PETITION FOR A WRIT OF CERTIORARI

Petitioners, Douglas R, Mauler and Judith A. Mauler, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The district court's opinion (per Crabb, C.J.) granting respondent's motion for summary judgment (App. pp. 12a-35a) is reported at 204 F. Supp. 2d 1168 (W.D. Wis. 2001). The opinion of the Circuit Court of Appeals for the Seventh Circuit (App. pp. 1a-11a) is reported at 309 F.3d 997 (7th Cir. 2002).

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on October 31, 2002, and denied rehearing and rehearing en banc on November 25, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Provisions of the Quiet Title Act, 28 U.S.C. § 1346 (f) and 2409a, the National Trail System Improvement Act of 1988, Public Law 100-170, 102 Stat. 2281 (1988), 16 U.S.C. § 1248, the Act of May 25, 1920, ch. 197, 41 Stat. 621, 43 U.S.C. § 913, relating to the authority of railroads to dispose of rights-of-way through the public lands, the Act of March 8, 1922, ch. 94, 42 Stat. 414, 43 U.S.C. § 912 (Federal Abandoned Railroad Right-of-Way Act 1922), relevant to this petition, are reprinted in the Appendix pp. 37a-43a.

The U.S. Constitution, Article I, section 9, clause 3 provides: No Bill of Attainder or ex post facto Law shall be passed." Amendment V provides: "No person . . . shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." Amendment XIV, § 1 provides: No state shall make or enforce any law which shall abridge he privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; . . ."

STATEMENT OF THE CASE

A. Statutory Framework

The Act of March 8, 1922, ch. 94, 42 Stat. 414, 43 U.S.C. § 912, otherwise known as the Federal Abandoned Railroad Right of Way Act (FARRWA), (App. pp. 42a-43a) was adopted by Congress to dispose of reversionary interests which this Court had implied in decisions such as *Northern Pacific Railway Co. v. Townsend*, 190 U.S. 267 (1903) and *Rio Grande Western Railway Co. v. Stringham,* 239 U.S. 44 (1915).*(construing the Northern Pacific Railroad land grant and the General Right of Way Act of 1875, ch. 152, 18 Stat. 482 (codified at 43 U.S.C. §§ 934-939 repealed and superseded by Act of October 21, 1976, P.L. 94-579, 90 Stat. 2793)).*[1] According to the House Report of the Act of March 8, 1922:

[1]Although Congress also enacted a general right of way act in 1852, 10 Stat. 28 (Aug. 4, 1852), this Act was limited to railroads actually formed and constructed within fifteen years of August 4, 1852.

> The object of this bill is to provide for disposition of lands embraced in forfeited or abandoned railroad rights of way on what was originally public lands. . . . Under the decisions of the courts railroad companies receiving such grants take a qualified fee with an implied condition of reverter in the event the companies cease to use the lands for purposes for which they were granted. Upon abandonment or forfeiture, therefore, of any portions of such right of way the land reverts to and becomes property of the United States.
>
> . . . .
>
> It seemed to the committee that such abandoned or forfeited strips are of little or no value to the Government and that in case of lands in the rural communities they ought in justice to become the property of the person to whom the whole of the legal subdivision had been granted or his successor in interest. Granting such relief in reality gives him only the land covered by the original patent.

See also S. Rep. No. 388, 67th Cong., 2d Sess. 2 (1922).

In 1988, Congress enacted the National Trails System Improvement Act of 1988 Public Law 100-170, 102 Stat. 2281 (1988), to amend 16 U.S.C. § 1248 adding the following provision (c):

> Commencing upon October 4, 1988, any and all right, title, interest, and estate of the United states in all rights-of-way of the type described in the Act of March 8, 1922

> (43 U.S.C. § 912), shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, shall have been embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such Act.

16 U.S.C. § 1248 (d)-(f) provided for three classes of abandoned right of way: right-of-way located within the boundaries of "conservation system units" or a National Forest, right-of-way located outside of a National Forest or conservation system unit but adjacent to such Forest or unit and right-of-way outside but not adjacent to any National Forest or conservation system unit. Right-of-way within a National Forest or conservation unit was to be incorporated within the Forest or unit, but right-of-way outside whether or not it was adjacent or contiguous to such Forest or unit, was to be evaluated for suitability as a recreational trail or other recreational purposes which the Secretary of the Interior determines is appropriate. Abandoned right-of-way outside of National Forests and conservation system units and not adjacent or contiguous were subject to sale by the Secretary of the Interior with preference going to States and local units of government for purposes of development of recreational trails. App. pp. 37a-41a.

B. Historical and Factual Background

The present case arises out of a controversy involving the 1856 and 1864 special land grants "in aid of railroad construction" to the State of Wisconsin and in turn to the Chicago, St. Paul, Minneapolis & Omaha

Railroad Company (later the Chicago and Northwestern Transportation Company). The Act of June 3, 1856, entitled An Act granting Public Lands to the State of Wisconsin to aid in the Construction of railroads in said State [11 Stat. 20 (1856)] granted to the State of Wisconsin every alternate odd-numbered section of land for six sections in width on each of the road, declaring that the lands granted should be applied exclusively to the construction of the road and be subject to the disposal of the Wisconsin legislature and no other purpose. This railroad was to be routed from Madison or Columbus, Wisconsin, by way of Portage City to the St. Croix River or Lake between Townships twenty-five and thirty-one and from that point to the west end of Lake Superior and to Bayfield. The grant provided that the land could be sold in 120 section increments for each twenty miles of railroad actually constructed when the Governor of the State certified to the Secretary of the Interior that twenty miles were completed. If the road was not completed within ten years, then no further sales could be made and the unsold and would revert to the United States.

Congress extended the dates for completion of these railroads by the Act of May 5, 1864 entitled An Act granting Lands to aid in the Construction of certain railroads in the State of Wisconsin [13 Stat. 66(1864)] and again by Act of April 9, 1874 [18 Stat. 28, ch. 82 (1874)]. These Acts avoided the forfeiture of the land grants but the railroad were actually constructed by two companies after 1874, the Chicago, St. Paul, Minneapolis & Omaha Railroad Company (which became the Chicago and Northwestern Transportation Company) and the Wisconsin Central Railroad Company.

On February 14, 1884, the State of Wisconsin issued a patent to the Chicago, St. Paul, Minneapolis & Omaha Railway Company conveying 141, 712.87 acres of land or approximately 221.4 (640 acre) sections of land, including Section Thirty-five (35), Township 47, Range 6 West, Bayfield County, Wisconsin. Later that year, on November 30, 1884, the Chicago, St. Paul, Minneapolis & Omaha Railway Company conveyed to one John Canfield all of its right, title and interest of in all of a number of sections and fractional sections, including section Thirty-five (35), Township 47, Range 6 West, Bayfield County, Wisconsin. This conveyance was subject to the following reservation in the railroad (as party of the first part):

> The said party of the first part, however, hereby expressly reserves unto itself, its successors and assigns forever, the rights to occupy a strip of land 100 feet in width through, over, and across the premises granted as aforesaid, or any part thereof, the said strip to be included within two lines, each parallel with, and distant 50 feet from, the center line of the railway of the party of the first part, as the same is now constructed and operated, or as the same may hereafter be located, constructed and operated.

The Chicago, St. Paul, Minneapolis & Omaha Railway Company, which subsequently became the Chicago & Northwestern Transportation Company, operated a railroad on the strip of land until February 28, 1978, when the Interstate Commerce Commission granted approval to abandon the line.

The petitioners, Douglas R. Mauler and Judith A. Mauler (petitioners or "Maulers"), acquired legal ownership of two parcels of land totaling approximately fifty acres of land in Keystone Township, Bayfield County, Wisconsin, between November 14, 1994 and March 14, 1996. Their two parcels are legally described as:

> South 200 feet of the Southeast One-Quarter (SE ¼) of the Northeast One-Quarter (NE ¼), Section Thirty-five (35), Township Forty-seven (47), North Range Six (6) West; and
>
> North 460 feet of the Northeast Quarter (NE ¼) of the Southeast Quarter (SE ¼), Section Thirty-five (35), Township Forty-seven (47), North Range Six (6) West.
>
> The Southeast ¼ of the Northeast ¼, Except the South 200 feet thereof, less rights of way of record, Section 35, Township 47 North, Range 6 West, in the Town of Keystone, Bayfield County, Wisconsin.

Being in Section 35, the Maulers' land was part of the lands conveyed to John Canfield by the Chicago, St. Paul, Minneapolis & Omaha Railway Company from the "odd-numbered" sections granted to the State of Wisconsin "in aid of railroad construction." The Maulers' land was traversed by a 100 foot wide segment of the Chicago and Northwestern Transportation Company's right of way which extended from railroad Milepost 104.0 near Hayward, Wisconsin in Sawyer County to railroad Milepost 157.18 near Ashland

Junction, near Bayfield, Wisconsin in Bayfield County and from railroad Milepost 166.0 at Washburn to railroad Milepost 178.28 at Bayfield, altogether a total of 65.46 miles. The Interstate Commerce Commission granted approval for abandonment of this segment of the Chicago and Northwestern Transportation Company line by a decision dated February 24, 1978, (Service date March 1, 1978 in AB-1, Sub-No. 29). After the Interstate Commerce Commission approved abandonment of the line in 1978, the railroad removed the railroad tracks, ties and other appurtenances of the rail line. On July 3, 1986 the State of Wisconsin Department of Transportation issued a Statement of Release of Interest Under Section 85.09, Wis. Stats. which declared the line abandoned and released the right of way from any further obligation for public use under the Wisconsin rail banking act, Wis. Stats. § 85.09.

On May 25, 1989, the Chicago and Northwestern Transportation Company executed and delivered a quitclaim deed to the Bayfield County Snowmobile Alliance, Inc., a nonprofit corporation, including all of its interest in specified portions of a railroad right-of-way extending through the townships of Cable, Drummond, Grand View, Mason, Keystone, and Pilsen in Bayfield County. This deed was recorded June 22, 1989. On June 28, 1989, the Bayfield County Snowmobile Alliance, Inc. executed a quitclaim deed to Bayfield County of the same described strip of land. This deed was recorded June 29, 1989. Thereafter, Bayfield County purported to establish a snowmobile trail on the strip of land.

The Maulers, after becoming aware of the County's purported claim to the 100 foot strip, attempted to block the trail by erecting a five foot high

wooden barrier on the cleared path across the strip to prevent people from driving snowmobiles and all-terrain vehicles and hunting on their land. Bayfield County then commenced an action on October 27, 1998 in Bayfield County Circuit Court for declaratory judgment and injunction to establish that the conveyance from the Bayfield County Snowmobile Alliance, Inc. constituted a legally valid interest in a public snowmobile trail. The circuit court granted a motion for summary judgment to Bayfield County declaring that the County had a legally valid interest in the 100 foot strip of land "until a court of competent jurisdiction or an Act of Congress declared the right-of-way abandoned under 43 United States Code § 912." The Circuit Court refused to make a determination that the right-of-way had been abandoned and granted summary judgment to Bayfield County on September 3, 1999, declaring that Bayfield County had a legally valid interest in the strip of land. The Wisconsin Court of Appeals affirmed in an unpublished decision dated August 15, 2000, refusing to consider the Plaintiffs' arguments that 43 U.S.C. § 912 did not apply to the right-of-way on the ground that the issue had not been raised before the circuit court. The Wisconsin Supreme Court denied a petition for review.

The Maulers then commenced the present action in the United States District Court for the Western District of Wisconsin. The district court's jurisdiction was founded on the Quiet Title Act of 1972, 28 U.S.C. §§ 1346 (f) and 2409a, seeking to quiet title against the United States. Jurisdiction was also founded upon 28 U.S.C. §§ 1331, 2201 and 2202 involving a claim under the Constitution, laws and statutes of the United States for a declaration of abandonment and such further relief, including a declaratory judgment, that the actions of Bayfield County constituted a "taking". The

petitioners named as parties defendant the United States Department of the Interior-Bureau of Land Management, the Union Pacific Railroad Company, successor to the Chicago & Northwestern Transportation Company, which had reserved to itself mineral interests in the conveyance to the Bayfield County Snowmobile Alliance, Inc. and Bayfield County.

The United States Department of the Interior-Bureau of Land Management filed an answer as did Bayfield County and the Union Pacific Railroad but prior to the case being submitted for summary judgment, the United States Department of the Interior-Bureau of Land Management filed a disclaimer of interest and a motion to dismiss under 28 U.S.C. § 2409a(e) in the 100 foot strip of land. The district court entered an order dismissing the United States as a party and set up a briefing schedule for motions on summary judgment.

The court then granted Bayfield County's motion for summary judgment on December 4, 2001. App. pp. 12a-35a. The central point of the district court's decision was that the 1856 and 1864 land grants to the State of Wisconsin were no different from the "right-of-way" grant to the Northern Pacific Railway Company construed by the United States Supreme Court in *Northern Pacific Railway Company v. Townsend*:

> The Supreme Court has characterized the nature of land grants made to the railroads before 1871 as "limited fee, made on implied condition of reverter in the event the company ceases to use or retain the land for the purpose for which it was granted." *Northern Pacific Railway Co. v.*

Townsend, 190 U. S. 267, 271 (1903)*; see also Great Northern Railroad Company v. United States,* 315 U.S. 242 (1942)*. (distinguishing between* limited grants before 1871 and easements after 1871). In *Townsend*, 190 U.S. at 271, the grant did not state that it conveyed a "right-of-way" to the railroad. Instead, the grant contained a statement that the land could be used by the railroad only for the limited purpose of constructing and operating a railroad. The Court recognized that the United States has an interest in maintaining corridors for public transportation purposes. *Id.* The Court reasoned that because the railroad held a limited fee that it could not alienate in its discretion, the plaintiffs could not obtain an absolute, unlimited fee by adverse possession against the railroad.

As in *Townsend*, the land grant under which the strip in this case was conveyed to the railroad was made for the limited purpose of constructing and operating a railroad. The grant states that the lands "shall be exclusively applied to the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever." Further, the grant recognized the long term interest in the transportation corridor by limiting the manner in which the states could dispose of the federal and by stating that they

> "shall be and remain public highways." From the purpose of the grant and the conditions attached to the grant, I conclude that the United States intended to retain a reversionary interest in the strip just as in *Townsend*.

App. pp. 25a-26a. Although the district court held that the 100 foot strip was governed by 43 U.S.C. §§ 912 and 913, as well as 16 U.S.C. § 1248 (c), it refused to make a "declaration or decree of abandonment" on the grounds that the Maulers, as nonowners, lacked standing to make such a request. App. pp. 3a-35a. Nevertheless, the court found that the strip of land had been embraced within a "public highway" by common law dedication of the former right-of-way by the railroad to a snowmobile trail. App. pp. 28a-31a. The court rejected the Maulers' arguments that the right-of-way had reverted to them as abutting landowners under the Wisconsin Supreme Court case of *Pollnow v. State Dept. of Natural Resources,* 88 Wis.2d 350, 367, 276 N.W.2d 738, 746 (1979)*. It also rejected arguments that the establishment of the snowmobile trail constituted a "taking" of the appellants' land because the appellants never owned the land. App. pp. 27a-28a.*

On appeal, the United States Circuit Court of Appeals for the Seventh Circuit affirmed, holding that the district court had not erred in applying 16 U.S.C. § 1248 (c), 43 U.S.C. § 912 and 43 U.S.C. § 913 to the Maulers' land. The Court rejected the distinction between "right of way grants" and "grants in aid of railroad construction":

> We find this distinction to be without a difference. Nothing in the *Townsend*

> opnion suggests the Court intended to distinguish between a land grant for a "right of way . . . for the construction of a railroad"(the *Townsend* grant) and a land grant "for the purpose of aiding the construction of a railroad"(the grant in this case). Rather, the *Townsend* Court decided that Congress made all of the railroad grants "in order that the obligations to the United States, assumed in the acceptance of the grants, might be performed." 190 U.S. at 272, . . . Because the land grants in the present case were comprised of federal lands in the public domain and were given for exactly the same purpose as the grant in *Townsend*, we readily conclude that the strip of land at issue here was subject to an implied right of reverter in the United States.

App. p. 7a. In short, the Court, ignoring the language of the land grants and the Mauler's chain of title, ruled simply that the Maulers did not own the 100 foot strip of land:

> Applying these federal statutes to the land in this case, we find that § 912, as modified by § 1248 (c), vests a reversionary interest in the strip in the United States and not the Maulers. When the Railroad conveyed the strip to Bayfield County and Bayfield County established a public highway on the land as required by § 913, the United States reversionary interest expired in favor of Bayfield County. In short, the Maulers never possessed a legal interest in

> the former railroad corridor.

App. p. 8a.

The Maulers filed a petition for rehearing and rehearing *en banc* on November 13 , 2002, which petition was denied on November 25, 2002. App. p. 36a.

I. THE COURT OF APPEALS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

A. The Court of Appeals Decision Conflicts With This Court's Interpretation of 43 U.S.C. § 912 in *Noble v. Oklahoma City*, 297 U.S. 481 (1936).

It is fundamental that once this Court has construed a statute, it is the duty of lower courts to respect that understanding of the rule of law. *Rivers v. Roadway Express Co.*, 511 U.S. 298, 312-313 (1994). Although this Court has previously construed the Act of March 8, 1992 (43 U.S.C.§ 912) in *Noble v. Oklahoma City,* 297 U.S. 481 (1936), the Court of Appeals did not even mention this decision but relied instead upon *Northern Pacific Railway Co. v. Townsend*, 190 U.S. 267, 271 (1903), decided 19 years before 43 U.S.C. § 912 was even enacted.

The issue in *Noble v. Oklahoma City* was whether a right of way, which had been acquired by the Choctaw Coal and Railway Co. pursuant to a grant from Congress to locate, construct, own, equip, operate, use and maintain a railway, was subject to 43 U.S.C. § 912 allowing a municipality to acquire such right of way upon abandonment by the railroad. The owners of land

abutting the right of way challenged Oklahoma City's right to acquire the right of way presented deeds which had conveyed the right of way to railroad "in lieu of condemnation." The Oklahoma Supreme Court had held that the Act of Congress, dated February 18, 1888, vesting the railroad with the right to locate and construct a railroad was a grant *in praesenti* (a present grant) which predated the homestead claims of the abutting landowners./[2] On appeal, this Court reversed, specifically stating that the Act of March 8, 1922 applied only to right of way acts which "explicitly state that 'a right of way is hereby granted.'" *Noble v. Oklahoma City*, 297 U.S. at 490-491. The Court cited those grants which named specific railroads or states, such as the Illinois Central, the Northern Pacific, St. Joseph & Denver City Railroad Co., Union Pacific and others. *Noble v. Oklahoma City*, 297 U.S. at 491, fn. 17.

The Court explicitly excluded from 43 U.S.C. § 912 right of way under the Act of February 18, 1888, which it concluded was a "franchise" which authorized the taking of lands from landowners "in lieu of condemnation" upon payment of just compensation and right of way acquired from the public domain under the General Right of Way Act of 1875, ch. 152, 18 Stat. 482 (codified at 43 U.S.C. §§ 934-939 repealed and superseded by Act of October 21, 1976, P.L. 94-579, 90 Stat. 2793). *Noble v. Oklahoma City*, 297 U.S. at 490-491,

[2] Grants were *in praesenti*, where they "related back" to the date of the Act of Congress itself. *See e.g. Northern Pacific Railway Co. v. Townsend*, 190 U.S. 267, 271 (1903). Thus, even though the profile map for the Northern Pacific road was not filed until 1884 and construction not completed until 1887, the date of grant of the Northern Pacific right of way was July 2, 1864.*Compare Schulenberg v. Harriman*, 88 U.S. 44, 60 (1875).

494-495. Right of way acquired from the public domain under these Acts because none were *in praesenti*,(from the date of an Act of Congress), but instead dated from the filing of the profile map or actual construction of the road. *Noble v. Oklahoma City*, 297 U.S. at 494-495. *See also Jamestown & Northern Railroad Co. v. Jones,* 177 U.S. 125, 130 (1900); *Great Northern Railway Co. v.* Steinke, 261 U.S. 119, 131-132 (1923); *Minneapolis, St. Paul & S. Ste. Marie Railway Co. v. Doughty*, 208 U.S. 251, 259 (1908). Because the right of way under consideration in *Noble* had not been granted *in praesenti*, it was not subject to the Act of March 8, 1922, 43 U.S.C. § 912 and therefore Oklahoma City could not acquire title to abandoned right of way under the "municipality exception" to 43 U.S.C. § 912.

The present case involves lands from the Wisconsin land grants of 1856 and 1864, which, like the Act of February 18, 1888 in *Noble v. Oklahoma City* included no grant of right of way. The right of way in the present case was not actually constructed until after 1874. If there was any acquisition of right-of-way, it would have been under the General Right of Way Act of 1875. The record in the present case establishes that the right of way was acquired by a reservation in a deed to John Canfield, not that it was not taken from the public domain. Such a reservation in a deed created an easement under state law. *Pollnow v. State Dept. of Natural Resources,* 88 Wis.2d 350, 367, 276 N.W.2d 738, 746 (1979); *Green Bay and Mississippi Canal Co. v. Hewitt*, 66 Wis. 461, 466, 29 N.W. 237, 238 (1886). There was no *in praesenti* grant of right of way which would bring the present grant within 16 U.S.C. § 1248 (c) as "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912)." The Court of Appeals's disregard of this Court's interpretation of 43 U.S.C. § 912

in *Noble v. Oklahoma City* operated to deny to the petitioners due process of law and worked a taking of their property without just compensation, impairing the grant of lands to them as successors to the railroad which had earned the grant by constructing the railroad. *United States v. Northern Pacific Railroad Co.,* 256 U.S. 51, 63-64 (1921). *See also Lynch v. United States*, 292 U.S. 571, 579 (1934).

The Court of Appeals also prejudicially misapplied this Court's decision in *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942). The Court of Appeals corrected recognized that in *Great Northern Railway Co.*, the Court drew a distinction between pre-1871 grants of right of way, which continued to be recognized as "limited fee subject to an implied condition of reverter"and post-1871 grants of right of way which were recognized as "easements. " That distinction between pre- and post-1871 grants was irrelevant to the Court's interpretation of 43 U.S.C. § 912. The Court did not overrule *Noble v. Oklahoma City* in *Great Northern Railway Co. v. United States* but only held that statements in *Rio Grande Western Railway Co. v. Stringham,* 239 U.S. 44, 47 (1915), *Choctaw, O & G. R. Co. v. Mackey*, 256 U.S. 531, 538 (1921) and *Noble v. Oklahoma City,* 297 U.S. 481, 494 (1936) that the 1875 Act had granted a "limited fee subject to an implied condition of reverter" were wrong.

On the other hand, by erroneously assuming that there were *no* distinctions between rights of way acquired from the public domain, the Court of Appeals resurrected the very interpretation of the General Right of Way Act of 1875 as a "limited fee simple subject to an implied right of reverter" which this Court overruled in *Great Northern Railway Co. v. United States*, 315 U.S.

at 279. The Court of Appeals erroneously reasoned that *failing* to make a distinction between and post-1871 grants would somehow nullify the intent of Congress in enacting 43 U.S.C. §§ 912 and 913 and 16 U.S.C. § 1248 (c). The Court of Appeals reasoned that:

> Clearly Congress assumed the United States possessed a reversionary interest in railroad rights of way, else it would make little sense for Congress to have passed laws like §§ 912, 913 and § 1248 (c) to dispose of land the federal government did not own.

App. 8a. *Compare Marshall v. Chicago & Northwestern Transportation Co.*, 31 F.3d 1028, 1032 (10th Cir. 1994); *State of Idaho v. Oregon Short Line R.R. Co.*, 617 F. Supp. 207, 212 (D.C. Idaho, 1985); *Barney v. Burlington Northern Railroad Co.*, 490 N.W.2d 726, 731 (S.D. 1992) (all construing 43 U.S.C. § 912 as including easements under the 1875 General Right of Act "to avoid nullifying the intent of Congress"). This reasoning makes no sense since obviously if all right of way except *"in praesenti* right of way grants" of the Northern Pacific and Union Pacific type are excluded from 43 U.S.C. § 912, the statute would still be operational to those right of way. The Court of Appeals fear of nullifying the intent of Congress was clearly not a logical or lawful reason for disregarding this Court's interpretation of 43 U.S.C. § 912 in *Noble v. Oklahoma* City. The Court of Appeals decided in a way which conflicts with this Court's interpretation of the Act of March 8, 1922 (43 U.S.C. § 912). Other courts have likewise disregarded this interpretation. Certiorari should be granted to resolve this important issue of federal law.

B. The Court of Appeals Decided This Case In Way Which Conflicts With Relevant Decisions of This Court Governing Retroactive Application and Implied Repeal of Statutes.

The District Court and the Court of Appeals both construed 16 U.S.C. § 1248 (c) as having "modified", but not repealed, 43 U.S.C. §§ 912 and 913. *Mauler v. Bayfield County*, 204 F. Supp. 2d at 1175-1176; *Mauler v. Bayfield County*, 309 F.3d. At 999, 1002. This reasoning sidestepped the irreconcilable conflict between 16 U.S.C. § 1248 (c) on the one hand and 43 U.S.C. §§ 912 and 913 on the other, and the actual language of 16 U.S.C. § 1248 (c) which Congress clearly intended to apply only prospectively from October 4, 1988. The National Trails System Improvement Act of 1988 provides in 16 U.S.C. § 1248 (c):

> ***Commencing upon October 4, 1988***, any and all right, title, interest, and estate of the United states in all rights-of-way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912), ***shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof***, except to the extent that any such right-of-way, or portion thereof, shall have been embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such Act. (emphasis added).

The 100 foot strip of land traversing the petitioners' land was abandoned as a right of way as of July 3, 1986. App. 16a. Thus, as of October 4, 1988, the right of way had

already been abandoned for more than two years. The Chicago & Northwestern Transportation Company did not make any conveyance until May, 1989, which is more than one year after abandonment. Even assuming the Act of March 8, 1922 (43 U.S.C. § 912) applies to the 100 foot strip, the Act itself makes the date of ***abandonment*** the date from which any other nonrailroad public use must be commenced. The relevant language of 43 U.S. C. § 912 provides that:

> Whenever . . . ***use and occupancy*** of said [public] lands for such [right of way] purposes ***has ceased or shall hereafter cease***, whether by forfeiture or ***by abandonment by said railroad company declared*** or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest and estate of the United States in said lands shall, ***except such part thereof*** as may embraced in a public highway legally established ***within one year after the date of said*** decree or forfeiture or ***abandonment be transferred to and vested in any person, firm, or corporation, assigns, successors in title and interest to whom or to which title of the United States may have been or may be granted conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures***. . . . (emphasis added).

Vieux v. East Bay Regional Park Dist., 906 F.2d 1330, 1341-1342 (9th Cir. 1990). No public highway was established on the 100 foot strip within one year of July 3, 1986. Therefore, even assuming the Act of March 8, 1922 applied to the 100 foot strip of land, the petitioners would have been entitled to ownership upon abandonment as abutting landowners and as successors to the original grantee of the abutting land.

The Court of Appeals therefore construed 16 U.S.C. § 1248 (c) in a way which conflicts with decisions of this Court that "legislation must be considered as addressed to the future, not to the past." *Union Pac R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913); *Union Pac R. Co. v. Snow*, 231 U.S. 204, 211-212 (1913). *See Landgraff v. USI Film Products*, 511 U.S. 244, 266-273 (1994). Congress clearly did not intend the National Trail System Improvements Act of 1988, 16 U.S.C. § 1248 (c), to operate retroactively by including previously abandoned right of way into the National Trail System. Moreover, Congress clearly did not intend to bring "right of way" which was not previously identified as "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912)" under federal ownership.

On the other hand, the National Trail System Improvements Act of 1988, 16 U.S.C. § 1248 (c) does clearly manifest an intent by Congress to repeal 43 U.S.C. §§ 912 and 913 prospectively from October 4, 1988 by vesting all railroad "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912)" abandoned or forfeited **after** October 4, 1988 in the United States. Congress intended to leave unaffected all "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912)" abandoned or forfeited **prior** to

October 4, 1988 "except to the extent that any such right-of-way, or portion thereof, shall have been embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such Act." Congress did not intend to allow "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912)" to be used for "public highways" but rather intended such right of way to be used for recreational trails where the Secretary of the Interior deems such use suitable. 16 U.S.C. § 1248 (d)-(f).

Although repeals by implication are not favored," *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976), *and whenever possible, statutes should be read consistently. Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468 (1982), *this Court has recognized:*

> . . . two well-settled categories of repeals by implication - (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest. . . . .

Id. citing Radzanower v. Touche Ross & Co., 426 U.S. at 154, and *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). *There is an irreconcilable conflict*

between 16 U.S.C. § 1248 (c) and 43 U.S.C. §§ 912 and 913: land whose ownership is vested in the United States cannot be vested in either the abutting landowner or another person at the same time. Moreover, 16 U.S.C. § 1248 (c) covers the whole subject of "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912)", which by reference encompasses "right of way" dedicated to public highway use under 43 U.S.C. § 913. After October 4, 1988, Congress intended to substitute a policy of devoting such abandoned federal railroad right of way to recreational trail use rather than public highway use. These sections reveal a "clear and manifest intent" by Congress to repeal 43 U.S.C. §§ 912 and 913.

The district court wondered how repeal of 43 U.S.C. § 912 would benefit petitioners. App. pp. 23a-24a. If Congress clearly intended to prospectively repeal 43 U.S.C. §§ 912 and 913, previously abandoned or forfeited rights of way not embraced in a legally established public highway prior to October 4, 1988 would be left to the abutting landowners. Congress clearly did not intend to unsettle titles which had been previously vested according to the Act. This can be inferred from the exception in 16 U.S.C. § 1248 (c) for "any such right-of-way, or portion thereof, thereof, [which] shall have been embraced within a public highway no later than one year after a determination of abandonment or forfeiture". As to these rights of way, 16 U.S.C. § 1248 also provides that it shall be "as provided under such Act (of March 8, 1922 (43 U.S.C. § 912))". The Act of March 8, 1922 called for the public highway to be "legally established ***within one year after the date of said*** decree ***or*** forfeiture ***or abandonment***." Where such public highway had not been legally established within one year of abandonment, Congress

clearly intended landowners such as the petitioners to retain title in the right of way by virtue of the ownership in the abutting subdivision. Thus, petitioners are benefitted by a repeal of the 43 U.S.C. § 912 even if the 100 foot strip of land is "right of way of the type described in the Act of March 8, 1922 (43 U.S.C. § 912)" because the 100 foot strip of land was abandoned prior to October 4, 1988 when 16 U.S.C. § 1248 (c) took effect.

The Court of Appeals decided the case in a way which conflicts with decisions of this Court governing statutory interpretation. Had these decisions been followed, the Court would have quieted title to the 100 foot strip of land in the petitioners, not the United States. The United States evidently agreed with this interpretation since it disclaimed all right, title and interest and was dismissed by the district court before the case was submitted for summary judgment. Certiorari should therefore be granted to correct the Court of Appeals blatant misinterpretation of important federal law.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS AND THE HIGHEST COURTS OF SEVERAL STATES

The Court of Appeals decision in *Mauler v. Bayfield County*, App. pp. 1a-11a conflicts with the Tenth Circuit Court of Appeals decision in *Marshall v. Chicago & Northwestern Transp. Co.*, 31 F.3d 1028, 1030 (10th Cir. 1994) vesting title to such right of way in the abutting landowners even though the right of way was abandoned after October 4, 1988. Both of these cases conflict with the Tenth Circuit's decision in *Phillips Co. v. Denver & Rio Grande Western R. Co.*, 97 F.3d 1375 (10th Cir. 1996) holding that abandonment

could not occur under 16 U.S.C. § 1248 (c) or 43 U.S.C. §§ 912 and 913 unless and until the Interstate Commerce Commission approved such abandonment. The Tenth Circuit Court of Appeals decision in *Phillips Co. v. Denver & Rio Grande Western R. Co.*, conflicts in this regard with the Ninth Circuit Court of Appeals in *Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330, 1339 (9th Cir. 1990) holding that "a railroad could abandon without any involvement of the I.C.C., the U.S. or a state government." *Accord*: *Barney v. Burlington Northern Railroad Co.*, 490 N.W.2d 726, 732 (S.D. 1992).

The Court of Appeals decision in *Mauler v. Bayfield County* also conflicts with a decision of the Federal Circuit Court of Appeals in *Preseault v. United States*, 100 F.3d 1525, 1541-1544 (Fed. Cir. 1996). *Although the Preseault* case was decided on the basis of Vermont law on railroad right of way, the Federal Circuit held that the "shifting public use doctrine" was also rejected under Wisconsin law. *Preseault v. United States*, 100 F.3d at 1541-1544 applying Vermont law which is identical to Wisconsin and Washington state law. *Hill v. Western Vermont Railroad*, 32 Vt. 68 (1859); *Troy & Boston Railroad v. Potter,* 42 Vt. 265 (1869); *Lawson v. State*, 107 Wash.2d 444, 730 P.2d 1308 (1986); *Pollnow v. State Dept. of Natural Resources*, 88 Wis.2d 350, 276 N.W.2d 738 (1979). *Mauler v. Bayfield County* adopts a "shifting public use doctrine" contrary to *Preseault* and Wisconsin law where the land is situated. The Maulers are entitled to just compensation from the United States under 28 U.S.C. § 2409a (b) and from Bayfield County under 28 U.S.C. §§ 1331 and 1367 by reviewing the Mauler's rights as abutting land owners under state law just as in *Preseault*. *This Court should grant certiorari to resolve this conflict between the circuits not only as to the important issue of*

interpreting statutes but also as to the issue of whether the "shifting public use doctrine" is a justification for avoiding just compensation under the Fifth and Fourteenth Amendments to the U.S. Constitution.

III. CONCLUSION

Therefore, Petitioners Douglas R. Mauler and Judith A. Mauler, respectfully request that this Court invite the Solicitor General of the United States to comment on how the Department of the Interior could disclaim any right, title and interest in the 100 foot strip of land on their property when the Court of Appeals held that title to such property vested in the United States. The Maulers respectfully request that the Court grant their Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit.

RESPECTFULLY SUBMITTED,

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