

Property Rights Foundation of America®
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How the Federal Government Got Away with Taking the High Line

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Thank you, Carol. I'm going to keep it tight on the time because I don't want to encroach on the next speaker.

Carol and I have been corresponding via email for many years. The Property Rights Foundation of America was one of our friends of the court in this High Line case. I think it is fortuitous. I didn't know what Jim Burling was presenting on but I think that is the law theoretical and this is the law as applied. I have really two things. This is a case study. I call it a cautionary tale. It's about a rails-to-trails case, which is primarily what I do. What I've done for the last decade is represent property owners who sue the federal government for compensation when the government has converted an otherwise abandoned railroad on their property into a public hiking and biking trail.

Of all the cases we've only lost one and it's this one, which is an odd choice, I think, to pick to present on. You usually go and tout your victories not your losses. But I think this one is a really interesting case study for many reasons. The one that I highlight today – because I think it's the most germane to this group – is the foundational principle that property law comes from the state, not the federal government. So, anytime you have a federal case that's interpreting state property law, federal courts should make sure it is abundantly clear what the state law is before making a decision. I think you'll see, as this case unfolds, that was not the case. I think, in fact, it was contrary to New York law, made new law in New York out of the federal court, which I think is unacceptable and it's something that makes this case relevant not just for the narrow issue of rails-to-trails takings but all property cases.

Your property rights come from the state not the federal government. I think through this study, hopefully, you can think about ways how that could go wrong when we invest a court with nationwide jurisdiction in interpreting the fifty state's laws.

So, a little bit about the High Line. For those of you who aren't familiar with the High Line it is currently a public park in downtown Manhattan on the West Side in the Meat Packing District. However, it's important in these cases – these rails-to-trails cases, all of them – to understand how the railroad came to be. This is just a short excerpt from a book that we found called the West Side Highways of Death Avenue. It pointed out that "before the High Line became the park in the sky and before it was abandoned" – and that's going to be very instrumental in the court's analysis later, "before trains ran goods along its once thirteen-mile-length, before its massive trunk-like beams sprouted from the cobblestones to suspend its metal canopy above the

streets below, the West Side of New York churned with reckless energy. Freight trains ran at grade up and down the middle of 10th Avenue. Tracks inserted between cobbles, to ferry goods to and from the factories of the Meat Packing District. This interplay of heavy machinery and humanity proved a dangerous mix; the stretch of road became known as 'Death Avenue.'”

The reason the High Line was created was to remove it from the pedestrian thoroughfares of New York City. It was to purposely remove people and the trains from interacting.

The High Line's original use

It was created in 1929. I was explaining to some of my friends at the table earlier that that by my estimation is a fairly new railroad. When I do these cases I'm usually looking at documents from the 1850s. But this was created in 1929, and again, the whole purpose of this particular railroad was to separate it from the public thoroughfares. This was created by an easement. This was a ten-page single-spaced document that went into excruciating detail of how the High Line would be built down to every support beam and structure. Tellingly, it also had a provision, no one disputes this provision, that when it stopped being used as a railroad the railroad was to tear down the High Line. It was to get rid of the viaduct structure.

This is an excerpt from the High Line easement. I won't read the entire thing but I've highlighted the language that for the purposes of our case became instrumental. So, again, ten pages single-spaced as how it was to be used as a railroad. It stated that this would be used between two certain planes. We're in New York City. Your property rights, usually, we just think about as dirt. This one is property rights in the plane above and below a certain height above the ground. Our clients, my clients, the property owners, still have the right to the dirt but it only went up so high and to the bottom of that viaduct structure.

So, the railroad had an easement for railroad purposes and for such other purposes as the railroad company, its successors and assigns, may from time to time, or at any time, desire to make use of the same. That language is going to be instrumental, again in the court's interpretation of our case.

The High Line ran from 1929 until the late '70s. It was in the Meat Packing District. If you go to the High Line it went through buildings. It goes through what is now the Standard Hotel but it used to be instrumental in the Meat Packing District. I had a client who remembered when he was a little boy the carcasses coming in and rolling off right into the boxcar and in and out he can tell you [Unintelligible] died from friction burns another [Unintelligible] sores to say that this area has changed is a severe understatement but the High Line is not being used by the late '70s and it went into complete and total disrepair. That's when the federal taking or the whole process that resulted in the taking began.

In the early 1980s lore, what we've read, I haven't verified this as fact but the last train carried twelve cars of frozen turkeys and that was it for the High Line. In 1982 the tracks and ties were removed. In 1989 the property owners instituted an adverse abandonment proceeding in the STB. What is that? We talked about regulatory state

this morning. The STB, the Surface Transportation Board, is a federal agency that regulates all of the railroads in interstate commerce, that's all the railroads. The federal government has jurisdiction over every railroad in the country, every inch of their track and all of their operations. The Surface Transportation Board used to be known as the Interstate Commerce Commission. You see older cases that say Interstate Commerce Commission, that became what is now known as the STB.

Railroads can't just abandon their line. They can't just walk away and say, "We don't want to run this route anymore," or "We just want to pull up these tracks and ties. We're done." They have to get permission from the Surface Transportation Board. Ninety-eight percent of the cases I do begin with the *railroad* going to the STB and saying, "We're done. This is not economically feasible for us to run this line anymore." It usually has not had a train on it for at least two years. That's a requirement although the STB can bend that requirement. "It's no longer a public use and necessity. The public doesn't need us to run this train, either. We've got no shipper. We've got no customers. No one needs this railroad. Please let us leave."

This was an adverse abandonment proceeding. They are much rarer. The reason they're rarer is that they are very, very, very hard to win. What happens in an adverse abandonment proceeding is usually property owners but someone else other than the railroad goes to the federal government, goes to the federal Surface Transportation Board and says, "This railroad needs to be compelled to abandon. This is no longer of a public use and necessity. This railroad needs to go." It's a very high bar to force a railroad when they don't want to abandon their line, to abandon. In 1989 these property owners did just that. They went to the STB and petitioned for the STB to declare it abandoned and they won. Again, this is a high bar. So, the railroad, Conrail at the time, came in and said, "No, no, no. We've got plans for that. It's going to be a garbage route. It's going to be... I think they had a garbage truck. Then they had another plan for I can't remember what. The STB said that these are far-fetched. This is pie in the sky. This isn't going to happen. You're gone. You're done. This isn't a railroad anymore. The property owners said that you've got to tear it down. Remember our easement? You're gone. Tear it down and get it off our property. The railroad came in to the STB and said, "This is going to bankrupt us. It would be impossible. It would be so expensive for us to tear it down." The property owners came in with countervailing estimates. It would cost about seven million dollars to remove the viaduct structure. And so, what the STB said, "You win landowners. This is abandoned. But you have to put up a bond for every penny of that seven million dollars it's going to cost the railroad to tear this down."

Well, getting a bunch of property owners to actually ante up and get that bond done is a lot harder than I think. Saying they would do it once and they never got it together. They never got this bond. So, the railroad didn't tear down the viaduct. They actually appealed the STB's decision all the way to the DC Circuit Court of Appeals. The DC Circuit Court of Appeals in 1994 said, "This is abandoned. Demolish it." But they did say that the STB's requirement that the landowner's are supposed to bond for the excessive cost of the demolition was also valid.

So, here we are at 1999. The High Line is still there despite being ordered to be abandoned. The landowners went back to the STB said they've got to start tearing this down. The railroad fought it saying it's just going to be too expensive. They don't

have this bond. The bond's a requirement. The STB said, "Yes, we did make this bond a requirement. You've got to get together, landowners, before the wrecking ball swings, we need this bond."

In the meantime, a group called the Friends of the High Line had percolated up. The Friends of the High Line was a group who had this idea to convert the High Line into a public park – this elevated park. I will say as an aside, if you've not been to the High Line, it is very lovely. It is a well-done public project. Until this year, if you watched Saturday Night Live! it was featured prominently in the opening credits of that show. It has been a wild success. To say an understatement. That's really neither nor there for this case though.

This group came to the STB and said, "Hey, why don't you open up that 1992 decision to abandon the High Line and instead issue us what is called a Certificate of Interim Trail Use [CITU] or abandonment?" Now, what does that mean? Back in the 1970s the railroads were abandoning their lines at a rapid rate. Both the interstate highway system had taken a lot of the shipping and the trucking and the railroads were just being abandoned left and right. Congress sat down and said, "We don't like this." This was the Cold War era. "We're losing a lot of our national infrastructure. What can we do?" A congressman had this great idea: Let's just use them as public parks and then we'll keep our rights-of-way intact and we'll keep this infrastructure. And parks are pretty low-impact use." God speed. Go forward. They pass the Trails Act in the '70s and absolutely nothing happened because nobody thought about the fact that these are state law property interests. Most railroads own an easement for railroad purposes in their right-of-way. When they stopped using that easement for that purpose that easement extinguishes and the property goes back to the underlying landowner. That's exactly what was happening. Nothing about the federal Trails Act had any impact on that. Because again, your property rights are state law rights. What would happen was the railroad would abandon the right-of-way. The property owner would go into state court and quiet title on themselves and that right-of-way was no longer.

Congress fixed the glitch in 1983. They said, "We'll fix that problem." They really did. It's called the National Trails Act Amendment of 1983. It contained this provision. This is it. It says that such interim use, and that means use as a trail, public hiking and biking trail in the interim. The whole point of this act remember is to keep this railroad infrastructure intact in case we need it in the future. The thinking was that we might need it for national defense later. We might build high speed rail, whatever the purpose we might make this a railroad again but in the interim we can use it as a park. "Such interim use shall not be treated for purposes of any law or rule of law as abandonment of the use of such rights-of-way for railroad purposes." What Congress did with that sentence was wipe out all fifty states' law to the contrary that when a railroad easement was abandoned for railroad purposes it would be extinguished. That's what happened. In 2005 the STB issued what was called a Certificate of Interim Trail Use. What that is is it's an order from the STB and it simply says that this railroad could be abandoned. It meets all of our requirements of abandonment but instead the railroad can go sell this, donate it, transfer it, to a private party, in this case the City of New York, to use as a public hiking and biking trail.

It achieved two government objectives. It preserved the right-of-way for future railroad use. It authorizes current public recreational use. Neither of which was part of the original easement in 1929, in my opinion, which we'll get to. The importance of this 2005, we call this a CITU. You'll see the word "NITU" [Notice of Interim Trail Use] here. This is the government order that takes the property. Now, this wasn't understood right off the bat when these cases started but it came to be understood through various challenges to the statute of limitations that this order is what invoked that law that wiped out state law. So, whenever this order issues, whatever your state law right part of the property whether they be from New York, or Missouri, or California, or North Carolina, the federal government has wiped out the law on that, on that issue, and said that we, the federal government, say that this can be used for a public park. It's also the date for our cases where you had to be the owner of the property. If you owned the property on that date you were the one who had the property taken from you. It's the date that the property was appraised. It's the date that interest accrues from. It's a very critical date in our cases because it is the date of taking.

Shortly after that, a few month later, these railroads, in fact, quitclaimed their entire interest in this right-of-way to New York for use as a trail. It affected twenty-seven lots, occupied more that seven acres of property in Manhattan. Think about that. Seven acres of West Side Manhattan property. The quitclaim deed expressly said that this is pursuant to this federal order. They didn't even pretend that they had independent authority to enter into this quitclaim deed. They said we're entering this deed by the order of the federal government, implicitly acknowledging that there was no authority under New York law where this transfer could have taken place.

The High Line today

I talked a little bit about it. It's a one-and-a-half-mile park. It was built in sections. I visited it many times. There are concerts out there. There are taco trucks. There's coffee shops. There's art installations. There are a lot of things. What there aren't, are the trains. There are millions of visitors every year to the park. It was much more than they even estimated when they were developing it.

So, our landowners filed a lawsuit in 2011. You might be looking at these dates and think, "Alright, the property was taken in 2005. Why didn't they get around to filing the lawsuit until 2011?" I'll tell you why. Early in 2011 I sat down to read the New York Times Sunday Style section as I often do on Saturday mornings. There was an article in the fashion section about it being a public runway to go look at fashion and people seen. And something caught my eye. It said it was an abandoned railroad. And I thought, "No, I'm sure that this is a long time ago that this statute has passed. There's no way that this is a rail-to-trail." But always thinking in rails-to-trails terms, I started doing a little research. Five hours later I was drafting a very long email on a Saturday to my colleagues saying, "Hey, I think this is a takings case in Manhattan and it looks pretty good and the statute is going to run in about four months so it's now or never." So, we pitched it to our firm and we vetted this case heavily as you can imagine. This is a high-profile – no pun intended – case. More so than let's say a rail-to-trail in the middle of Kansas or Illinois or some of our other projects that might fall under the radar nationally. This one was of much bigger national news.

We solicited landowners and, you know, here they are approached from an attorney in Missouri telling them they have a right to compensation from the federal government for something that happened six years ago. They were understandably interested but a little skeptical. So, we would meet with them and explain what had happened to their property. I thought, in my biases or my presumptions, I thought, “You know, these folks own property in Manhattan and they’re hip to their rights. They know this happened like this, right?” No. This was news to almost every single one of them. They just had some documents shoved in front of them. They said, “Oh, you have some development rights. Sign here.” That’s what happened. They didn’t really think they had a choice in the matter and they thought once it was a trail that was it. It was done. End of story. That was surprising to me. I say that if you own property in Manhattan you would be among what I would consider probably pretty sophisticated landowners. They had no idea that this was a program that the federal government had instituted. They thought this was all at the local level. That’s typical in these cases. When I go around and initially talk to landowners, they think it’s the county or the non-profit that’s developing the trail that’s imposing on their property until I explain to them, “No, actually, the only reason they’re there – and they’re there legally – is because the federal government allowed them to be. They nullified your state law property interests and allowed this third party. The third party is acting completely within the confines of the law to come on your property and build this park. The federal government is a silent actor and they like to remain that way. I would like to out them as the catalyst that makes these projects possible.

We filed our case in the Court of Federal Claims. Why did we file in the Court of Federal Claims? Because we had no choice. That would be the last choice of where I would file on these cases. But if you’re familiar with something called the Tucker Act, and I think, sir, you are, the Tucker Act says if you have a claim against the United States in excess of \$10,000 you file in the Court of Federal Claims. What is the Court of Federal Claims? It is a court in Washington, DC. It is literally across from the White House. It has judges. It’s not an Article III court. The judges are appointed for ten-year terms. Otherwise it functions very much like a federal district court. It has nationwide jurisdiction. So, what does that mean? Every single claim against the government in excess of \$10,000 for taking property is heard by this court regardless of the state that it comes from. Would I rather file these in the Southern District in New York? Absolutely! Why? Because the Southern District of New York, albeit a federal court, is going to be much more familiar with New York State property law than whatever judge I’m randomly assigned to in a court in Washington who is not licensed, likely, in New York, or the state that I’m bringing the case in, and doesn’t do, frankly, a lot of property law. This court is a lot of other things. It’s government contracts. It’s patents. In fact, I think these cases are a nuisance because it does take them back to sort of law school property law. But we challenged that with a whole separate presentation but as of now, you can only file a claim in excess of \$10,000. It’s safe to say that these claims were in excess of \$10,000 in the Court of Federal Claims. And the law, well, it’s the Trails Act, which I talked about earlier but more fundamentally, it’s the Fifth Amendment. These are constitutional claims. These are private property being taken for public use without just compensation. The government doesn’t come and knock on the door and say, “Hey, we realize we’re preempting you property right. We’re going to offer you “X” amount of dollars and then we’re going to build our trail.” No. They issue the order. The trail gets built or

gets in the process of being built and only if you affirmatively go and make a claim will you get paid compensation.

What is the effect of the Trails Act?

Most fundamentally, the effect is this: Under state law if there was a railroad easement on your property and it was abandoned – it was no longer used for the purpose for which it was created – you would have full unencumbered use of that property back. That’s what would happen under state law. Instead they preempted that and said instead you’re now hosting a public park on your property. That is not one of the things you bargained for when you purchased the property or inherited it or however you acquired the property. It was not authorized for public use. That was not the type of easement that was on the property at the time you acquired it. That’s a new and completely different use. Or at least so says I, again.

The Trails Act was challenged. The constitutionality if it was challenged. It went up to the United States Supreme Court in a case called *Preseault [v. United States]* in 1990. It was a couple in Vermont. They had this happen to them. Their property on Lake Champlain had a railroad easement through it. The Interstate Commerce Commission had issued this order, a Notice of Interim Trail Use, and authorized it to be a trail. Instead of having narrow property that was on Lake Champlain the property was a public park that was on Lake Champlain. So, they challenged it. The court said this is constitutional. It’s an exercise of the government’s eminent domain authority. They can take private property for a public purpose. There’s a remedy. That’s just compensation. These are a couple of quotes. And again, I think they highlight the court’s focus on the fact that these state laws, the Preseault’s right came from Vermont state law not from the federal government.

Justice Rehnquist: [The Trails Act] gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests. ...frequently the easements provide that the property reverts to the abutting landowners upon abandonment of rail operations.

Probably one of the most stringent defenders of state law being the source of property rights, Justice O’Connor concurred. She wanted to emphasize that “...state law creates and defines the scope of the reversionary or other real property interests affected by the ICC’s actions pursuant to the Trails Act. Property interests are defined by existing rules or understandings that stem from state law.”

She later in her opinion said that government cannot redefine those rights by *ipse dixit* [an assertion without proof]. The government just can’t come in and say, “Well, we’re going to call it that your railroad easement is now also a public park easement. That is a taking. They cannot do that. It’s the understanding when the property right was created.

This is a little cul de sac. So, we filed our case. We immediately had to confront this elephant in the room. I uncovered that New York City *after* the date of taking had slipped many pieces of paper under the property owners’ noses. One of them was a covenant not to sue. This covenant not to sue was between the owner and the City of

New York. The federal government admitted later that it had no idea that this document existed. But couched in there was a little provision that the owners agreed not to sue or join any action seeking compensation from [Unintelligible] withdraw from any class action – ours is not a class action but that's beside the point – seeking compensation from the City or the United States of America or any of its departments or agencies with respect to the High Line CITU.

So, here we have the covenant not to sue between the City of New York and our landowner. The United States comes in and says, "Well, we're the third party beneficiary of this contract and we can assert this as our right," and they did. So, we go New York law on third party beneficiaries. Because, again, federal court has to apply state law. It's New York law from third party beneficiaries that will apply. Do we have an existence of a valid and binding contract between the parties? We did, between other parties, we did. We wouldn't dispute that. The contract was intended for its benefit and that benefit was sufficiently immediate rather than incidental to indicate the assumption by the contracting parties of a duty to compensate it to the benefit it lost.

Our owners had no idea they even had this right against the United States. It cannot be said that they immediately knew that they were waiving this right when they signed the covenant. But more than that, the government put an affidavit from the City of New York into the record where it said, "We put this in there because we just didn't want any litigation about the High Line." It did not say that they intended to benefit the United States, to save United States Treasury money. That was not in the record. That was not a fact here. In New York law also they followed the restatement when it comes to intended or incidental beneficiaries. We would agree that the United States was an incidental beneficiary. Incidental beneficiaries cannot enforce the covenant. The City of New York would have had to come in and enforce it on their behalf. They did not do that. They had to be an intended beneficiary for the United States to take advantage of this covenant. New York law also had, New York cases had, or a lot of cases were saying that there's public policy in New York against covenants not to sue. We're going to construe them very narrowly. That was public policy of New York. On that backdrop, the Court of Federal Claims acknowledged that there's no dispute that the United States was not a party. They didn't know about this. And then again, the United States produced an affidavit from the City stating that its intent was to eliminate litigation concerning the High Line. But it did not say that the intent was to benefit the United States.

The CFC found, and that's the Court of Federal Claims, Judge Firestone, found that the court finds the United States wasn't intended, that should be was an intended beneficiary of plaintiff's promise in the covenant not to sue agreement not to seek compensation from the United States in connection with High Line CITU. The United States may therefore enforce the agreements in this action as a third party beneficiary.

There was one New York case on point. One case that dealt with third party beneficiaries in a covenant not to sue and it did not allow the third party to enforce the covenant not to sue. Judge Firestone is the first and only case saying that under New York law a third party beneficiary can enforce a covenant not to sue. I keep checking this case on Westlaw probably every month and it still remains the only New York case that allows this.

And that goes back to my original theme of do we really want a federal court with national jurisdiction interpreting state law that is unsettled and to make an opinion like this which had no precedent in state law when it comes to constitutional rights. I think the answer to that is absolutely not.

We appealed this to the federal circuit. We filed long briefs. I mean, these were not short briefs. We had other theories in there. There was a case called *Koontz* [*Koontz v. St. Johns River Water Management District*] that was percolating in the background in the United States Supreme Court. It had to do with exactions essentially when a government presents, or a local government says, we'll give you this benefit, be it zoning rights or these development rights in exchange for you giving us this property. The court in *Koontz* ultimately came and said that the Supreme Court, while this case was going on, said that's an unconstitutional exaction. You can't force the private property owner to essentially "deal away" this constitutional right in exchange for some zoning benefit or other property benefit. All these arguments spirited debate on the court. We had the judges, there's a panel. There's three judges on the federal circuit court to hear your case or your appeal. They were totally government. Now these New York cases in the court, none of them go this far right? The government kept trying to convince them all. They really do. It's implicit in these cases that they would rule this way. We eagerly awaited until the entirety of this decision we got on the federal circuit. They just came back with a verdict *per curiam*. No reasoning, no explanation. It was very frustrating, very frustrating. It's one thing to lose a case. It's one thing to not get a peep out of the Appellate Court as to why. We appealed it to the Supreme Court. Probably not well advised when you get a firm *per curiam* appellate court decision but we were resolute that we were right on this. I should know. My firm has an office in New York. It wasn't that we were going without consultation with New York attorneys on the contract, the law of third party beneficiary contracts, either. Many of my clients were attorneys. Many of them know the real estate business in New York. And they said that you can't enforce that. It wasn't exactly rogue that we were going it alone. We filed a petition at the Supreme Court and we had a professor called Brad Clark joining our petition. He'd written a little bit about these unconstitutional exactions. We thought that was helpful but he also had really good advice. We didn't ask the Supreme Court to take the case. But we said that you need to vacate the court's decision below and remand it for them to reconsider in light of your decision in *Koontz*, which was the unconstitutional exaction case that had come out in the interim. He said, "Let's give the court the benefit of the doubt. They didn't have your sage guidance at that time. Send it back down now that you've issued an opinion and have a redo, essentially." We weren't even asking for them to take it on the merits, we said just go back and at least consider this new interim case that wasn't there. I put our opening line from our brief. One of the basic principles of federalism and constitutional ways direct federal court confronting an unsettled question of state law and the federal constitutional issue to refer the unsettled issue of state law to the state's highest court.

What does that mean? We can ask the federal circuit, the Court of Appeals, to certify this to New York. We didn't do that in the trial court, the court below, because you can't. New York law says, well, the New York Appellate court, which is, as you're all familiar, the highest court in New York, well, it's happy to take on certified questions.

In fact, we've found they've done it over two hundred times. But they only take them from federal appellate courts not from trial courts. So, we waited until we got to the appellate court and the first thing we did when we stepped in the court and we said, "There's no New York law on this or if there is it's not clear. You need to send this to New York. Let's get an answer from New York and then we can come back into federal court and keep on going. The court didn't even address, they didn't even address our request for certification. We really focused on that at the Supreme Court. We said, "This is not how you want this federal court, particularly one with national jurisdiction functioning. It's deciding important issues of property law in the fifty states and unless it is crystal clear they should be certifying these when it's available to them." Not all states have the ability to do that. New York did. In the United States there is no dispute here that there's no New York Case that ever had construed New York law to the effect that Judge Firestone has. That was not something they disputed. They have implicitly acknowledged that this would be the only case if you looked up this issue to enforce such a covenant not to sue.

The Supreme Court denied our certification. What happened? Well, all but one of our owners had signed that covenant. One of our owners had not signed that covenant not to sue. What happened was immediately after the CITU was issued they had sold their property to another entity and they also ran that entity but for all intents and purposes it was a new owner. That new owner signed the covenant not to sue. We said, "Well, they didn't sign it. [Unintelligible] date of taking law about this. Whatever happened after the date of taking, which should also extend to the covenant not to sue, but what happened after is irrelevant. It's a snapshot in time and this property was taken. So, we're back on these fundamental property questions. Was there New York State property in law interests taken? They didn't sign a covenant. Everyone here agreed that the railroad had an easement. That is a big factor in this case. Ninety-nine percent of my cases are won on the issue of fee versus easement. What is that mean? You go back to the original document by which the railroad was created. You go to the register and fees office. I do this on a weekly basis. I don't physically go there but I request them and you say that I need all these books and pages. What those are, are the original deeds from the landowners to the railroad that gives the railroad an interest in that property. Sometimes there's state cognation orders. Sometimes there's nothing. The railroad just built their tracks and ties and then you go to state law on prescriptive easements. Many times there's a written deed. The liabilities of the federal government often turns on did that deed convey the fee estate in the land under state law to the railroad or does it convey an easement for railroad purposes. Here, there was no dispute that there was an easement. Not at all. I ordered a [Unintelligible]. We had to prove that that easement was limited to railroad purposes. This is the three elements of a trail back taking case:

It wasn't an easement. It's usually the hardest fought issue, already won here.

Easement limited to use of the easement for railroad purposes. Until this case that had been a throw away question. Why? Because it's obvious. Easements by definition are the right to use another person's property for a specific purpose. That's why they're not the fee estate. They're the right to use someone's property for a specific use. Every court had acknowledged that. We now have a footnote of cases that takes up three-quarters of a page, single-spaced in ten-point font of all the cases from this court

agreeing in every state that we brought a case, that if it was an easement to a railroad, of course, it was for railroad purposes. What else would it be?

An easement, if we were to lose that issue, the way this law has developed, the jurisprudence on this issue was that even if an easement was brought, if the railroad had [Unintelligible] abandon it under state law you still had your property interest taken. So, even if this was an easement for a road – and there was one case in Maryland where the federal circuit had certified this question to the Maryland Supreme Court and they had said, "You know this is a weird railroad easement. It's actually for a road and they happen to use it as a railroad, so we're going to find this trail is within the scope of this properly worded easement." That was the only case before this case that had ever found that. In that case, you'd go back and say, "Well, okay, but had they nonetheless abandoned their road easement. Then your property interest is still taken. That easement will still not extinguish. Then we go back to the easement. What was the easement for? For railroad purposes and for such other purposes as the railroad company, its successors and assigns, from time to time or any time may desire to make use of the same. The court realizing that almost [Unintelligible] The government seized on this "such other purposes" and said that means any use, they could make any use, including a public park. The two definitions of easements here limited. They're specific. The first specific use.

The federal circuit had said it's almost beyond [Unintelligible] to think that walking, hiking, biking, picnicking and Frisbee-playing would be within the scope of a railroad easement. Since the different uses create different [Unintelligible]. This is my favorite sentence in all of these cases because I think it goes to sort of a lot of people's gut reactions. [Unintelligible] that reaction [Unintelligible] these cases. Wouldn't you rather have a park on your property than a railroad? Over decades of doing things I know the answer to that is "no". In a lot of cases, no. Not at all. That's not what we bargained for. The Appellate Court recognized that some may think it better to have people strolling on one's property than to have a freight train rumbling through. That's not the point. It's a different use, a different burden.

We're going to rush through these.

We have New York law on this issue. Easements granted in general terms must be construed to include any reasonable use to which they may be devoted. An easement granted for a passenger railroad line is not allowed to use it for a freight line. That's how narrow the New York courts have interpreted it. Railroad uses are incompatible with the public square. We weren't without precedent here. Oh, but the court found that this was limited. This easement was limited to... you could only use the property between two certain planes. That was the limitation there but otherwise you could use it for anything you wanted. That's bizarre. That's truly a bizarre finding, an easement for whatever you wanted only defined by its area. That's like saying, "I can use my property. I'm only limited by the metes and bounds. I can't go outside the boundary lines." So, that's how she decided that fit with the New York law and made it not limitless. It has limits. You couldn't use the property outside the area of the easement. She agreed. The parties at the time of the easement was granted could not proceed with the order as a public park. That's one of the fundamental concepts that have to be pursued – the intent of the parties. The parties at the time couldn't have foreseen that this could be used as a public park, how could it be within the scope of this easement?

And what about the plain language, "such other purposes"? Well, interestingly enough, I was reading, as we all did probably on CNN or whatever and it just issued the Affordable Care Act decision and it just so happened to come down while we were briefing this case. Most people are reading it in context. I found this little sentence and was fascinated. Justice Roberts interpreted the word "such" in the same context the statute said, "establish and operate such exchange within the state." He defined that as "that of those, having just been mentioned." Well, that was railroad purposes. The plain language, as the Supreme Court had just told us, would have been railroad purposes or such other purposes related to a railroad. No, no no. We went up to the federal circuit. It slightly improved. We got an opinion this time. We cited New York law that the scope of the easement as long as it's specific use for which it is granted. These cases don't stand for the proposition that an easement created for *any* purpose for which the grantee wishes to use it would be the unenforceable in New York.

There was no case law for this. Absolutely none. Every single case they had to distinguish from New York to arrive at this result. We filed the cert petition again to the Supreme Court. We had lots of friends, including the Property Rights Foundation of America who filed a couple of separate amicus briefs. [Unintelligible] No court had ever recognizing an easement for anything. We pointed also that New York has certification send this to New York if there's any ambiguity. Cert was not granted. We could have still won on abandonment and I thought here that that was our saving grace. Okay, the scope is broad, which I don't agree with. Everyone agrees this was abandonment. The DC Circuit Court Appeals in 1994 said it was abandoned. A New York State court had said "this is abandoned." But, again, they actually found it wasn't abandoned because it could be used for anything. So it wasn't abandoned. The railroad has no intent to abandon. [Unintelligible] stand alone for now. The government rushed into all of our trails back cases with this case as we expected and said, "Oh, no, no. All these reasons now they're unlimited. You can use them for parks." One Judge has eviscerated that in Georgia. She said, "No." she said [Unintelligible] the phrase any other purpose. I believe it was very similar. That phrase when it's read in tandem with the associate language, the rest of the language in the document made it clear that it was for the purposes of building and using a railroad.

What if the property owners had won? What if we'd won? Would the High Line had gone away. Would they have torn it down? Absolutely not. This I think goes to June's presentation. This is a way that the public can get what it wants and private property owners can be compensated. That's the point. You've got to pay these people that you're using their property now for a different, wholly different purpose. Instead, the property owners, they've just given up. Their property has been taken and the public gets what it wants.

Nothing would have happened if they would have been paid. They would have been paid the fair market value for the encumbrance on their property which is a huge encumbrance if your in Manhattan and you only have the property below the viaduct. It wouldn't have affected the High Line. There was just a claim for compensation. I'm sorry but it's kind of a joke. The High line would be [Unintelligible] a mile and a half long but the government now has the first high speed train. Thank you.