An Investigation of the Ownership of Railroad Right-of-Way: The Case of Indiana

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State governments are often asked to supply information on the ownership of operating or abandoned rail lines. Citizens' concerns range from issues of maintenance in the operating case to questions of ownership related to alternative uses in the abandoned case. This research developed a procedure for sampling county land records to determine the original railroad owners of rail right-of-way and the nature of that ownership. The instruments used to hold the land were categorized as either fee simple or easement. Based on the research, the dominant instrument was the right-of-way easement (60 percent), with fee simple holding 30 percent. Ten percent of the lines could not be classified because they were composed of a mixture of these instruments. The procedures developed should be useful in the eastern United States where railroads had to secure their right-of-way.

One of the more difficult research questions regarding abandoned railroad right-of-way land is to determine how the railroad owned the land before abandonment. The question goes beyond idle curiosity for its answer is an integral component of several types of analyses. For example, in assessing the viability of railroad branch lines, it is common to consider land value as a salvageable component of the right-of-way and this helps to determine the opportunity cost of retaining a line. Implicit in this construction is the assumption that the land is owned by the railroad.

It is common for railroad rationalization teams, whether they are transport consultants, rail industry members, or federal planners, to assume that railroads own their rights-of-way. Those opposed to abandonments speak of easements and reversion of rights-of-way to abutting property owners. The impression is given that no one knows what they are talking about in this area; unfortunately, this impression may be correct.

The transportation and land use literature also has not proved useful on this question. The literature that does exist is often oriented toward the western United States where federal land grants were important *(1, 2)*. Such studies are not relevant to the eastern and southern portions of the country where railroads acquired their rights-of-way by using several different types of legal instruments.

The purpose of this paper is to summarize the manner in which the rail right-of-way ownership was examined in a recent study in Indiana *(4)*. It presents a brief history of the process of land acquisition, explains how the research was conducted, identifies some of the problems encountered, notes the sampling procedure finally used, and presents the general findings of the study. It is not known if these findings are applicable to other states (they probably are to nearby Midwestern states), but the general design and approach should be useful for other states that wish to economically examine this issue.

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The Acquisition of Transport Rights-of-Way: A Brief History

During the colonial period of American history it was common for individuals to request permission from local courts to build roads from one point to another. The following is typical of such early records:

> To the Honorable Court of Augusta. Petition of inhabitants and subscribers of the South Fork of the South Branch of the Pattomuck are very much discommoded for want of a road to market and to Court if occation but espetily to market. We have found a very good way for road: Beginning at John Patton's over the mountain to Cap. John Smith's; we begg that you will take this our petition unto your consideration and grant us a briddle road to Court and a road to market where it will suit most convenient, and will ever pray, etc. (*5*, p. 432).

That record is for Augusta County, Virginia, in the year 1749. There is something attractive about the simplicity with which the land was acquired in those days.

Of course, the military was also active in building roads during the 1700s. Examples would be Forbes' Road and Braddock's Road in Pennsylvania.

Moving into the 1800s, the acquisition of rights-of-way was usually done through a charter enacted as a special legislative act by the state. In Indiana there were numerous pieces of legislation enacted by the General Assembly for the building of roads or plank roads. These special pieces of legislation, called "local acts", gave private entrepreneurs permission to acquire the necessary right-of-way for these roads by acquisition or release. Given the choice, most road builders preferred to have landowners simply release the right-of-way. An example of a release form used in 1850 for the Indianapolis and Springfield Plank Road appears as Figure 1. The road builders would arrange for an agent to visit all property owners along the intended right-of-way. It was the responsibility of the agent to get the individuals to sign the document. The compensation to the landowner was defined as the "benefits to be derived from

State of Indiana
Putnam County S.S.

I A _____ B _____ through whose lands the Indianapolis and Springfield Plank Road has been Surveyed, to wit, through the (here describe the land) do hereby in consideration of the benefits to be derived from said road forever relinquish, convey, and quit claim to said Company the right of way, and the right to open, construct, and permanently locate and establish the said road, through, over, and across my said lands on the same route so surveyed and estimated by A. B. Condit, the Engineer of said Company or any other route said Company may see fit to locate or establish said road upon. Hereby relinquishing to said Company all manner of right to sue for or recover any damages I may sustain by reason of said road being located, opened, constructed, or established through, over, or upon my said lands as aforesaid.

Witness my hand and seal here this

A.D. 1850

A. B. seal

State of Indiana, Putnam County, S.S. On this ____ day of _____ 1850, the above named A. B. came personally before me and acknowledged the execution of the above release to be his act and deed for the purpose thereon explained.

Witness my hand and seal

J. P. Estes

FIGURE 1 Release form for the Indianapolis and Springfield Plank Road.

said road"; there was no financial compensation offered as such.

This was the general procedure used during the 1830s, 1840s, and 1850s. However, beginning in the 1840s it was apparent that the railroads offered an even better alternative or mode of transport than wagons moving over roads. As a result, several of the early charters for plank roads in the Midwest were converted to charters for railroads. Even the charters written explicitly for railroads did not differ much from the road charters. It was natural that the railroad builders would also use the same type of release forms, and they did.

No one seems to have viewed such releases of rights-of-way as land transactions. The landowners retained the basic ownership of the land; they were merely granting an easement to the railroad. In many cases the landowners were anxious to see the railroads arrive because they increased the accessibility of the land and the marketability of its crops or minerals. If an area already had a railroad, then another railroad was not always viewed with such enthusiasm; in this case the farmers often objected to the railroad taking their land. During the 1850s and later these conflicts were often settled through condemnation proceedings. One such proceedings took place in Indiana's Lawrence County in the year 1853. The railroad was the Ohio and Mississippi Railway being built between Cincinnati, Ohio, and Vincennes, Indiana. Every landowner in the proceedings lost his case and his land and none received compensation. The railroad paid the court costs of $6 or $7 for each segment of land taken.

An exception to this process in the early years occurred in cities and towns. In these cases the railroads were usually obligated to buy the individual's store or house. Such transactions were usually recorded, but the railroads still felt no compulsion to record releases and in most cases they did not.

By the 1890s it was clear that the railroads did not always bring economic wealth or benefits to all of the lands they passed through. For this reason it became necessary for the railroad companies to begin purchasing the land. These purchases were duly taken to the county court house and recorded. Without doubt there are exceptions to this historical pattern, but this practice was generally employed.

INSTRUMENTS OF CONVEYANCE

There are two basic types of instruments that were used to convey land to the railroads in Indiana. These were fee simple absolute deeds and easements. A brief examination of each of these follows.

Fee Simple Absolute Deed

A fee simple absolute deed is a real property interest of infinite duration and absolute control free of any conditions, limitations, or restrictions. Such a deed is also referred to as a fee simple deed. A railroad company that holds land in this manner has complete control of the land. It is similar to the way in which an individual might own a house and the land on which it is located. As a general rule, acquiring land in fee simple absolute is more expensive than other methods. The deeds under which railroad corridors are conveyed in this manner will

usually refer to the land as "a strip, piece, or parcel of land," not as a right-of-way.

Easements

As it is generally used in the rail literature, an easement involves primarily the privilege of doing a certain act on, or to the detriment of, another's land. In the case of a railroad, the rail right-of-way might be referred to as a public easement.

Although the literature abounds with references to different types of easements (e.g., determinable easements and affirmative easements), and fees other than fee simple absolute (e.g., fee simple conditional, fee simple defeasible, and fee simple determinable), it is sufficient to view all of these as easements because they place constraints on the railroad that would not exist if the land were held in fee simple absolute. In other words, all of the conveyance instruments can be placed in one of two mutually exclusive classes: fee simple absolute title and easements.

A reading of Indiana case law leads to the conclusion that fee simple absolute deeds are easy to identify. Land conveyed in this manner was free of any restrictions on use. As previously noted, it was also referred to generally as "a piece, strip, or parcel of land"; in no case was the land referred to as a right-of-way. As a result although some researchers would view certain deeds in a strict legal sense as "fee simple conditional," the presence of the condition tended to void the interpretation of the instrument as fee simple absolute. It became an easement.

Research reveals far more different types of easements in the deeds or records examined. Among these were the "release of right-of-way" previously referred to, permission to take necessary lands as granted by state charters, deeds subject to constraints on use, lands received through condemnation proceedings, and lands obtained through adverse possession.

The important point regarding right-of-way that is held fee simple absolute and right-of-way that is held through any type of easement, is that on abandonment of the primary use the land held by easement will generally revert to abutting property owners. Land held as fee simple remains with the railroad owners and may be sold by them. This may appear to be an oversimplification of the situation, but it is surprisingly accurate.

RESEARCH AND SURVEY DESIGN

The railroad system examined in this study is presented in Figure 2. This is the rail system of Indiana that existed in 1967. At that time the system consisted of 6,488 route miles of track. Since that time more than 1,689 route miles have been abandoned. These abandoned miles were included in the study universe because they are, at present, the focus of most of the interest in this area. The study also examined operating lines that are part of the current rail system. Although it was desirable to decrease the size of the universe examined, it was recognized that any rail line in Indiana could be abandoned the next day and, therefore, the study included all of the 1967 system.

In order to make a determination of how the land was held, it was necessary to examine records for the initial right-of-way land acquired by the railroads. In its simplest form, this constitutes a title search. When nearly 6,500 miles of rail line are involved, however, it is not practical to search all the titles.

A sampling approach was required that would answer the title questions with a low error level. The best approach appeared to be to sample the counties in Indiana. This approach was tried. It required an examination of all the land records of the counties included in the sample. This was far too labor intensive and time consuming. The data collectors had no way of determining which recorded information was relevant. For example, it was not uncommon to find dozens of miles of right-of-way acquired by a railroad through some county during the 1870s. It was also not uncommon to find that nothing had ever been constructed on the right-of-way so acquired and it had later been sold in pieces. Just recording this information was a waste of time, but there was no clear way to know this at the time the data were collected.

Other approaches were tried, but the procedure finally adopted was based on an observed regularity in the data. It was found that the manner in which a railroad company acquired land in one county tended to be followed in the other counties where it was located. If the railroad company had started acquiring a fee simple absolute interest in their right-of-way in one county, it tended to do this in all counties. As a result, if it were possible to identify the names of the original railroads that acquired land it would be possible to examine a sample of their deeds from any county and generalize this data for their entire line in the state. Similarly, if a railroad had a charter that essentially granted them permission to take land, they would do this in all counties. They would also fail to record such a practice in all counties.

As an illustration of this point, consider the practices of two early railroad companies: the New Albany and Salem Railroad and the Indianapolis Southern Railroad. The New Albany and Salem Railroad had an 1847 charter that permitted them to obtain releases of right-of-way. The railway passed through 14 counties. In no county was it possible to find records of its land acquisitions. Its land acquisition practice could have been inferred from one county. In the case of the Indianapolis Southern, it acquired its lands during the early 1900s through a fee simple absolute mechanism. It did this in all counties and likewise its behavior could have been inferred from any one of the counties.

Before collecting data in the field, therefore, it was necessary to identify the names of the original land-acquiring railroads. Indiana has had more than 250 railroads that have operated within its borders. Of these, it is believed that about 105 acquired the original right-of-way of the system. That is, if a map of all rail lines that have ever been constructed in the state is inspected, it is seen that the land they occupied was acquired by about 105 railroads.

These early railroads were identified by examining annual volumes of Poor's Manual of Railroads for each year of the late 1800s. Use was also made of Moody's manuals for the 1920s; these often contained historical information. So-called railroad histories were occasionally useful, but county histories were often more so.

Besides the names of the early railroads, data on end points and approximate date of land acquisition were recorded. Once

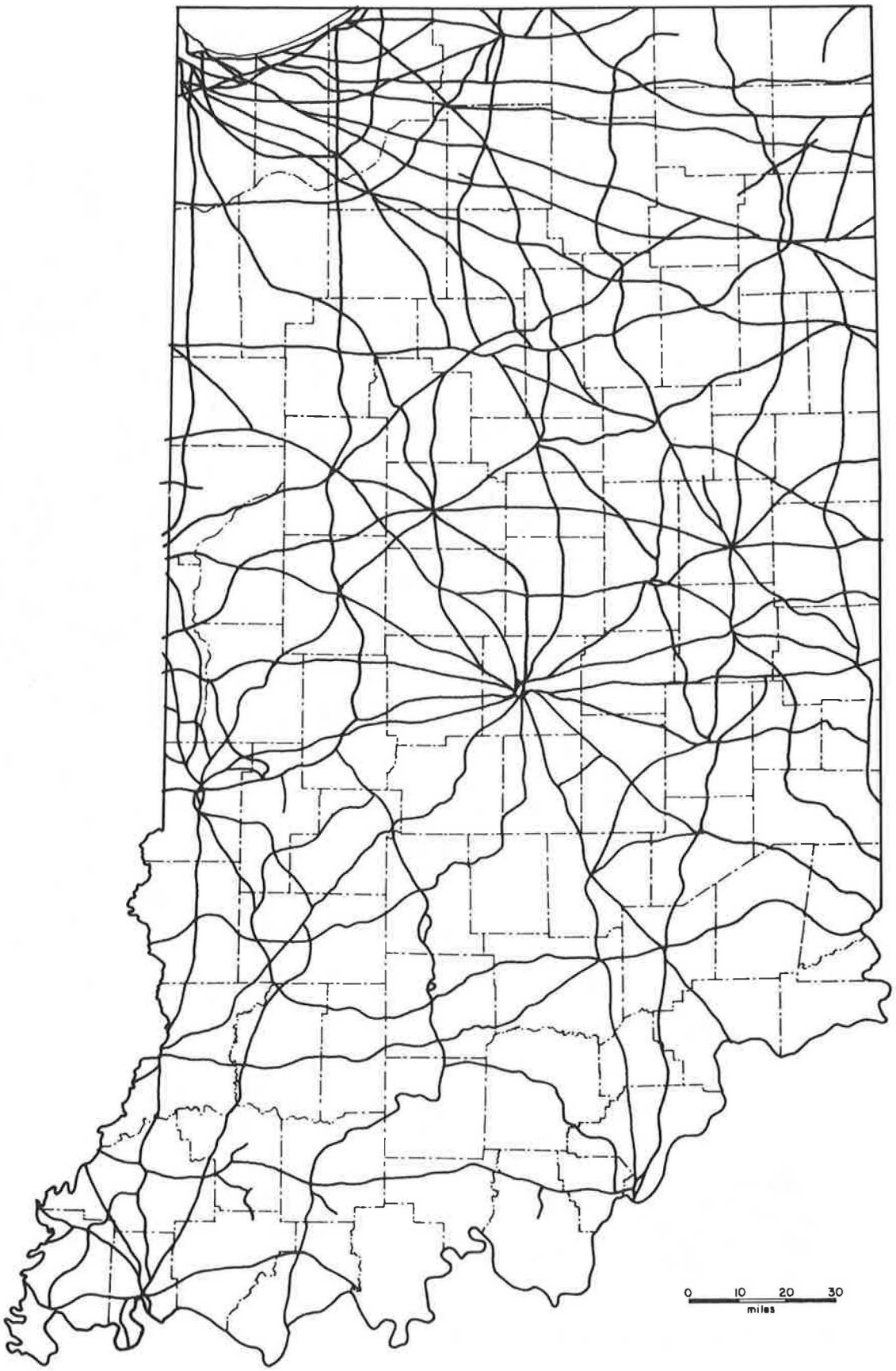

FIGURE 2 Railroad system of Indiana in 1967.

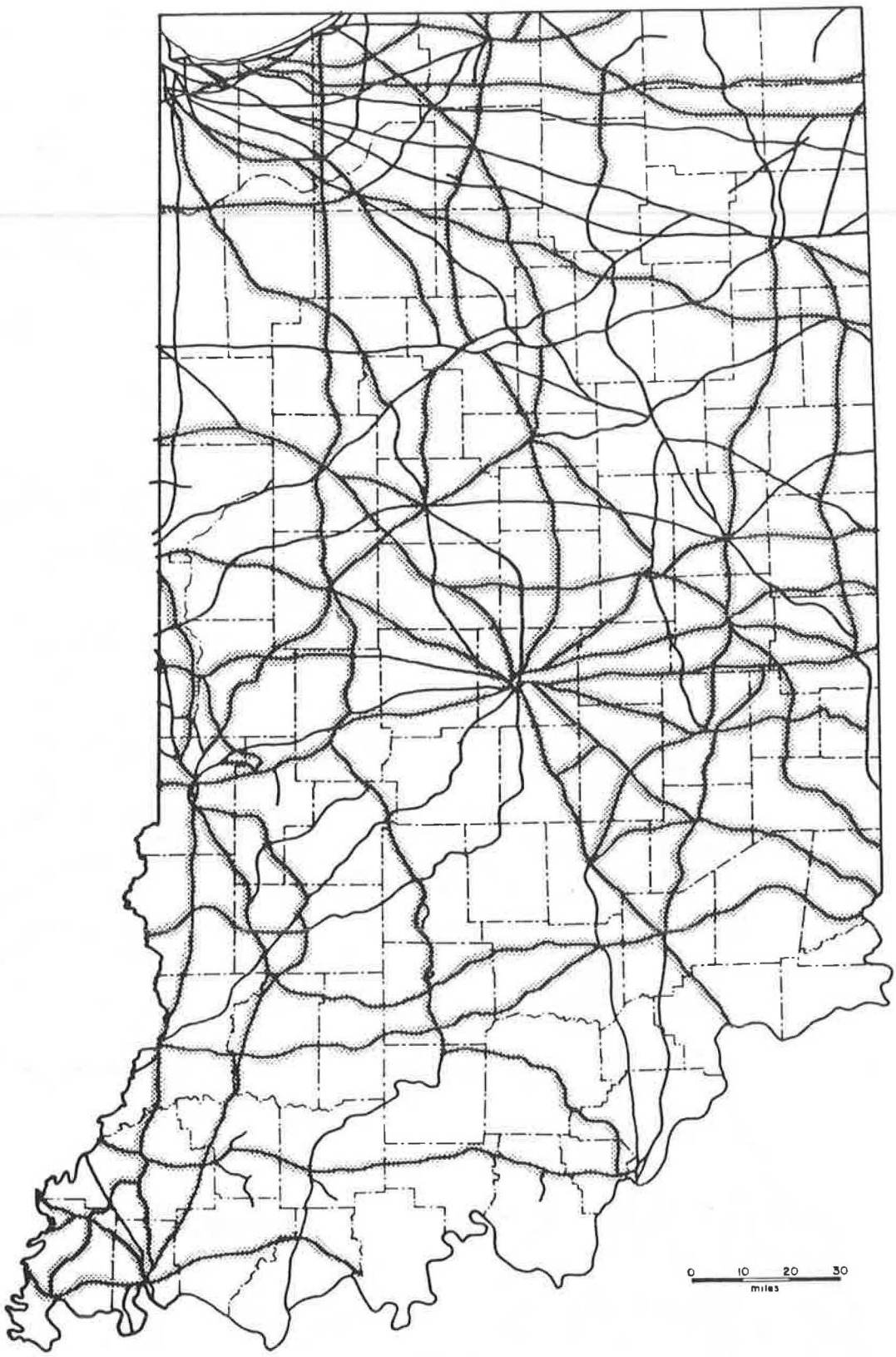

FIGURE 3 Railroad lands held by easements.

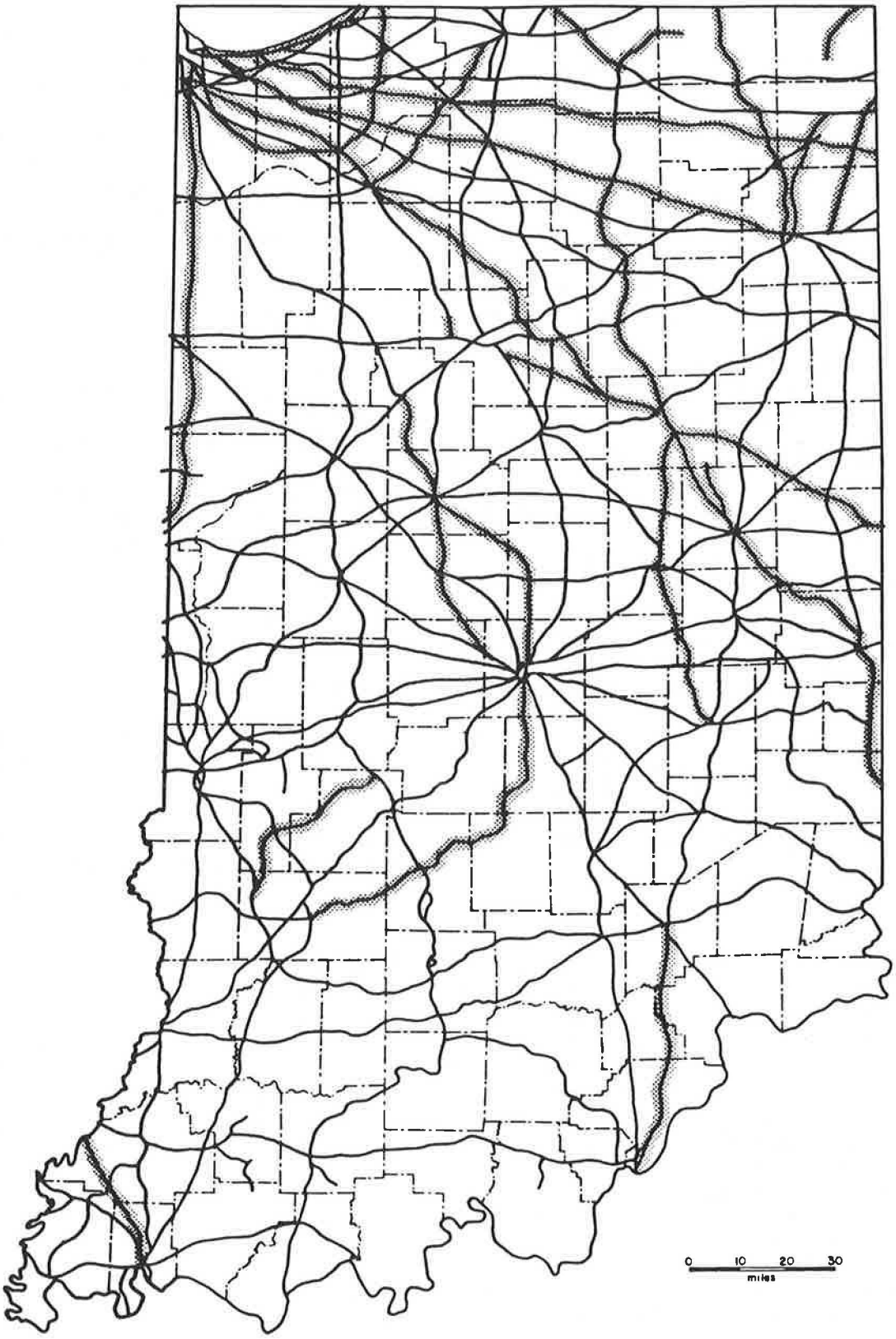

FIGURE 4 Railroad lands held fee simple absolute.

the extent of the line, its name, and year of purchase were known, it was possible to figure out exactly where to look in the county records for deeds, if they existed.

In a few cases it was found that the information collected was wrong (e.g., the land might have been acquired under a completely different name from that of the first operating railroad). Whenever the records were not found as expected, a thorough search was undertaken to make sure the land was not acquired and recorded by a different railroad.

INTERPRETATION OF THE RECORDS

All the charters and land records that exist for this process of railroad land acquisition could therefore be found, but it was still necessary to interpret the records. This required a complete review of Indiana case law covering railroad lands, easements, right-of-way, abandonments, and so forth. Before reaching any conclusions, some working assumptions had to be established; these were based to a large extent on Indiana statutes and court rulings. They are as follows:

1. All right-of-way lands released or relinquished by a charter of the State of Indiana are easements;
2. All right-of-way lands acquired through condemnation proceedings are easements;
3. All right-of-way "deeds" that restrict the use of land or specify how the land is to be used, or the purpose for which it was being conveyed, are easements;
4. All right-of-way cases where individual deeds are missing (as opposed to all deeds) are assumed to be held by the railroads through adverse possession and this creates an easement;
5. Failure to find a series of deeds for a right-of-way led to the conclusion that the land was held as an easement; and
6. A fee simple absolute deed was one that conveyed property (e.g., "a strip, piece, or parcel of land") without any indication that the land was to be used for railroad right-of-way or purposes.

FINDINGS

Given these assumptions, it was possible to categorize numerous lines as predominantly fee simple or easements. For the 105 railroad companies identified as being involved in acquiring rail land in Indiana, it was necessary to drop 13 of these segments because of an absence of data. For the 92 remaining railroad segments, 28 were categorized as fee simple absolute, and 55 were categorized as easements. There were an additional 9 segments that could not be categorized. In terms of percentages, 60 percent were easements, 30 percent were fee simple absolute, and 10 percent could not be classified.

It should be noted that there were exceptions to all of the cases examined. For example, a railroad might set out to acquire a fee simple title to a right-of-way only to find that a few landowners were unwilling to sell regardless of the price offered. In these cases the railroad would be involved in a condemnation suit that, if successful, would result in the railroad getting the land as an easement. Similarly, some landowners had no interest in granting railroads an easement but they were willing to sell their land. As a result, to categorize lines' deeds as fee or easements may be misleading. In interpreting the results, therefore, it may make more sense to view the lines as 90 percent fee and 10 percent easement, or 10 percent fee and 90 percent easement.

The findings of this study occupy more than one hundred maps. The findings are geographically summarized in Figures 3 and 4. The overwhelming dominance of easements is illustrated by Figure 3. Lines held as fee simple absolute are far less common and occur primarily in the northern part of the state. This is consistent with the general development pattern and the process referred to earlier; that is, rail lines constructed late in the development process frequently had to obtain fee title to their rights-of-way. Lines that do not appear on either map are those that could not be classified.

As previously noted, this procedure was not a complete title search and there may have been cases in which a railroad company has tried to perfect its title on some of these lines that may have been missed. It seems likely that it would do this on some 90 percent fee simple lines and some evidence of this was noted. Trying to perfect title on lines that were 90 percent easements would appear difficult and as a result unlikely to have taken place.

CONCLUSIONS

The approach summarized here appears to be a sound method of determining the nature of rail line ownership. This information can be used by state transportation officials to advise individuals of the ownership status of lines that have been abandoned, as well as to identify who has the maintenance responsibilities for abandoned lines. It can also be used by state recreational planners to identify lines for future development of jogging, hiking, and biking trails. It is not a substitute for a complete title search, but it does give the state considerably more information, in an economical way, than it has had heretofore on the question of rail line ownership.

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