

# Cutting Edge Issues and Valuation in Rails-to- Trails Cases



# The Trails Act

“[I]n the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, **if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for the purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.**”

16 U.S.C. § 1247(d)

# Rails-to-Trails Program

## Intent:

- Preserve rights-of-way for future reactivation of rail service
- Protect rail transportation corridors
- Encourage energy efficient transportation use
- Promote development of recreational trails

# Rails-to-Trails Program

## 1) Railbanking –

- ◆ Preserves railroad corridor so that any railroad can seek reactivation of rail service in the future
- ◆ It is this preservation that has the potential of delaying abandonment that would otherwise have occurred under state property law

## 2) Interim Trail Use –

- ◆ Encouraged, but not mandated, required, or even allowed if otherwise conflicts with state law
- ◆ Right-of-way sold or donated “in a manner consistent with this chapter”

# The Litigation Starts

Beautiful stretch of a former railroad right-of-way on the shores of Lake Champlain running through the Preseault's property



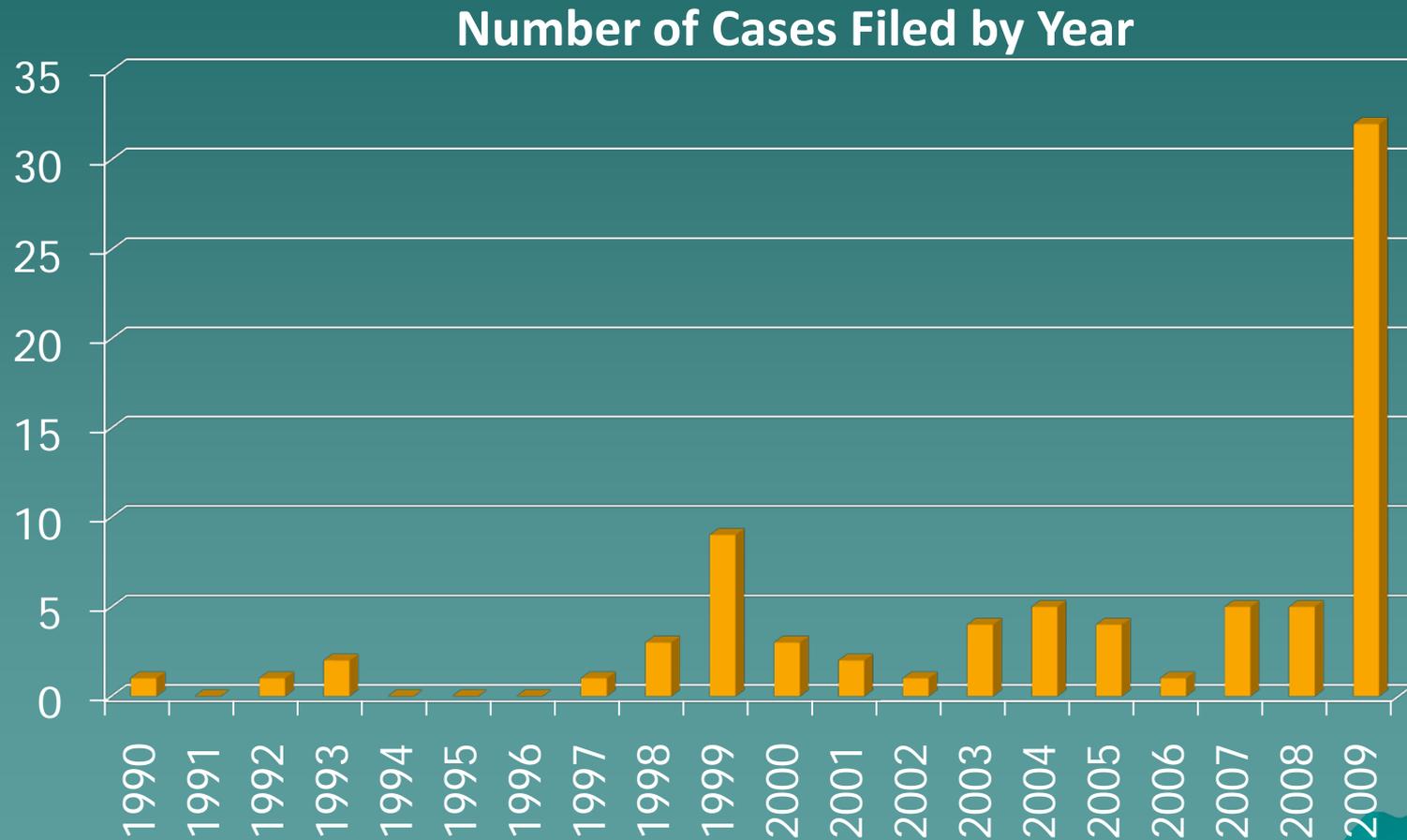
# Interference with State Law Property Interests

- ◆ “By deeming interim trail use to be like discontinuance rather than abandonment . . . Congress prevented property interests from reverting under state law.” *Preseault I*, 494 U.S. at 8.
- ◆ “[I]ssuance of the NITU is the only government action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way.” *Caldwell*, 391 F.3d at 1233-34.
- ◆ “A taking occurs when state law reversionary property interests are blocked.” *Ladd v. United States*, 630 F. 3d at 1023.

# Current Litigation

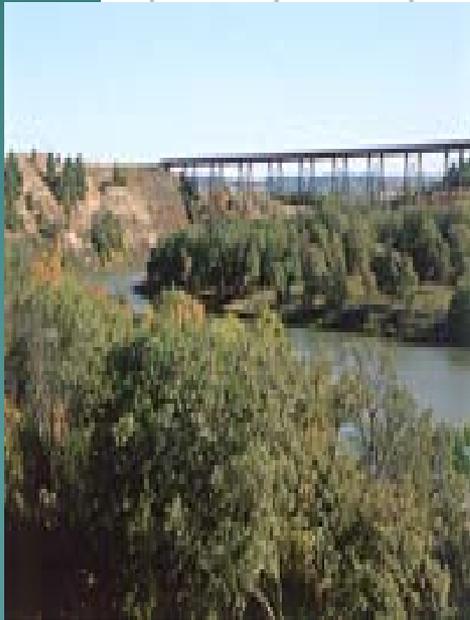
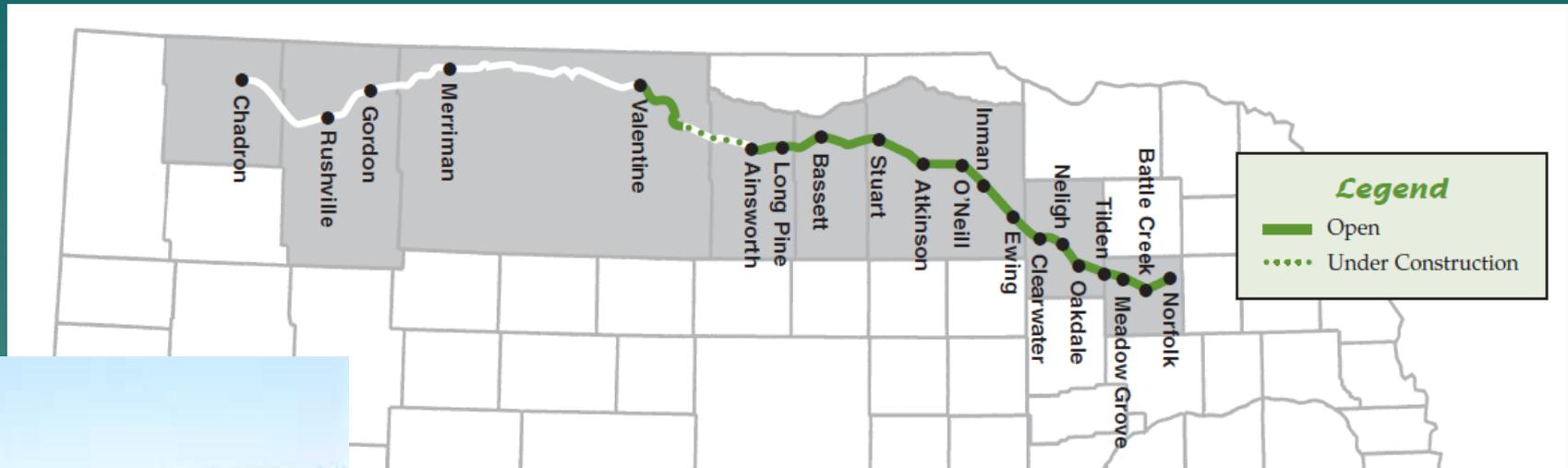
- ◆ Currently 58 cases
  - Court of Federal Claims
  - District Courts
- ◆ 70 different complaints
- ◆ > 10,000 properties

# Recent Spike of Rails-to-Trails Litigation



# Schneider v. United States (D. Neb.)

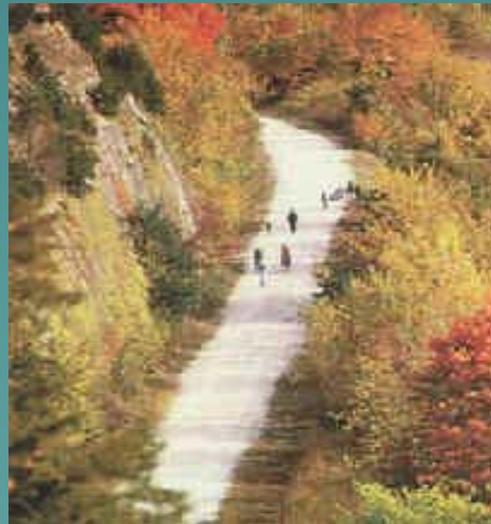
(opt-out state-wide class action consisting of 12 trails)



The Cowboy Trail, Nebraska - Born in the 1870s as a route to Black Hills gold, this 321-mile railroad corridor created and supplied settlements across northern Nebraska. Soon after the trains stopped in 1992, Rails-to-Trails Conservancy purchased the right-of-way for the nation's longest recreational rail-to-trail project. <sup>9</sup>

*Glosemeyer v. United States*, 45 Fed. Cl. 771 (2000)  
(consolidated with *Moore* and *Town of Grantwood Village*)

**Katy Trail, Missouri** - At 225 miles, it is America's longest completed rails-to-trails project, stretching across most of the state of Missouri. Over half of it follows Lewis and Clark's path up the Missouri River.



# Baseline Issue: Does the Adjoining Owner Have an Interest in the Right-of-Way?

Under *Preseault I*, everyone agrees that if the railroad owned the right-of-way in fee the adjoining property owner holds no reversionary interest:

“[U]nder any view of takings law, only some rail-to-trail conversions will amount to takings. Some rights-of-way are held in fee simple [by the railroad]. Others are held as easements that do not even as a matter of state law revert upon interim use as nature trails.”

*Preseault I*, 494 U.S. at 16.

# Easement Only

- ◆ But, what if the railroad only possesses an easement over the right-of-way?
- ◆ What is the next question for the Court to address?
  - Language from the Federal Circuit has created a perception that scope of the easement should come next
  - Language of the act suggests that abandonment should come next

# Interference with Abandonment is the Key

- ◆ Neither the Trails Act nor individual NITUs authorize trail use
- ◆ The potential taking results from the interference with reversionary state law property rights, not the establishment of a trail

# Government's View: Trail Use is Not Relevant to a Federal Taking

- ◆ “Because according to our precedent, a takings claim accrues on the date that a NITU issues, events arising after that date – including entering into a trail use agreement and converting the railway to a recreational trail – cannot be necessary elements of the claim. Hence it is irrelevant that no trail use agreement has been reached and that no recreational trail has been established.” *Ladd*, 630 F.3d at 1024.
- ◆ “The NITU barred abandonment; abandonment cannot occur after the issuance of a NITU while the NITU is in effect. The barrier to reversion is the NITU, not physical ouster from possession.” *Barclay*, 443 F.3d at 1374.

# Landowners' View: Intent of the Act was to Create Trails and Preserve Rail Corridors

“Two congressional purposes are evident. First, Congress intended to encourage the development of additional trails and to assist recreation[al] users by providing opportunities for trail use on an interim basis. Second, Congress intended to preserve established railroad rights-of-way for future reactivation of rail service . . .”

*Preseault I*, 494 U.S. at 17-18 (citations and internal quotations omitted).

# Trails Act Authorizes Trail Use on Railroad Easements

“[W]e find that rail-to-trail conversions giving rise to just compensation claims are clearly authorized by § 8(d). That section speaks in capacious terms of ‘interim use of *any* established railroad rights-of-way’ (emphasis added) and does not support petitioners’ proposed distinction between conversions that might result in a taking and those that do not . . . . We reaffirm that a Tucker Act remedy exists unless there are unambiguous indications to the contrary.”

*Preseault I*, 494 U.S. at 13.

# Scope is the Issue: Trails Act Prevents Abandonment

“By deeming interim trail use to be like discontinuance rather than abandonment . . . Congress **prevented** property interests from reverting under state law.”

*Preseault I*, 494 U.S. at 8.

# Scope of the Easement is Key: Unauthorized Use Creates Fifth Amendment Taking

Principal issue for determining liability was:

“[W]hether the easements granted to the Railroad . . . are sufficiently broad in their scope so that the use of the easements for a public recreational trail is not a violation of the Preseaults' rights as owners of the underlying fee estate.” And thus, **“if the Government's use of the land for a recreational trail is not within the scope of the easements, then that use would constitute an unauthorized invasion of the land to which the Preseaults hold title.”**

*Preseault II*, 100 F.3d at 1541.

# Scope is Key: Unauthorized Use Creates Fifth Amendment Taking

“It is elementary law that if the Government uses (or authorizes the use of—a point to be considered later) **an existing railroad easement** for purposes and in a manner not allowed by the terms of the grant of the easement, the Government has taken the landowner's property for the new use.”

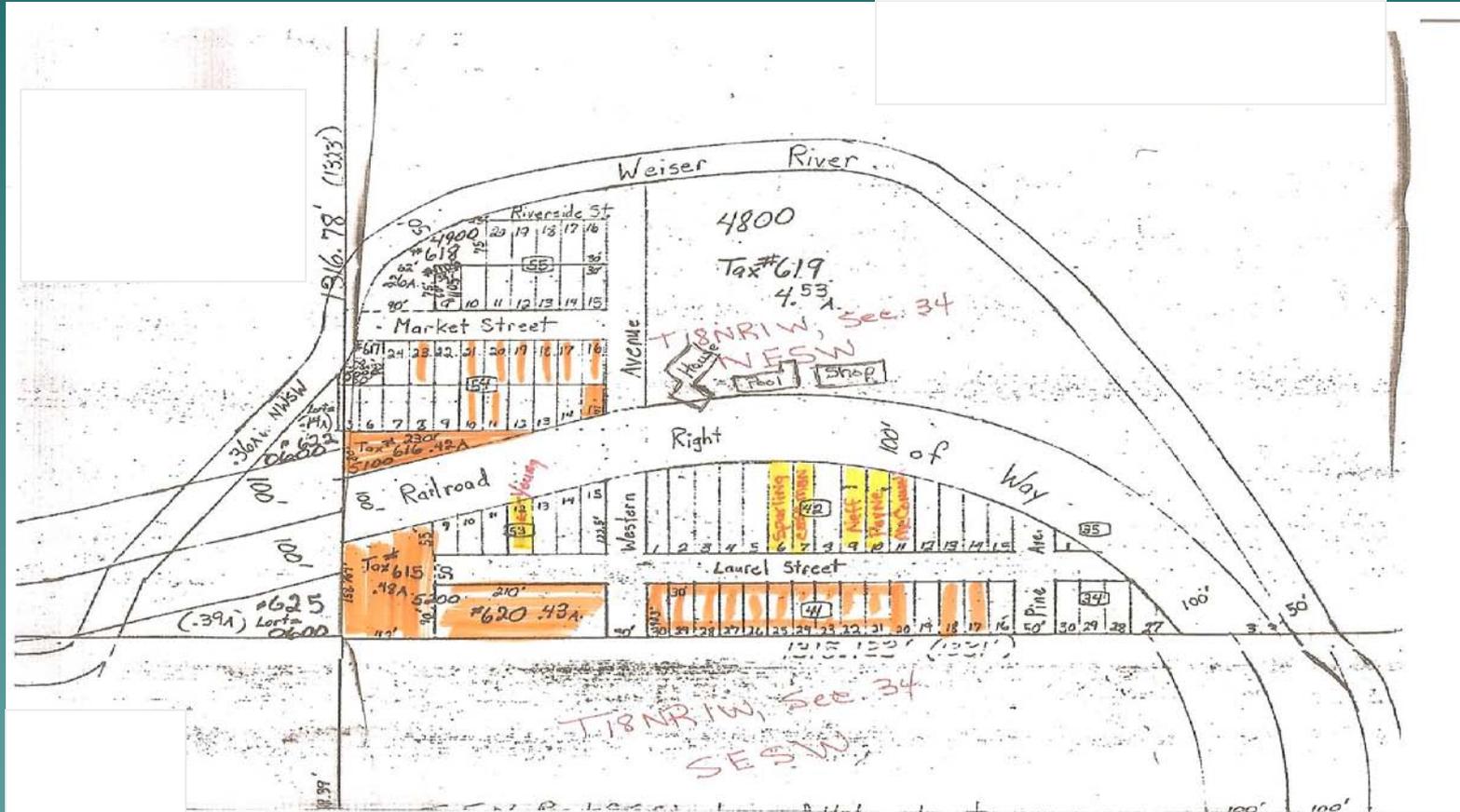
*Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004).

# *Ladd*: Scope Determines Liability

**“It is settled law that a Fifth Amendment taking occurs in Rails-to-Trails cases when government action destroys state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement.”**

*Ladd*, 630 F.3d at 1019.

# Historical Right-of-Way: Platted at 100 Feet



# Rural Right-of-Way: Train Occupied Approximately an 8-foot Width



# Trail Group Alleges a 200-foot Width



# Unauthorized Use: Different Burden



# Unauthorized Use: Different Burden



# Unauthorized Use: Different Burden



# Unauthorized Use: Different Burden



# Unauthorized Use: Different Burden



# Unauthorized Use: Different Burden



# Unauthorized Use: Different Burden



# Unauthorized Use: Different Burden



# Unauthorized Use: Different Burden



# Unauthorized Use: Different Burden



# Unauthorized Use: Different Burden



# Disputes Can Arise Between Landowners Over Ownership of the Easement



# Title Disputes in Eminent Domain Cases: Identification of all Interested Parties

- ◆ Compensation must be paid to the party who held title to the condemned property on the date of taking.

*United States v. Dow*, 357 U.S. 17 (1958)

- ◆ Rule 71.1(c)(3) of the Federal Rules of Civil Procedure, governing affirmative takings, mandates:

*before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, considering both the property's character and value and the interests to be acquired.*

# Title Disputes in Eminent Domain Cases: Resolving Ownership Claims

- ◆ Federal courts are authorized to determine who among competing claimants owns condemned land. *United States v. Certain Land Located in the County of Barnstable*, 889 F.2d 352, 353 (1st Cir. 1989)
- ◆ United States takes no advocacy position and will offer to serve as *amicus curiae* on title matters assisting federal courts. *United States v. Certain Lands in Town of Hempstead*, 129 F.2d 918, 920 (2d Cir. 1942)
- ◆ Each claimant bears the burden of establishing his right to the property in question. *United States v. 350.925 Acres of Land*, 588 F.2d 430, 431 (5th Cir. 1979); *United States v. Certain Land in the Village of Highgate Springs*, 413 F.2d 128 (2d Cir. 1969)

# Certification to State Supreme Courts

- ◆ *Chevy Chase Land Co. v. United States*, 158 F.3d 578 (Fed. Cir. 1998).
- ◆ *Toews v. United States*, 376 F.3d 1371 (Fed. Cir. 2004).
- ◆ *Howard v. United States*, No. 09-575L (Fed. Cl.).

# Class Actions: RCFC 23

1. Numerosity
2. Commonality
3. Typicality
4. Adequacy
5. Superiority

*Bigelow v. United States*, 97 Fed. Cl. 674 (2011)

# Numerosity: A Class So Large That Joinder is Impracticable

“The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations.”

*Bigelow*, 97 Fed. Cl. at 677 (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 330 (1982)).

# Commonality: Requires the Presence of Common Questions of Law or Fact

- ◆ There must be questions of fact or law common to the class, and those questions must “predominate” over questions affecting only individual members under RCFC 23(b)(2).
- ◆ *Wal-Mart v. Dukes* innaposite in the context of a takings claim:

“The deficiencies in the Wal-Mart class certification went to the core of whether a court would be able to adjudicate the disputes encompassed by the sprawling putative class . . . . No similar concern over justiciability looms in the present case.”

*Geneva Rock*, 2011 WL 4099150 at \*6.

# Typicality: the Named Parties' Claims are Typical of the Class

Typicality requires that “the named plaintiff's claim and the class are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.”

*Bigelow*, 97 Fed. Cl. at 678 (citation omitted).

# Adequacy: Relating to Fair Representation

“The penultimate requirement of RCFC 23, adequate representation, requires a certified class to be fairly and adequately represented by class counsel. In making this evaluation, the court must consider whether (i) class counsel is qualified, experienced and generally able to conduct litigation, and (ii) class members have interests that are antagonistic to one another.”

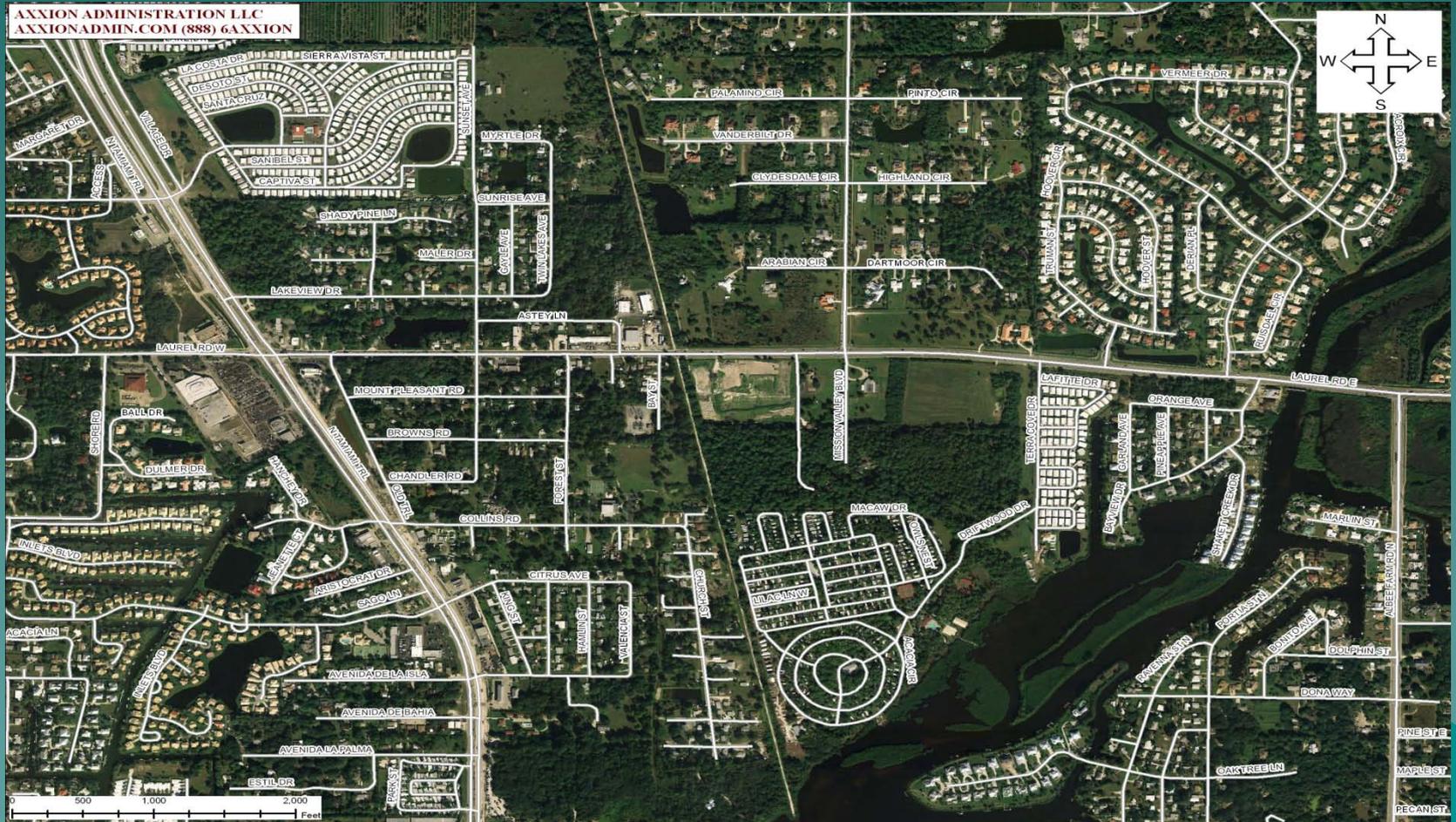
*Bigelow*, 97 Fed. Cl. at 678 (citation omitted).

# Superiority: Class Action is the Fairest and Most Efficient Way to Resolve Controversies

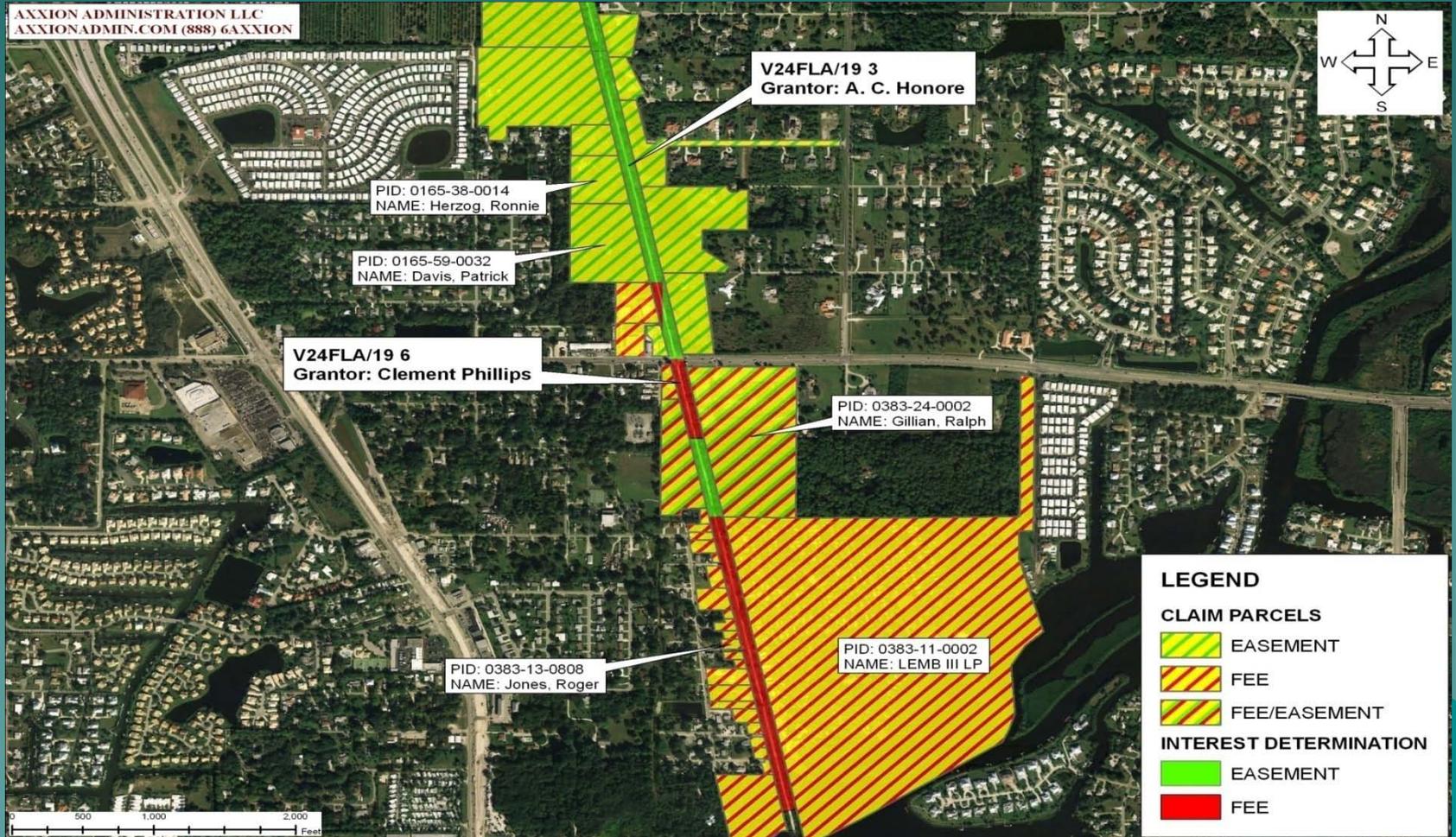
“The final requirement, superiority, is met when a class action would achieve economies of time, effort, and expense, and promote the uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.”

*Bigelow*, 97 Fed. Cl. at 678 (citation omitted).

# Aerial of Current Topography of a Rail-to-Trail Area



# Property Interest Determinations Linked to Adjacent Tax Parcels for Evaluation of Eligibility



# Interplay Between Class Certification and Statute of Limitations – *Bright/Fauvergue*

*Bright v. United States*, 603 F.3d 1273, 1276 (Fed.Cir. 2010) (complaint and class certification motion tolled statute of limitations to allow time for class members to opt-in to class), *rev'g Fauvergue v. United States*, 86 Fed. Cl. 82 (2009).

*Geneva Rock*, at \*5 (explaining *Bright*: “tolling of the statute of limitations was contingent not on a motion for class certification, but rather on the plaintiff's seeking class certification which may be done through class-action allegations in a complaint.”) (citing *Toscano v. United States*, 98 Fed. Cl. 152 (2011)).

# Government Issues in Class Certification

- ◆ Numerosity: very low threshold in the rails-to-trails context
- ◆ Commonality: unique terms of acquisition; unique valuation / just compensation
- ◆ Superiority: is a class really superior to joinder when the class size is small?

# Valuation in Rails-to-Trails Cases

- ◆ Parties are valuing partial, permanent takings of larger parcels of land
- ◆ Wide range of property types at issue: rural and urban areas; residential, commercial, and industrial uses
- ◆ Volume of cases and value at issue may drive appraisal timing and methodology

# Valuation of Partial Takings

- ◆ Just compensation is the market value of the property taken. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 9-10 (1984); *United States v. Miller*, 317 U.S. 369, 374 (1943)
- ◆ Majority of federal courts measure impact of taking with “before and after” rule: (value of before taking) – (value after taking) = just compensation. *United States v. Virginia Electric Co.*, 365 U.S. 624, 632 (1961)
- ◆ Key steps for appraising partial taking: in the before, determine larger parcel (including unity of use, ownership, and contiguity) and its highest and best use; in the after, determine remainder’s highest and best use

# Valuation of Partial Takings: Common Problems

- ◆ Strip or easement appraisal is inappropriate – except for nominal damages cases – as it ignores damages, benefits, larger parcel, and highest and best use. *Virginia Electric* at 632; *Transwestern Pipeline Co. v. O'Brien*, 418 F.2d 15, 21 (5th Cir. 1969)
- ◆ Consideration of special vs. general benefits of the public project requires market analysis and study (and not economist's "public interest valuation"). *United States v. River Rouge Co.*, 269 U.S. 411, 415-16 (1926)
- ◆ Appraisal profession dictates written *legal* instructions for *legal* issues (e.g., unity of title, noncompensable damages, and multiple premises) but NOT allowed for steering valuation determinations

# Hollow Hill Farm

Rail /Trail

County Road

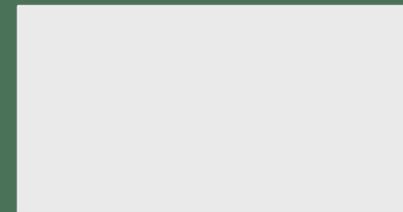
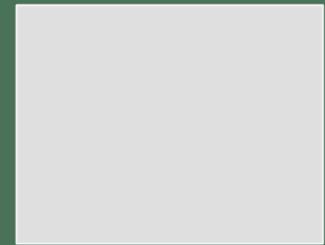
Acme  
Industries  
Storage Lot

Beta Industries  
Storage Lot

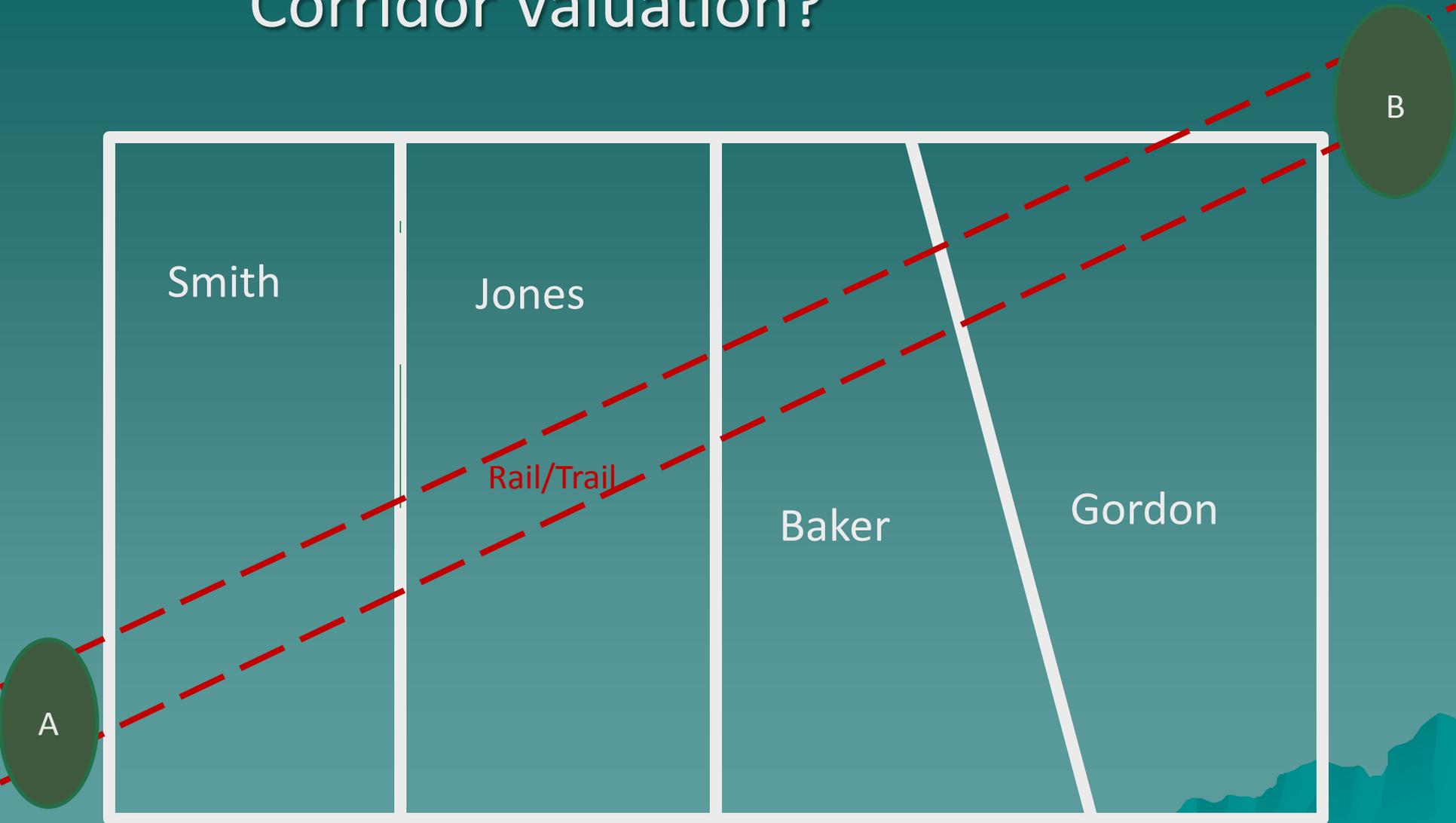
Acme Industries Building

Beta Industries Building

Pleasantville, USA

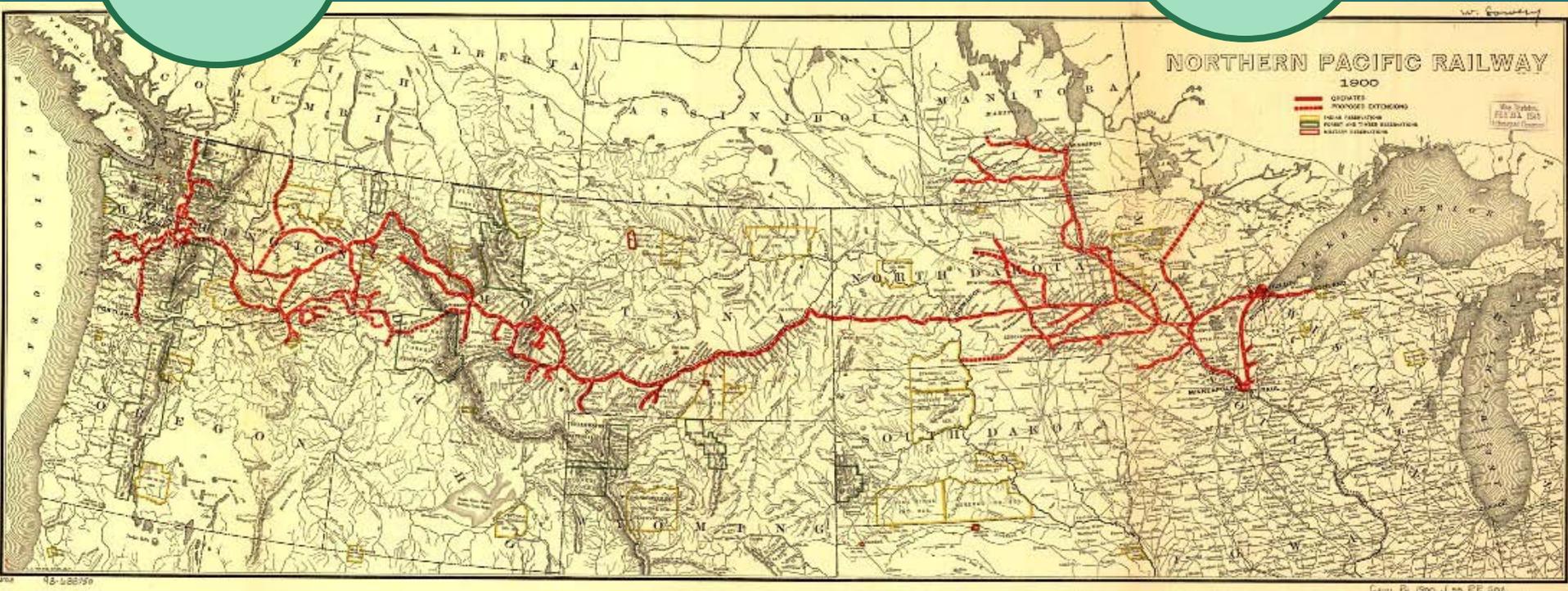


# Corridor Valuation?



Point A

Point B



What is the corridor?