



United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

February 18, 2022

M-37074

Memorandum

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

From: Solicitor

Subject: The Scope of a Railroad's Rights under the General Railroad Right-of-Way Act of March 3, 1875 – Withdrawal of Solicitor's Opinion M-37048 and Reinstatement of Solicitor's Opinion M-37025

This opinion addresses competing Solicitor's opinions regarding the scope of a railroad's rights under the General Railroad Right-of-Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-39 ("1875 Act"). In particular, it responds to a federal court decision critical of the interpretation of the 1875 Act as expressed in Solicitor's Opinion M-37048.¹ I have reviewed the Jorjani M-Opinion, as well as relevant statutes, legislative history, and caselaw regarding the scope of the 1875 Act. For the reasons set forth below, I hereby withdraw the Jorjani M-Opinion and reinstate Solicitor's Opinion M-37025.² Based on my review, I have concluded that the Jorjani M-Opinion misinterprets the 1875 Act by applying incorrect canons of statutory construction and misconstruing or ignoring federal court decisions to find that railroad companies received the right to use, or authorize third parties to use, their easement for any purpose as long as such uses do not interfere with railroad operations.³ By contrast, the Tompkins M-Opinion accurately

¹ Solicitor's Opinion M-37048, *Withdrawal of Solicitor's Opinion M-37025 issued on November 4, 2011, and Partial Withdrawal of Solicitor's Opinion M-36964 issued on January 5, 1989*, 2017 WL 7805667 (Sept. 1, 2017) ("Jorjani M-Opinion"). The district court in *Ctr. for Biological Diversity, et al. v. BLM, et al.*, No. 2:17-cv-08587, 2019 WL 2635587 (C.D. Cal. June 20, 2019) ("CBD") was sharply critical of the Jorjani M-Opinion's legal interpretation of the 1875 Act. In that case, the Bureau of Land Management ("BLM") relied on the Opinion for its determination that a proposed water pipeline was within the scope of a railroad right-of-way under the 1875 Act, which the district court rejected. *See also L.K.L. Assocs., Inc. v. Union Pacific R.R.*, 17 F.4th 1287, 1301 n.4 (10th Cir. 2021) (declining the railroad's invitation to rely on the Jorjani M-Opinion in support of its interpretation of the 1875 Act).

² Solicitor's Opinion M-37025, *Partial Withdrawal of M-36964—Proposed Installation of MCI Fiber Optic Communications Line Within Southern Pacific Transportation Co.'s Railroad Right-of-Way*, 2011 WL 13277688 (Nov. 4, 2011) ("Tompkins M-Opinion").

³ Notably, the Jorjani M-Opinion did offer a secondary, alternative interpretation of the 1875 Act, focusing on the incidental use doctrine. That portion of the Jorjani M-Opinion is largely consistent with the interpretation of the incidental use doctrine explained in the Tompkins M-Opinion, but the Tompkins M-Opinion provides a more

reflects the legislative history, canons of statutory construction, and federal court decisions to conclude that the 1875 Act provided railroad companies with an exclusive right-of-way easement across federal land limited to those activities that derive from or further a railroad purpose. Moreover, the Tompkins M-Opinion is consistent with the holding in *CBD* and other recent federal court decisions, including *Barahona v. Union Pacific R.R. Co.*, 881 F.3d 1122 (9th Cir. 2018) and *L.K.L. Assocs., Inc. v. Union Pacific R.R.*, 17 F.4th 1287 (10th Cir. 2021).

Background

Over the last thirty years, the Solicitor has issued several opinions interpreting the 1875 Act. These opinions have examined the scope of rights railroad companies received through a right-of-way grant under the 1875 Act. The conclusions in these Opinions, in turn, largely inform whether federal agencies, including the BLM, have any authority over proposed activities within 1875 Act railroad rights-of-way crossing over federal lands.

In 1989, the Solicitor issued Solicitor's Opinion M-36964, *Proposed Installation of MCI Fiber Optic Communications Line Within Southern Pacific Transportation Co.'s Railroad Right-of-Way*, 96 I.D. 439 (Jan. 5, 1989) ("Solicitor's Opinion M-36964"). This opinion primarily focuses on interpreting the rights of the pre-1871 Acts,⁴ but it also opined on the rights granted by the 1875 Act.⁵ Despite acknowledging that the 1875 Act granted an "easement, and not [a fee]" to the railroad, citing *Great Northern R.R. Co. v. United States*, 315 U.S. 262 (1942), it nevertheless concluded that "[t]he scope of this easement, unlike an ordinary common law easement, is an interest tantamount to fee ownership, including the right to use and authorize others to use (where not inconsistent with railroad operations) the surface, subsurface, and airspace."⁶

In 2011, the Solicitor reviewed Solicitor's Opinion M-36964 in response to criticisms and concerns about that Opinion's interpretation of the 1875 Act, and ultimately withdrew that portion of the Opinion and replaced it with the Tompkins M-Opinion. The Tompkins M-

precise and complete summary and analysis of the applicable law. Accordingly, I am withdrawing the Jorjani M-Opinion in its entirety.

⁴ The pre-1871 Acts are railroad grants authorized by Congress between 1850 and 1871, e.g., the Act of July 27, 1866, 14 Stat. 292. Congress offered these grants to specific railroad companies and the grants included provisions authorizing such railroad companies to obtain fee ownership of either even or odd section lands adjacent to the constructed railroad rights-of-way. In contrast to 1875 Act grants, the Supreme Court has interpreted the pre-1871 Act grants as providing the railroad companies a limited fee with a right of reverter. See *Northern Pac. R.R. v. Townsend*, 190 U.S. 267, 271 (1903). The pre-1871 Acts, however, "have little relevance to the question of what interest the 1875 Act conveyed to railroads." *Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93, 107 (2014).

⁵ Solicitor's Opinion M-36964 at 450. Relying on *Townsend*, Solicitor's Opinion M-36964 concluded that railroads have limited fee ownership of land granted under the pre-1871 Acts, the scope of which includes the surface, subsurface (except for minerals), and airspace. The duration of such a right-of-way is perpetual with the United States possessing a possibility of reverter if the lands are no longer used for railroad purposes. Because of the nature of the right-of-way grant offered under the pre-1871 Acts, the Opinion explained that "the grantee may authorize third parties to utilize its right-of-way for activities and structures not inconsistent with the grantee's operation of a railroad." *Id.* In other words, as long as the third-party use did not interfere with railroad operations, the railroad could use – or authorize others to use – the land within the right-of-way as it pleased. *Id.*

⁶ *Id.* at 450. This conclusion relied on limited, narrow references to *Great Northern*; *United States v. Union Pac. R.R. Co.*, 353 U.S. 112 (1957) (dissenting opinion); and *State of Idaho v. Oregon Short Line R.R. Co.*, 617 F. Supp. 207 (D. Idaho 1985).

Opinion first identified the applicable canon of construction, determining that the Supreme Court’s liberal construction for railroad rights-of-way “in favor of the purposes for which it was enacted” is nonetheless “subject to the general rule of construction that any ambiguity in a grant is to be resolved favorably to a sovereign grantor – ‘nothing passes but what is conveyed in clear and explicit language.’”⁷ Next, the Opinion considered the Supreme Court’s decision in *Great Northern*, which concluded, based on the text and legislative history of the 1875 Act, that the Act gave railroads a mere easement as opposed to the “limited fee” offered by the pre-1871 Acts.⁸ Thus, the Tompkins M-Opinion determined that Solicitor’s Opinion M-36964’s interpretation of the 1875 Act was inconsistent with the Act, its legislative history, and caselaw, concluding that the Act granted a right of use only (i.e., an easement), as distinct from the grant of a “limited fee” with a right of reversion as in the pre-1871 Acts. Accordingly, a railroad’s authority to undertake or authorize activities is limited to activities that “derive from or further a railroad purpose.”⁹ The Tompkins M-Opinion also identified several principles for determining whether activities derive from or further a railroad purpose, including that: (1) a railroad may undertake, or authorize third parties to undertake, activities relating to the construction and operation of a railroad without distinguishing between third-party uses or uses that generate income;¹⁰ (2) a railroad could authorize uses providing a benefit to the construction and operation of a railroad and also a non-railroad purpose – known as the “incidental use doctrine”;¹¹ and (3) the 1875 Act easement does not distinguish between surface and subsurface uses and both uses are subject to the same test to determine if they constitute a railroad purpose.¹²

On September 1, 2017, the Jorjani M-Opinion withdrew and replaced the Tompkins M-Opinion.¹³ The Jorjani M-Opinion reconsidered the Tompkins M-Opinion’s legal analysis, re-examining the text of the Act, the legislative history, and caselaw relied on by the Tompkins M-Opinion, including *Home on the Range*. The Jorjani M-Opinion first applied common law principles associated with exclusive easements, concluding that 1875 Act easements are exclusive easements in gross and thus are apportionable by the easement owner limited only by a contrary intent of the parties or where such use unreasonably burdens the servient estate.¹⁴ Next, the Jorjani M-Opinion applied the general rule against reading limitations into the 1875 Act (*casus omissus pro omisso habendus est*), arguing that Section 1 of the Act did not limit the use of the 200-foot right-of-way to only railroad purposes.¹⁵ It also applied the canon of *expressio*

⁷ Tompkins M-Opinion at 1-3 (quoting *Leo Sheep Co. v. United States*, 440 U.S. 668, 683 (1979) and *Great Northern*, 315 U.S. at 272).

⁸ *Id.* at 3-6. The Opinion placed substantial weight on the district court’s analysis of the distinctions between rights offered through the pre-1871 Acts versus the 1875 Act in *Home on the Range v. AT&T Corp.*, 386 F. Supp. 2d 999 (S.D. Ind. 2005). *Id.* at 6-9.

⁹ *Id.* at 8-9.

¹⁰ *Id.* at 9-11.

¹¹ *Id.*

¹² *Id.* at 10-11, 12 n.26. The Department also issued earlier opinions acknowledging and applying the incidental use doctrine as reflected in *Grand Truck R.R. v. Richardson*, 91 U.S. 454 (1875). *See, e.g., Railroad Right of Way-Lease for Warehouse Purposes. Clear Water Short Line Ry. Co.*, 29 Pub. Lands Dec. 569, 1900 WL 1895 (Mar. 3, 1900); Solicitor’s Opinion M-36016, *Lease of Railroad Station Grounds of the Colorado River Indian Reservation* (Oct. 17, 1949). The Opinions accept the *Grand Truck R.R.* Court’s view of expanded uses within a railroad right-of-way easement as being within the scope of a railroad’s rights.

¹³ Jorjani M-Opinion at 1.

¹⁴ *Id.* at 9-10. As noted below, the Tenth Circuit recently rejected this conclusion, finding that while 1875 Act easements are exclusive, a railroad’s use of the right-of-way easement is still limited to uses serving a railroad purpose. *L.K.L. Assocs., Inc.*, 17 F.4th at 1297-98.

¹⁵ Jorjani M-Opinion at 10-11.

unius est exclusion alterius to support an interpretation that the 1875 Act provided limitations in other sections of the statute, but not in Section 1 regarding the grant of the right-of-way.¹⁶ Further, the Jorjani M-Opinion applied the canon of construction to liberally construe railroad grants, rejecting the Tompkins M-Opinion's interpretation that the liberal construction is constrained by the general rule that land grants are construed favorably to the Government and any ambiguity is resolved for and not against the Government.¹⁷ Based on this statutory construction, the Jorjani M-Opinion concluded that leasing portions of the right-of-way to third parties for uses that do not interfere with railroad operations was consistent with the purpose of the Act, including a broad interpretation of encouraging Western expansion and economic development, and did not place an unreasonable burden on the servient estate, suggesting this reading was supported by the Supreme Court's decision in *Great Northern*.¹⁸ This interpretation recognized a railroad company's authority over 1875 Act activities and uses within the rights-of-way limited only by those activities or uses that interfered with railroad operations. As noted above, the Jorjani M-Opinion also offered a secondary, alternative interpretation to reinforce a broad application of the incidental use doctrine to allow a railroad company to authorize uses within the right-of-way, assuming uses within the railroad right-of-way must further a railroad purpose.¹⁹

In 2017 and 2018, several environmental organizations filed lawsuits challenging a BLM determination regarding proposed activities within an 1875 Act railroad right-of-way that relied on the legal interpretation in the Jorjani M-Opinion. One of the lawsuits directly challenged the Jorjani M-Opinion. The district court conducted a thorough review of the legal analysis and reasoning in the Jorjani M-Opinion, rejecting, as contrary to the 1875 Act, the Jorjani M-Opinion's primary legal interpretation that a holder of an 1875 Act right-of-way has a right to lease to third parties for any uses not interfering with continued railroad operations.²⁰ The district court, however, did not vacate the Jorjani M-Opinion. Instead, the district court concluded that the secondary interpretation in the Jorjani M-Opinion came to the same, correct interpretation in the Tompkins M-Opinion – the scope of an 1875 Act right-of-way is limited to activities that serve a railroad purpose, including activities that are incidental to uses that serve railroad purposes.²¹

¹⁶ *Id.*

¹⁷ *Id.* at 14-15. The Jorjani M-Opinion rejects the Tompkins M-Opinion's reliance on *Home on the Range* regarding the general rule that land grants are construed favorably to the Government and the legal interpretation of the Act as limited to those uses serving a railroad purpose. The Jorjani M-Opinion argues that the holding in *Home on the Range* misread or disregarded the Supreme Court's decisions in *United States v. Denver & Rio Grande Railway Co.*, 150 U.S. 1 (1893), *United States v. Union Pac. R.R. Co.*, 353 U.S. 112 (1957), and *Leo Sheep Co.*

¹⁸ The Jorjani M-Opinion also argues that railroad companies and entities leasing lands from railroad companies up until the Tompkins M-Opinion believed such uses of the right-of-way were permissible and thus their settled expectations support broadly interpreting the purpose of the Act. *Id.* at 16-17.

¹⁹ *Id.* at 17-19.

²⁰ CBD, 2019 WL 2635587 at 25.

²¹ *Id.* at 26-28. The district court ultimately remanded the BLM's determination back to the BLM for failing to adequately explain why an application of the same facts, or a disregard of certain facts, supported a different conclusion. *Id.* at 31. The Department did not appeal the district court's decision. On February 7, 2020, the BLM reexamined the remanded determination based on the district court's decision and issued a revised determination. The revised determination provided an explanation in support of a finding that the proposed uses of the railroad right-of-way "derived from or furthered a railroad purpose." This Opinion does not take a position on the BLM's revised determination's application of the incidental use doctrine.

Analysis

Based on my review of past and current Solicitor's Opinions, the 1875 Act, the legislative history, and relevant court decisions, I conclude that the Tompkins M-Opinion correctly analyzes and interprets the 1875 Act. I reach this conclusion for several reasons.

First, contrary to the view taken by the Jorjani M-Opinion, common law principles of easements do not support a broad interpretation of the 1875 Act as offering railroads an exclusive easement for any use not interfering with railroad operations. While the Tompkins M-Opinion referred to 1875 Act grants as easements having some exclusive rights to use, it still concluded that the nature of the easement is constrained by the purpose for which the easement was offered – a “railroad purpose.”²² In contrast, the Jorjani M-Opinion interpreted 1875 Act grants as exclusive easements in gross, allowing the easement holder to use the easement for any purpose not interfering with railroad operations or placing an unreasonable burden on the servient estate.²³ On this point, the Jorjani M-Opinion suggested that the Supreme Court's decision in *Brandt* warranted a review of the Tompkins M-Opinion, but then ignored the Court's findings regarding the nature of the easement offered through the 1875 Act, namely that what the Act offered “was a simple easement.”²⁴ The Jorjani M-Opinion represented an overly expansive and unsupported interpretation of easements, especially when considered against the context in which Congress enacted the 1875 Act. **Even if the easement is exclusive, it cannot be understood to offer anything more than a right of use for railroad purposes**, which is precisely what is reflected in the Tompkins M-Opinion.

Second, an interpretation of the 1875 Act, even if liberally construed as it applies to the purposes of a railroad right-of-way, is still “subject to the general rule of construction that any ambiguity in a grant is to be resolved favorably to a sovereign grantor – ‘nothing passes but what is conveyed in clear and explicit language.’”²⁵ Contrary to the position expressed in the Jorjani M-Opinion, the 1875 Act does not provide a railroad company in “clear and explicit language” a right to authorize any use that does not interfere with railroad operations, nor does it support a broad interpretation of purpose that includes “westward expansion” and “economic development.”²⁶ And while the text does not clearly limit the scope to railroad purposes, Section 1 of the 1875 Act only offered a 200-foot right-of-way with a right to materials for construction of the railroad.²⁷ Thus, any ambiguity in the text should favor the Government.

²² Tompkins M-Opinion at 9. The Tenth Circuit's recent decision in *L.K.L. Assocs., Inc.* supports this conclusion. See *L.K.L. Assocs., Inc.*, 17 F.4th at 1297-99 (finding that although an 1875 Act right-of-way is an exclusive easement, it nevertheless may only be used for a railroad purpose). To be clear, the incidental use doctrine is applicable to 1875 Act easements, which allows a railroad to authorize uses of a right-of-way that offer “a variety of uses incidental to railroad operations.” *Barahona*, 881 F.3d at 1134. Notably, however, “the incidental use doctrine does not automatically consider any purpose employed by a railroad to be a railroad purpose.” *L.K.L. Assocs., Inc.*, 17 F.4th at 1299. In *L.K.L. Assocs., Inc.*, for example, the court specifically rejected an interpretation that any activity generating revenue for the railroad through a third-party lease of a right-of-way could constitute a railroad purpose. *Id.* at 1300 (“That interpretation would turn the railroad purpose requirement into something else entirely.”).

²³ Jorjani M-Opinion at 14.

²⁴ *Brandt*, 572 U.S. at 110.

²⁵ *Great Northern*, 315 U.S. at 272 (quoting *Caldwell v. United States*, 250 U.S. 14, 20-21 (1919)).

²⁶ *CBD*, 2019 WL 2635587 at 16-17.

²⁷ 43 U.S.C. § 934.

Third, the Supreme Court decisions examining the 1875 Act are persuasive in support of an interpretation of the Act as requiring a railroad's use of the right-of-way to relate to a railroad purpose. *Great Northern*, *Union Pacific*, and *Brandt* conclude that the 1875 Act offered easements, acknowledging the context in which Congress enacted the 1875 Act and making clear Congress' intention to distinguish these rights from the pre-1871 Act grants.²⁸ While these cases do not delineate the scope of permissible uses, they do conclude that "the 1875 Act granted an easement and nothing more."²⁹ Lower federal courts have considered the scope of the 1875 Act and consistently decided that uses must serve some railroad purpose.³⁰ The Tompkins M-Opinion gave appropriate weight to those decisions before it to support an interpretation that the 1875 Act offered an easement for the purpose of constructing and operating a railroad, which was reaffirmed by the Tenth Circuit's recent decision in *L.K.L. Assocs., Inc.* By contrast, the Jorjani M-Opinion ignored or misinterpreted the decisions before it (and is contrary to the subsequent *Barahona* and *L.K.L. Assocs., Inc.* decisions), including their examination of the legislative history of the Act in favor of an unsupported interpretation that broadly expands the rights offered by the 1875 Act, which is something more akin to a fee.³¹

Finally, the Tompkins M-Opinion and the secondary, alternative interpretation in the Jorjani M-Opinion are consistent in acknowledging and characterizing the application of the incidental use doctrine to determine whether uses are within the scope of an 1875 Act grant.³² As both opinions note, a railroad company may authorize a third party to use its right-of-way in those circumstances where such uses offer an incidental benefit to railroad operations. As a result, reinstating the Tompkins M-Opinion relating to the incidental use doctrine leaves in place the secondary, alternative legal interpretation in the Jorjani M-Opinion.

Based on the foregoing analysis, the Jorjani M-Opinion's interpretation of the scope of rights offered through the 1875 Act is inconsistent with the text, legislative history, and applicable caselaw, and thus I withdraw that Opinion. Because the Tompkins M-Opinion is an accurate representation of the 1875 Act, which granted railroad company's a right to use or authorize others to use the right-of-way for uses that "derive from or further a railroad purpose," I hereby reinstate that Opinion. As the Tompkins M-Opinion explains, BLM should exercise its discretion in reviewing past and future uses of 1875 Act railroad rights-of-way to determine on a case-by-case basis what actions, if any, should be taken with respect to such uses.³³ This

²⁸ See, e.g., *Great Northern*, 315 U.S. at 272-73; *Brandt*, 572 U.S. at 96-98. Notably, the Supreme Court issued its decision in *Brandt* after the Tompkins M-Opinion issued. However, *Brandt* is consistent with the Tompkins M-Opinion as it relates to the nature of the easement offered by the 1875 Act and in particular the distinctions between the pre-1871 Acts and the 1875 Act. The Jorjani M-Opinion's strained reading of the *Brandt* decision lacks merit.

²⁹ *Brandt*, 572 U.S. at 103; see also *id.* at 105 n.4 (noting that "granting an easement merely gives the grantee the right to enter and use the grantor's land for a certain purpose"); *Great Northern*, 315 U.S. at 271 ("[T]he right granted is one of use and occupancy only, rather than the land itself."). Moreover, the Supreme Court decided in *Brandt* that the underlying landowner acquires the area encumbered by the right-of-way provided by the 1875 Act if the railroad right-of-way is abandoned. *Brandt*, 572 U.S. at 105. Accordingly, any derivative right to use the right-of-way for a railroad purpose might lapse as well.

³⁰ See, e.g., *Home on the Range*, 368 F. Supp. 2d at 1024; see also *Barahona*, 881 F.3d at 1133; *L.K.L. Assocs., Inc.*, 17 F.4th at 1298-99.

³¹ See Jorjani M-Opinion at 5-7.

³² Compare Tompkins M-Opinion at 9-11 with Jorjani M-Opinion at 17-19.

³³ Tompkins M-Opinion at 12-13.

decision is consistent with the holding in *CBD*, which determined that the primary interpretation in the Jorjani M-Opinion was unlawful.

This Opinion was prepared with the substantial assistance of Michael Smith in the Solicitor's Office.

A handwritten signature in blue ink, reading "Robert T. Anderson", written over a horizontal line.

Robert T. Anderson