest in the land, *special and exclusive in its nature.*’ ”)

Alaska R.R. Corp. v. Flying Crown Subdivision Addition No. 1 & Addition No. 2

Prop. Owners Ass'n, 89 F.4th 792, 796–97 (9th Cir. 2023) (emphasis added.)

The concept of ‘limited fee’ was no doubt applied in Townsend because under the common law an easement was an incorporeal hereditament which did not give an exclusive right of possession. With the expansion of the meaning of easement to include, so far as railroads are concerned, a *right in perpetuity to exclusive use and possession* the need for the ‘limited fee’ label disappeared.

State of Wyo. v. Udall, 379 F.2d 635, 640 (10th Cir. 1967) (emphasis added).

Nelson is simply incorrect in his assertion that because he seeks a prescriptive easement as opposed to title by way of adverse possession, the claimed easement can exist over the subject ROW.⁵ This is not only because Congress granted the ROW to BNSF’s predecessor for the specific use necessary to build and operate a railroad, as previously discussed. It is also because BNSF’s use of the ROW is exclusive. Exclusive means “shutting out; debarring from interference or participation; vested in one person alone. An exclusive right is one which only the

⁵ The caselaw relied on by Nelson before the District Court either did not involve the 1864 Land Grant or was otherwise distinguishable. Order on Summ. Judg. at 7-8 (Dist. Ct. Doc. 36; Nelson Appx. at 1). Nelson wisely abandoned those arguments on appeal.

grantee thereof can exercise, and from which all others are prohibited or shut out. Black's Law Dictionary, www.thelawdictionary.com/exclusive/ (citing *In re Union Ferry Co.*, 98 N.Y. 139, 151 (Ct. App. N.Y. 1885)). This former MRL territory is one of the main routes of rail transportation in Montana. Nelson's claimed easement, by its very nature, is not compatible with the right to exclusive use and possession of the ROW.

2. Courts examining this very issue agree that the exclusive, designated railroad purpose precludes private prescriptive easements.

Nearly this identical issue of whether a private prescriptive easement may be obtained over a railroad ROW granted pursuant to a pre-1871 land grant was addressed in *Wolf v. Central Oregon & Pacific R.R., Inc.*, 216 P.3d 316, 230 Or.App. 269 (Or. App. 2009). In *Wolf*, the property owner 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. 216 P.3d at 317, 230 Or.App. at 271. The tracks were authorized and the ROW was created by an 1866 act of Congress. *Id.* The plaintiffs and their predecessors in interest had used the crossing for "many years." 216 P.3d at 319, 230 Or.App. at 273. 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 for the removal of the black top. *Id.*

The trial court granted summary judgment in the railroad's favor ruling that "the law is government grant railroad property that is right of way cannot be adversely possessed or subject to a prescriptive easement." *Id.* On appeal, the court agreed, explaining that "[a]s a general matter, a private party can obtain an easement by prescription over a railroad right-of-way." 216 P.3d at 321, 230 Or.App. at 278 (citations omitted). "However, a railroad right-of-way obtained as the result of a federal land grant is treated differently." 216 P.3d at 321-22, 230 Or.App. at 279 (emphasis added) (citing *Puett v. W. Pac. R. Co.*, 104 Nev. 17, 22, 752 P.2d 213, 216-17 (Nev. 1988)).

The *Wolf* court looked to *Townsend* and its progeny to determine whether an easement by prescription for private use "would conflict with the railroad's congressionally granted right of exclusive use and control." *See e.g. Townsend*, 190 U.S. at 272 ("[t]he whole of the granted right of way must be presumed to be necessary for the purpose of the railroad"); *Stepan*, 81 Mont. at 263 P. at 427-28 (federally granted ROWs have "the attributes of a fee, that is perpetuity and exclusive use and possession"); *Udall*, 379 F.2d at 640 (The term "limited fee" was used by the *Townsend* Court to describe the interest in ROWs granted to railroads by the federal government "because under the common law an easement . . . did not

give an exclusive right of possession” while a “limited fee” did); *Puett*, 104 Nev. at 20-21, 752 P.2d at 215-216 (“[S]o long as the defendant railway company maintains its line of road, it has the right of exclusive use and possession of its right of way.”) (citation omitted).

The *Wolf* court concluded that while an easement 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.” *Wolf*, 216 P.3d at 323, 230 Or.App. at 281 (citing *Puett*, 104 Nev. at 21-22, 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); *Barnes v. Southern Pac. Co.*, 16 F.2d 100, 103 (9th Cir. 1926) (Although the railroad cannot alienate, and others may not acquire, portions of the railroad ROW, “revocable licenses are, of course, excluded. In such cases the railroad company never loses its right to possession and control.”)) “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 ⁶, we are of the view that such an easement cannot be obtained by prescription.” ⁷ 216 P.3d at 323, 230 Or.App. at 281-82.

Wolf is not alone. For example, in *City of Commerce City v. BNSF*, 2017 CV 30308 (Adams Co. Dist. Ct. Colo Sept. 17, 2017), a municipality sought numerous non-exclusive easements from the railroad for the purpose of improving a roadway running parallel to, but not across, railroad tracks. *City of Commerce City*, FOF & COL at *2 (Sept. 17, 2017) (Dist. Ct. Doc. 20, Ex. “D”; Appx. “4”). Such easements, if found to exist, would be “longitudinal surface easements” similar to Nelson claims 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 went on to explain 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*, 171 Cal 32, 40-41, 151 P. 663, 666 (Cal. 1915) (claim of adverse

⁶ The Gustin Declaration (Dist. Ct. Doc. 20, Ex. “C”; Appx. “3”) establishes that in this case the proposed easement would impede the operations of the railway.

⁷ The court observed that public, as opposed to private, easements across railroad ROWs can be obtained by condemnation. 216 P.3d at 322-23, 230 Or.App. at 281-82.

possession of portion of railroad ROW denied, noting that per *Townsend* railroad need not show entire ROW was necessary for public use).

Private prescriptive easements over pre-1871 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.

B. The Claimed Private Prescriptive Easement Would Impact the Federal Government's Ownership on Reverter.

Not only would Nelson's claimed private prescriptive easement interfere with the railroad's right of exclusive use and control for the designated purpose of railroad operations, but it would improperly impact the federal government's ownership on reverter.

Prescriptive easements "run with the land," meaning "the benefit or burden passes automatically to successors." *Clark v. Heirs and Devisees of Dwyer*, 2007 MT 237, ¶ 25, 339 Mont. 197, 170 P.3d 927 (citing *Leichtfuss v. Dabney*, 2005 MT 271, ¶ 37, 329 Mont. 129, 122 P.3d 1220). In this case that means should a prescriptive easement be found to exist, any future abandonment of the ROW by the railroad would result in the burden of the prescriptive easement passing to the federal government since, as stated in *Townsend*, "[i]n effect the grant was of a limited fee, made on an implied condition of reverter[.]" *Townsend*, 190 U.S. at 271, 23 S. Ct. at 672. However, "[a] private party cannot obtain a prescriptive easement against the federal government." *Burcalow Family, LLC v. Corral Bar, Inc.*, 2013 MT 345,

¶ 21, 372 Mont. 498, 313 P.3d 182 (citing *Davis v. Hall*, 2012 MT 125, ¶ 34, 365 Mont. 216, 280 P.3d 261); *United States v. Vasarajs*, 908 F.2d 443, 446 n. 3 (9th Cir. 1990) (“prescriptive rights cannot be obtained against the federal government”).

That the federal government’s reversionary interest precluded Nelson’s prescriptive easement was not disputed at the summary judgment hearing. In fact, Nelson agreed at the hearing that *Townsend* precluded prescriptive easements on railroad ROWs: “In these cases when Mr. Nelson’s easement, and that was the basis of the *Townsend* Act (sic), is because when the land is abandoned, and it would revert to the federal government, *you can’t get a prescriptive easement over the federal land, we can’t do that. That we know.* And so, therefore, the Railroad stepped into the shoes of the federal government in those cases.” Hrg. Tr. at 33:24-34:7 (emphasis added). Nelson further agreed that the “logic [of the *Townsend* case] is you can’t get at the time a possessory interest *or a nonpossessory interest* because when abandoned, it would revert back to the federal government.” *Id.* at 30:4-8 (emphasis added). Thus, Nelson explicitly acknowledged that under *Townsend*, a private prescriptive easement (a nonpossessory interest) is precluded on the basis of reverter.

Nelson’s admission at the hearing was a clear recognition of the breadth of the holding of *Townsend* and the inescapable effect of the federal government’s reversionary interest. *Townsend* not only determined that the limited fee grant was

for specific railroad purposes, but also determined that the land could not be alienated nor subject to adverse private purposes given the federal government's reversionary interests. Nelson's current claim otherwise must fail.

C. *Townsend* Did Not Omit Easements from its Holding.

Contrary to his position at the hearing, Nelson now argues that *Townsend* carved out an exception for private prescriptive easements. App. Br. at 14. This is incorrect. To be sure, over one hundred years ago, the Supreme Court recognized that there were processes by which the public could cross the ROW. The parade of horrors alleged by Nelson that unless this Court adopts his argument, there would be vast swatches the United States inaccessible due to railroad ROWs is clearly not accurate as there are public and private crossings visible along any public highway. However, these crossings were not created by private prescriptive easement, but by devices such as licenses and revocable leases⁸, or by public crossings working with the Department of Transportation.

⁸ MRL offered Nelson numerous opportunities to enter into a revocable lease as is contemplated under *Barnes*, 16 F.2d at 103 (Although the railroad cannot alienate, and others may not acquire, portions of the railroad ROW, "revocable licenses are, of course, excluded. In such cases the railroad company never loses its right to possession and control.")). He refused and any claimed improvements were made at his peril. Now, based on changed conditions described by the Gustin Declaration (Dist. Ct. Doc. 20, Ex. "C"; Appx. "3"), granting Nelson access is not conducive to railroad operations.

Nelson punctuates his brief with “[t]his makes sense.” App. Br. at 13, 19. However, if that argument was so clear there would undeniably be precedent somewhere to support his arguments. There is none. This is because the *Townsend* language cited by Nelson in support of a purported right of a private easement over an 1864 Act ROW holds otherwise. That language is specific to interests in favor of the *general public*, not a private easement as sought by Nelson:

Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations *in favor of the general public* upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed.

Townsend, 190 U.S. at 272, 23 S. Ct. at 673 (emphasis added).

The *Wolf* court examined this very same passage and concluded: “[t]hus, crossings of a federally granted railroad right-of-way may be obtained *for the benefit of the public.*” 230 Or. App. at 281, 216 P.3d at 322 (emphasis added) (citing *Townsend*, 190 U.S. at 272, 23 S. Ct. at 673; *Himonas v. Denver & R.G.W.R. Co.*, 179 F.2d 171, 174 (10th Cir. 1949) (since the use the plaintiff sought to establish “was a public and not a private use” it could have been acquired by “condemnation and it follows that they could acquire such easement by grant from the Railroad Company or by prescription [for public purposes]”); *Puett*, 104 Nev. at 23, 752 P.2d at 217 (“there has never been any question that the rights of way granted the private railroad companies are subject to the states’ power of eminent domain” for the

benefit of the public)). The *Wolf* Court, in determining that a private prescriptive easement could not be had, continued:

Here, however, there is no contention that the crossing sought is for the benefit of the public. On the contrary, it is sought for the benefit of only plaintiffs and their successors-in-interest.

230 Or. App. at 281, 216 P.3d at 323.

Just as the easement in *Wolf*, the easement sought by Nelson is for his and his successors-in-interest's own benefit. And just as in *Wolf*, such a *private* prescriptive easement cannot be had on the pre-1871 federally granted limited fee railroad ROW.

II. NELSON'S RAILS TO TRAILS ACT ARGUMENT IS NEW, CONSTITUTES A CHANGE IN LEGAL THEORY, AND SHOULD NOT BE CONSIDERED.

Nelson, for the first time on appeal, argues that the National Trails System Improvements Act of 1988, 16 U.S.C. § 1248, ("Rails to Trails Act") disposes of the federal government's reversionary interest in abandoned 1864 Act ROWs. App. Br. at 21-27. This, according to Nelson, undermines the premise that prescriptive easements upon 1864 Act ROWs cannot be had because such prescriptive easements would impact the federal government's ownership on reverter. *Id.* While this argument is incorrect and the Rails to Trails Act in no way does away with the federal government's reversionary interest, as will be discussed in greater detail below, the argument should not be considered because Nelson failed to make the argument to the trial court.

“The general rule in Montana is that this Court will not address either an issue raised for the first time on appeal or a party’s change in legal theory.” *Tai Tam, LLC v. Missoula County by and Through Board of County Commissioners*, 2022 MT 229, ¶ 21, 410 Mont. 465, 520 P.3d 312 (citing *Unified Industries, Inc. v. Easley*, 1998 MT 145, ¶ 15, 289 Mont. 255, 961 P.2d 100). The basis for this rule is that “it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.” *Id.* (citing *Gateway Hosp. Grp. Inc. v. Phila. Indem. Ins. Co.*, 2020 MT 125, ¶ 15, 400 Mont. 80, 464 P.3d 44).

Nelson’s summary judgment briefing, response to BNSF and MRLs’ motion for summary judgment, and proposed findings and conclusions are devoid of any mention of or cite to the Rails to Trails Act. *See* Pet.’s Mot. & Br. Supt. Mot. Summ. Judg. (Dec. 19, 2022) (Dist. Ct. Docs. 19, 20); Pet.’s Resp. Respondents’ Mot. Summ. Judg. (Jan. 17, 2023) (Dist. Ct. Doc. 26; Pet.’s Reply Br. Supt. Mot. Summ. Judg. (Feb. 2, 2023) (Dist. Ct. Doc. 30); Pet.’s Prop. FOF & COL (Apr. 28, 2023) (Dist. Ct. Doc. 35). Nor do these filings otherwise challenge the federal government’s reversionary interest in federal land grant ROWs. Nelson did challenge the federal government’s reversionary interest in federal land grant ROWs during the March 31, 2023, summary judgment hearing. However, he based that new argument not on the Rails to Trails Act, but on that Act’s predecessor, the Abandoned Railroad Right of Way Act, 43 U.S.C. § 912, (“ARRWA”).

As background, approximately twenty years after *Townsend*, in 1922, Congress enacted the ARROWA “to dispose of the abandoned railroad lands to which the United States held a right of reverter under *Townsend*.” *Avista Corp. Inc. v. Wolfe*, 549 F.3d at 1243 (citing *Mauler v. Bayfield County*, 309 F.3d 997, 999 (7th Cir. 2002); Pub.L. No. 67-163, 42 Stat. 414 (1922)). “In short, [the ARROWA] requires that public lands given by the United States for use as railroad rights of way be turned into public highways within one year of their abandonment or be given to the owners of the land traversed by the right of way.” *Id.*

Armed with the ARROWA, which included provisions returning abandoned railroad ROWs to property owners, Nelson jettisoned his argument that *Townsend* only prohibited a person from acquiring a possessory, as opposed to nonpossessory, interest in federal land grant ROWs. Indeed, as previously discussed, Nelson admitted at the hearing that *Townsend* prohibited both possessory and nonpossessory interests of federal land grant ROWs by others due to the federal government’s reversionary interest. Hrg. Tr. at 28:10 – 29:4; 30:3-8; 33:18 – 34:8. It was only through the enactment of the ARROWA, Nelson argued, that the *Townsend* prohibition of possessory and nonpossessory interests was extinguished. Nelson claimed:

Counsel: . . . There is one case that is not cited in any of the briefs.
And that’s what you get when you ask for oral argument

sometimes. It's *Avista v. Sanders County* here in Montana. And that's - -

The Court: Give me the - - stat that again, please.

Counsel: Avista, A-V - -

The Court: Spelled?

Counsel:⁹ - - I-S-T-A vs. Sanders County. And that's 485 F.Supp.2d 1176.¹⁰ It's from 2007 Montana District Court. And what they talk about is the *Townsend* case, and the *Townsend* case is applicable, right? And in that time when that was decided, we didn't have the Abandonment Railroad Right-of-way Act, which is Section 912. And so, at the time, anytime that a railroad is abandoned, it goes back to the federal government.

That's no more. And that's why that was decided *that you couldn't get a possessory interest or nonpossessory interest* into that land. It's because once it reverts back to the - - once a railroad abandons it, it reverts back to the federal government. That's no more. Now, it reverts back to the landowner, Mr. Nelson.

⁹ The transcript incorrectly indicates that Appellee's counsel, not Appellant's counsel, delivered the last-quoted portion of this exchange. Hrg. Tr. at 28:9. However, the context of the transcript clearly demonstrates that this entire exchange was between the Court and Appellant's counsel.

¹⁰ This Montana Federal District Court decision relying on the ARRWA was reversed by the Ninth Circuit and remanded to the District Court to determine the effect of the Rails to Trails Act in that action where the abandonment became final after the Rails to Trails Act's enactment in 1988. *See Avista Corp. Inc.*, 549 F.3d 1239.

So, we can now get possessory interest and nonpossessory interest in these railroads that before you couldn't get.

Hrg. Tr. at 27:25 – 29:4 (emphasis added). Nelson later doubled-down on that position:

Counsel: . . . What we have is the *Townsend* case that was decided and we have the Abandonment Act. And we now know that the land reverts to the landowner, not the federal government.

In these cases when Mr. Nelson's easement, and that was the basis of the *Townsend* Act (sic), is because when the land is abandoned, and it would revert to the federal government, *you can't get a prescriptive easement over the federal land, we can't do that. That we know.* And so, therefore, the Railroad stepped into the shoes of the federal government in those cases. But that no longer applies because of the Abandonment Act.

Id. at 33:19 – 34:8 (emphasis added).

What Nelson apparently did not realize when going “all in” on the ARRWA was that the ARRWA is no longer the law of the land. Instead, it was supplanted in 1988 by the Rails to Trails Act. And, as the Ninth Circuit Court of Appeals recently explained, and will be discussed in more detail below, “[i]n effect, [the Rails to Trails Act] reversed the policy of [the ARRWA] and preserved the government's interests in rights of way abandoned after 1988.” *Estate of Finnigan v. United States*, 2 F.4th 793, 798 (9th Cir. 2021). This means that as of 1988 the ARRWA exception to *Townsend's* reversionary interest argument no longer applies. Instead, we are left

with *Townsend's* analysis without ARRWA modification which, according to Nelson at the hearing, results in a finding that a prescriptive easement cannot be had.

Nelson may point out that BNSF and MRL in their Proposed Order explained Nelson's mistaken reliance on the ARRWA at the hearing, as well as the applicability of the Rails to Trails Act and its preservation of the federal government's interest in federal land grant ROWs. Resp. Prop. Order at 8-10 (Apr. 28, 2023) (Dist. Ct. Doc. 34). The trial court ultimately agreed and included a similar discussion on pages 9 and 10 of its Order on Summary Judgment. Order on Summ. Judg. (Dist. Ct. Doc. 36; Nelson Appx. at 1). However, while the Rails to Trails Act was discussed, at no point did either party argue to the Court that the provisions of that Act divest the federal government of its reversionary interest or otherwise result in a finding favorable to Nelson.

Nelson never argued to the trial court that the provisions of the Rails to Trails Act somehow work to remove the federal government of its reversionary interest and, as a result, do away with the *Townsend* prohibition of a person obtaining an interest (either possessory or nonpossessory) in a federal land grant ROW. This argument is new, constitutes a change in legal theory, and should not be considered by this Court.

III. NELSON’S RAILS TO TRAILS ACT ARGUMENT FAILS EVEN IF CONSIDERED BY THE COURT.

Nelson’s new claim that the Rails to Trails Act works to divest the federal government of its reversionary interest fails. To be sure, the Rails to Trails Act preserves the federal government’s interest in abandoned ROWs and in no way robs it of the same. As previously discussed, Nelson cannot have a prescriptive easement on federal government property. Further, Nelson’s purely speculative guessing on what the federal government might choose to do with the ROW if one day it is abandoned seeks an impermissible advisory opinion from the Court. It also serves as evidence that the federal government, and not Nelson, retains control of the ROW upon abandonment. Finally, none of the possible speculative abandonment scenarios result in Nelson retaining a private prescriptive easement.

A. The Rails to Trails Act Preserves the Federal Government’s Interest in Abandoned Railroads.

Nelson argues that pursuant to the Rails to Trails Act the federal government is left with a “limited ownership interest” and that the ROW, if abandoned, “must become a public road or trail.” App. Br. at 13, 26. This is categorically false. The Ninth Circuit’s discussion in *Estate of Finnigan* of the history of the federal government’s interest in railroad ROWs over time is instructive. In that case, the Court discussed the 1922 ARROWA’s provisions providing possible transfer of ROW

ownership to landowners and then discussed the Rails to Trails Act's reversal of that policy as follows:

In the meantime, however, Congress had changed course again. By the 1980s, the struggling railroad industry was abandoning 4,000 to 8,000 miles of railroad per year. In 1983, concerned about the proliferation of abandoned railroads, Congress created a system of "railbanking" to preserve inactive corridors for future use while permitting interim trail use. In 1988, Congress enacted the [Rails to Trails Act].

As its colloquial name implies, the Rails to Trails Act grew out of a movement to convert abandoned railways into recreation areas for hiking, biking, skiing, and snowshoeing. Under § 1248(c), Congress provided that title to a right of way 'shall remain' with the United States for railroad rights of way abandoned after October 4, 1988, except to the extent that the right of way was converted to a public highway within one year of abandonment. *In effect, [the Rails to Trails Act] reversed the policy of [the ARRWA] and preserved the government's interests in rights of way abandoned after 1988.* [citation omitted].

Estate of Finnigan, 2 F.4th at 798 (emphasis added).

Any question about the current applicability (or lack thereof) of the ARRWA to railroad ROWs in Montana established by the 1864 Act was answered in *Estate of Finnegan*. In that case, a 20-mile stretch of rail near Noxon, Montana, granted to the railroad by the 1864 Act, was abandoned by Northern Pacific in the 1950s when the ARRWA was in effect. *Id.* at 796. The adjacent landowner appellant failed to seek a judicial decree of abandonment while the ARRWA was in effect, but instead waited until 1996 after the enactment of the Rails to Trails Act. *Id.* at 798. The Ninth Circuit concluded that this failure brought the abandonment under the control

of the Rails to Trails Act, not the ARROWA, thereby reverting title to that stretch of ROW to the federal government. *Id.* at 801. Based on this analysis, there is no argument that any future abandonment of the subject ROW would result in Nelson’s ownership of the property. Indeed, the right of reverter for the subject ROW unquestionably remains with the federal government pursuant to the Rails to Trails Act, as was the case when the 1864 Act was enacted and *Townsend* was decided.

Pursuant to § 1248(c), railroad ROWs abandoned after 1988 revert to the federal government.¹¹ 16 U.S.C. § 1248(c); *Estate of Finnigan*, 2 F.4th at 798; *Avista Corp. Inc.*, 549 F.3d at 1243 n. 2. Nelson, as a private party, cannot hold a prescriptive easement on federal government land.¹² *See Burcalow Family, LLC*, ¶

¹¹ The Rails to Trails Act and its predecessor ARROWA include a provision allowing federal land grant ROWs to become a public highway within a year of abandonment. 16 U.S.C. § 1248(c); 43 U.S.C. § 912. However, any such transition to a public highway occurs after the ROW reverts to the federal government. 16 U.S.C. § 1248(c) (“any and all right, title, interest, and estate of the United States” in federal land grant ROWs “shall remain in the United States upon abandonment”). Thereafter, said interest of the United States does not remain if the ROW “is embraced within a public highway” within a year of abandonment. *Id.* Accordingly, the ROW reverts to the federal government for at least a period of time whether the ROW later becomes a public highway or not.

¹² Assuming for the sake of argument that the ROW would convert directly to a public highway upon abandonment without first reverting to the federal government, a private prescriptive easement cannot be had upon a public highway either. *See e.g. Cremer Rodeo Land and Livestock Co. v. McMullen*, 2023 MT 117, ¶ 45, 412 Mont. 471, 531 P.3d 566 (Court excluded period of use of road as public

21 (“[a] private party cannot obtain a prescriptive easement against the federal government”); *Vasarajs*, 908 F.2d at 446 n. 3 (“prescriptive rights cannot be obtained against the federal government”). Nor does the ROW, after abandonment, somehow become Nelson’s as was argued with regard to the ARROWA.

It also must also not be forgotten that Courts that have examined whether private prescriptive easements can be had on federal land grant ROWS after the enactment of the 1988 Rails to Trails Act continue to apply *Townsend’s* prohibition. See e.g. *Wolf* (decided 2009), *City of Commerce City* (decided 2017). There is, simply, no argument that the subject ROW would revert to anyone other than the federal government should BNSF one day abandon that stretch of railroad ROW.

B. Nelson’s Speculation About What the Federal Government May Choose to Do with the ROW if it is Someday Abandoned Ignores the Fact that the Property Would Necessarily be Owned by the Federal Government and Not Subject to a Prescriptive Easement.

Nelson goes to great lengths to speculate as to what the federal government would do with the ROW should the railroad someday abandon that length of mainline track. His conclusions are baseless, incorrect, and only serve to establish, not discredit, the federal government’s reversionary interest in the ROW.

Initially, it cannot be stressed enough that there is no evidence in the record

highway in calculating five-year private prescriptive easement time limit; only included time after public highway was abandoned by the county).

that the railroad will at any point in time abandon its mainline track, setting up a scenario where the subject ROW reverts back to the federal government. Considering that this rail line formed the basis of the entire MRL operations, common sense dictates that no abandonment is contemplated. However, BNSF understands that such a possibility, however unlikely, forms the basis for the federal government's reversionary interest. That said, there is also no evidence in the record of what the federal government might choose to do with the ROW if the railroad abandons it. Nelson's speculation upon speculation does not present an issue ripe for this Court's consideration. *See e.g. Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 19, 333 Mont. 331, 338, 142 P.3d 864, 870 ("The doctrine or ripeness 'requires an actual, present controversy, and therefore a court will not act when the legal issue raised is only hypothetical or the existence of a controversy merely speculative.'") (quoting *Montana Power Co. v. Public Service Comm.*, 2001 MT 102, ¶ 32, 305 Mont. 260, 26 P.3d 91). As such, the Court should not expend unnecessary resources going down Nelson's various "what if" rabbit holes in this regard.

That said, should the Court entertain these various far-fetched hypotheticals, Nelson's argument still falls flat. Under any scenario if for some reason BNSF did one day abandon its mainline track, the federal government becomes the owner of the ROW. 16 U.S.C. § 1248(c). It is, of course, only after the property reverts to

the federal government that the government has a variety of options available to it should it decide to convey the property. The ROW land, in falling under the ownership of the federal government, cannot have a prescriptive easement attached to it. *See Burcalow Family, LLC*, ¶ 21, and *Vasarajs*, 908 F.2d at 446 n. 3, *supra*. For that reason, the prescriptive easement cannot exist. Beyond that, none of the options available to the federal government after reverter include a requirement, let alone an option, of transferring the property to Nelson for his own private use.

Instead, the federal government could create a public recreational trail or other recreational property to be managed by the Secretary of Interior. 16 U.S.C. § 1248(d). Nelson could not maintain a prescriptive easement under this scenario. Or, if it chooses, the federal government could release and quitclaim the property “to a unit of government or to any other entity meeting the requirements of [16 U.S.C. § 1248(e)][.]” 16 U.S.C. § 1248(e)(1). But the release and quitclaim option is only available to a “unit of State or local government or another entity which the Secretary of the Interior determines to be legally and financially qualified to manage the relevant portion for public recreational purposes.” *Id.* This is not an option for private landowners looking to access otherwise landlocked properties, and certainly does not provide Nelson or another landowner the opportunity to purchase the ROW as claimed. App. Br. at 26.

The ROW, upon abandonment, would revert back to the federal government. This would prevent Nelson from maintaining a prescriptive easement on the property. Should the property one day revert to the federal government, what the government chooses to do with the property is irrelevant with regard to the existence of the purported prescriptive easement. But even under such a scenario the property would not come back to Nelson or be consistent with his purported prescriptive easement.

CONCLUSION

Nelson cites no authority for his claims, not the ones raised before the District Court or the ones raised for the first time on appeal. Nelson's tortured reasoning is devoid of common sense. At end, Nelson's claim of a private prescriptive easement must fail. It is undisputed that the subject ROW was bestowed pursuant to the 1864 Act. The District Court correctly determined that under binding Supreme Court precedent, Nelson may not encumber any part of the ROW. The District Court's decision should be affirmed.¹³

DATED this 20th day of February, 2024.

By: /s/Michelle T. Friend

Michelle T. Friend
Attorney for Respondents-Appellees

¹³ Should this Court not affirm the District Court, the matter must be remanded back for consideration of Respondent's ICCTA preemption arguments.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft Word does not exceed 10,000 words, excluding the Table of Contents, Table of Citations, Certificate of Service and Certificate of Compliance.

DATED this 20th day of February, 2024.

By: /s/ Michelle T. Friend

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CERTIFICATE OF SERVICE

I, Michelle T. Friend, hereby certify that I have served true and correct copies of the foregoing Response Brief of Defendant BNSF Railway on February 20, 2024, upon the following:

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