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Ruling Could Drive Stake Through Heart of Rails-to-Trails

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In a potentially costly setback to the federal government's rails-to-trails program, the U.S. Supreme Court on Monday ruled that under an 1875 law, abandoned railroad rights of way belong, not to the government, but to the private parties that acquired the underlying lands.

Offering a short history of the settlement and development of the West and the role of railroads in that history, Chief Justice John Roberts Jr. said that rights of way over public lands granted under the 1875 General Railroad Right-of-Way Act were easements that ended with a railroad's abandonment.

The 1875 act granted thousands of miles of right of way across the nation to railroads. The rails-to-trails program, seeking to put those abandoned lands to public use as bike and hiking trails, has triggered an explosion of property rights litigation against the government. One of the critical legal questions has been who owns the abandoned right of way.

Writing for an 8-1 majority in *The Marvin M. Brandt Revocable Trust v. United States*, Roberts rejected the government's argument that it retained an interest in the lands under the act even when the government had conveyed the land to a private party.

"The Government loses that argument today, in large part because it won when it argued the opposite before this Court more than 70 years ago, in the case of *Great Northern Railway Co. v. United States*, 315 U. S. 262 (1942)," Roberts wrote.

In the case decided Monday, the United States in 1976 patented an 83-acre parcel of land in Fox Park, Wyo., surrounded by the Medicine Bow-Routt National Forest, to Melvin and Lulu Brandt. The Medicine Bow Trail runs through southeastern Wyoming's Medicine Bow National Forest. (A land patent, Roberts said, is an official document reflecting a grant by a sovereign that is made public, or "patent.")

The patent provided that the land grant was "subject to those rights for railroad purposes as have been granted to the Laramie, Hahn's Peak & Pacific Railway Company, its successors or assigns." But the patent did not specify what would happen if the railroad abandoned this right of way. (Roberts, in a footnote, said, "Locals at the time translated the railroad's acronym LHP&P as 'Lord Help Push and Pull' or 'Late, Hard Pressed, and Panicky.' ")

The Wyoming and Colorado Railroad, a successor to LHP&P, tore up the tracks and ties and completed abandonment in 2004. Two years later, the United States moved to quiet title to the abandoned right-of-way. The government settled or won default judgments against all but one of the owners of the 31 acres of land crossed by the abandoned right of way. The only holdout was Marvin Brandt, who claimed full title to the stretch crossing his land, now unburdened by the easement.

The district court ruled for the government, and the U.S. Court of Appeals for the Tenth Circuit affirmed, holding that, based on circuit precedent, the United States had retained an "implied reversionary interest" in the right of way, which then vested in the United States when the right of way was relinquished. The ruling conflicted with holdings by the Seventh and Federal circuits.

In his opinion, Roberts said the high court had adopted the United States' position "in full" in its 1942 decision in *Great Northern Railway*, a dispute over whether that railroad could drill for oil beneath its right of way. In that case, the United States argued that the railroad had only an easement and that the government retained all interests below the surface.

The 1942 court, Roberts wrote, held it was clear from the act's language, its legislative history, its early administrative interpretation and the construction placed upon it by Congress in subsequent enactments that the railroad obtained only an easement under the 1875 law.

"When the United States patented the Fox Park parcel to Brandt's parents in 1976, it conveyed fee simple title to that land, 'subject to those rights for railroad purposes' that had been granted to the LHP&P," Roberts wrote. "The United States did not reserve to itself any interest in the right of way in that patent. Under *Great Northern*, the railroad thus had an easement in its right of way over land owned by the Brandts."

In 1988, he said, Congress did an "about-face" and attempted to reserve the rights of way to the United States. "That policy shift cannot operate to create an interest in land that the Government had already given away," he concluded.

Justice Sonia Sotomayor dissented, writing, "Since 1903, this Court has held that rights of way were granted to railroads with an implied possibility of reverter to the United States. Regardless of whether these rights of way are labeled 'easements' or 'fees,' nothing in *Great Northern* overruled that conclusion.

"By changing course today, the Court undermines the legality of thousands of miles of former rights of way that the public now enjoys as means of transportation and recreation," she wrote. "And lawsuits challenging the conversion of former rails to recreational trails alone may well cost American taxpayers hundreds of millions of dollars."

The Brandt family, represented by Steven Lechner of Mountain States Legal Foundation, has a related takings claim pending against the government in the U.S. Court of Federal Claims. In the high court, the family drew support from such property rights advocates as the Cato Institute and the Pacific Legal Foundation.

“This is a great victory for Marvin Brandt, who had the courage to fight back for millions of landowners who might find themselves in his shoes, and for those who supported our efforts on his behalf,” Mountain States president William Perry Pendley said in a written statement.

The government’s amicus support included state and local governments, the Rails to Trails Conservancy and the National Trust for Historic Preservation.

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