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Supreme Court Overwhelmingly Votes to Uphold Rights of Private Property Owners

By Myron Ebell
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The Supreme Court has decided an important property rights case in favor of the private property owners and against the claim of the federal government by an eight-to-one majority. Surprisingly, the Court's liberal Justices, with the exception of Justice Sonia Sotomayor dissenting, signed Chief Justice John Roberts's March 10 decision. In reversing the Tenth Circuit Court of Appeals, the Court ruled, in *Brandt Revocable Trust et al. v. United States*, that a right of way granted to a railroad in 1908 did not revert to the federal government when the railroad abandoned the tracks in 2004.

The original right of way was over federal land, but 83 acres of that land were patented in 1976 in a land swap with the U. S. Forest Service. The Department of Justice argued that even though those 83 acres had been turned over to private owners, the right of way over that now-private land had reverted to the federal government when the railroad stopped running. Arguing for the Brandts, William Perry Pendley of Mountain States Legal Foundation stated that the right of way was an easement granted for a particular use, and therefore had expired when its intended use, operation of a railroad, had ended.

The Chief Justice's opinion relies heavily on the 1942 Supreme Court decision, *Great Northern Railway Company v. United States* (315 U. S. 262), in which the Court agreed with the federal government's argument that the General Railroad Right of Way Act of 1875 only conveyed easements. The majority opinion stated:

More than 70 years ago, the Government argued before this Court that a right of way granted under the 1875 Act was a simple easement. The Court was persuaded, and so ruled. Now the Government argues that such a right of way is tantamount to a limited fee with an implied reversionary interest. We decline to endorse such a stark change in position….

In her dissent, Justice Sotomayor noted the practical consequences for the trails that have been created under the Rails-to-Trails program by claiming that abandoned railroad rights of way always revert to the federal government.

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. And lawsuits

challenging the conversion of former rails to recreational trails alone may well cost American taxpayers hundreds of millions of dollars.

Justice Sotomayor did not mention the many thousands of private landowners who have had their property taken for public use without compensation. The *National Law Journal* reported last year that there are 8,000 claims from private landowners pending in federal courts. The Rails-to-Trails Conservancy, which is naturally disappointed with the decision, explains in an advisory to members which trails may be affected.

This is a big win for property rights and against the federal government's endless claims that it can impose public uses on private land without paying compensation. Perry Pendley and the Mountain States Legal Foundation did a great job arguing the case and deserve a big "thank you" from all property owners, not just the victims of Rails-to-Trails. The National Association of Reversionary Property Owners together with the Cato Institute and Pacific Legal Foundation filed useful amicus briefs.

Now, if only the Supreme Court would agree to take a case from Mountain States on regulatory takings using the Endangered Species Act.