Derailed by the Supreme Court

Description

Derailed by the Supreme Court: (Some) Railroad Rights-of-Way Are Just an Easement

On March 10, 2014, the United States Supreme Court decided Marvin M. Brandt Revocable Trust v. United States, 572 U.S. ___, 134 S.Ct. 1257, 188 L.Ed.2d 272, 82 USLW 4187 (2014). The decision reversed a ruling of the Federal Circuit Court of Appeals in favor of the United States, and remanded the case for further proceedings consistent with the decision in favor of a private citizen landowner. The case was not a ruling on a major current social or constitutional issue, but a simple decision of statutory and common law on property rights. It raised (or settled) questions of title to the fee in the bed of railroad rights-of-way across federal lands, particularly in the West. The case triggered concerns of many public interest groups resulting in nearly a dozen amici on each side of the appeal (including the American Land Title Association on behalf of the landowner). The decision had an adverse impact on the popular rails-to-trails program. Chief Justice Roberts delivered the majority opinion, an 8-1 decision, with only Justice Sotomayor dissenting. The Chief Justice outlined the case and the issues succinctly in his opening paragraph:

VLTA Examiner

> In the mid-19th century, Congress began granting private railroad companies rights-of-way over public lands to encourage the settlement and development of the West. Many of those same public lands were later conveyed by the Government to homesteaders and other settlers, with the lands continuing to be subject to the railroadsâ?? rights of way. The settlers and their successors remained, but many of the railroads did not. This case presents the question of what happens to a railroadâ??s right of way granted under a particular statuteâ??the General Railroad Right-of-Way Act of 1875â??when the railroad abandons it: does it go to the Government, or to the private party who acquired the land underlying the right-of-way?

Bearing in mind that most of the lands west of the Mississippi were originally owned by the United States in its sovereign capacity, the expansion of the nation westward was fueled by the granting of those lands to brave pioneers and settlers, and enterprising businessmen and speculators. The prospect of free or cheap lands supported land rushes and gold rushes. By the Civil War, California was a state and a public need to tie the nation, east and west, by a rapid transportation system had been recognized. Government involvement was expected but constitutional questions as to financing limited options. Land was the governmentâ??s asset; during the Nineteenth Century it was used in different schemes to build the railroad infrastructure and draw private citizens.

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First was the checkerboard plan by which a railroad got a fee interest to a linear mile of right-of-way and the U.S. retained a reversionary interest in the fee for the next linear mile. The railroads were made rich by such grants, while public resentment grew due to the lack of availability of cheap land. Legislators were swayed by public opinion. Significantly, in 1872, a House of Representatives Resolution signaled a change in legislative intent vis-Ã -vis grants of public lands:

> â??That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law.â?• Cong. Globe, 42d Cong., 2d Sess., 1585.

In 1875, Congress adopted the General Railroad Rights-of-Way Act of 1875. Upon satisfaction of certain requirements (e.g., constructing the road, filing a map, obtaining Interior Department approval), a railroad could obtain a right-of-way of 100â?? on either side of the track. Not until 1976 was that law repealed. The 1875 Act controlled the outcome of Brandt.

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Coincidentally, in 1976, the United States granted 83 acres in the Medicine Bow-Routt National Forest to Melvin and Lulu Brandt. The patent excepted and reserved easements and rights-of-way in favor of the U.S. for ditches, canals, the Platte Access Road No. 512, and the Dry Park Road No. 517. The patent further stated that, if any of these easements went unused by the government for five years, it would terminate. The patent concluded with the condition that the land conveyed was â??â??subject to those rights for railroad purposes as have been granted to the Laramie, Hahnâ??s Peak & Pacific Railway Company (â??LHP&Pâ?•), its successors or assigns.â?? â?¦ The patent did not specify what would occur if the railroad abandoned this right of way.â?•

LHP&P was granted a 66 mile by 200â?? right-of-way from Laramie, WY to Coalmont, CO in 1908 under the provisions of the 1875 Act. Of that right-of-way, a one-half mile stretch crossed the land subsequently conveyed to the Brandts. [For the Brandts, that was about 10 acres of their 83-acre parcel.] By 1911, the railroad was constructed and its owners had high hopes for its economic success. Due to expenses of winter operations, however, the LHP&P was never successful and changed hands numerous times until becoming part of the Union Pacific group in 1935. In 1987, the line was sold to the Wyoming and Colorado Railroad with intentions of becoming a scenic passenger trail, but that was unprofitable also. By 2004, the Surface Transportation Board had approved abandonment of the line and the W & C had removed all tracks along the right-of-way. Now abandoned, the right-of-way became the subject of a quiet title action brought by the United States against the Brandt Revocable Trust (the title having been transferred by the Brandts to their estate planning trust) and other owners. Other than the Brandts, all property owners settled with the United States.

The Brandts (this reference is used to include Melvin Brandt, Lulu Brandt, and the Brandt Revocable Trust) argued that the abandonment of the right-of-way by the railroad resulted in unburdening of the underlying fee by the ROW and giving the adjacent property owner, the Brandts, title to the right-of-way unaffected by any interest of the USA. The USA countered with an argument that it retained a reversionary interest in the fee under the right-of-way. The Supreme Court succinctly outlined the arguments: â??Brandt asserted that the stretch of the right of way crossing his familyâ??s land was a mere easement that was extinguished upon abandonment by the railroad, so that, under common law property rules, he enjoyed full title to the land without the burden of the easement. The Government

countered that it had all along retained a reversionary interest in the railroad right of wayâ??that is, a future estate that would be restored to the United States if the railroad abandoned or forfeited its interest.â?• The district court and the court of appeals sustained the governmentâ??s position. The Brandts appealed to the U. S. Supreme Court and this decision resulted.

Since the grant to the Brandts did not deal with disposition of the fee upon abandonment of the right-of-way by LHP&P, saying instead that the grant was subject to the rights of the railroad to use the area for railroad purposes, the Court focused on the meaning of the grant to the railroad at the time of the grant. Since the grant of right-of-way was made by reference to the enabling legislation of 1875, the Court looked to the legislative history of the law and the statutory language to determine both what the railroad got by the grant and what, if anything, the United States reserved implicitly in the grant. And that, as they say, is where things got interesting. Indeed, a statutory change in the 1875 Act and a prudential argument by the U.S. led to the reversal that protected the Brandtsâ?? fee ownership of the bed under the railroad right-of-way.

Railroad grant acts antedating that of 1875 had been held to grant the right-of-way to a railroad subject to a reverter in fee to the United States. The former checkerboard land grant system was held by the Supreme Court to grant to the railroad â??a limited fee, made on an implied condition of reverter.â?• Congress, however, began to deal differently with railroad grants after 1871 if, for no other reason, to quell citizensâ?? outcry against the pattern of making railroads rich by the essential fee grants of the earlier laws. Indeed, without laying tracks, railroads became the second largest landowner in the west (behind only the federal government). As noted by the Court, the House of Representatives adopted a Resolution in 1872 that presaged the coming policy change:

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> That in the judgment of this house the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law. Cong. Globe, 42d Cong., 2d Session, 1585.

In 1875, the General Railroad Right-of-Way Act provided that a right of way would be granted to a railroad meeting certain conditions. In various parts of the Act, â??right-of-wayâ?? is the only term used for a railroadâ??s interest in the land conveyed by the United States from the public lands.

Ironically, the Court resolved Brandt by grabbing dictum from an earlier decision, which dictum was derived from an argument advanced by the United States. In Great Northern Railway Co. v. United States, 315 U.S. 262, 62 S.Ct. 529, 86 L.Ed. 836 (1942), held that the railroad did not have the right to exploit minerals below the surface of its right-of-way. Great Northern was granted its ROW pursuant to the 1875 Act. Part of the argument of the government was that the railroad did not own the subsurface because its surface rights were only to use the land as an easement. That is, there was no â??easement plusâ?• interest held by the railroad, in which extended interest the U.S. might have a reversionary interest. In other words, the Court, in part, applied stare decisis to the governmentâ??s earlier argument. In fact, it was the government that asserted that the railroad had nothing but an easement. Moreover, it argued that a new era of land grants to railroads dawned after 1871 and that cases decided under earlier statutes were not applicable to those decided under the 1875 Act. Since the 1875 Act did not make the right-of-way anything beyond an easement and the grant to the railroad did not reserve anything to the United States when it conveyed the land (nor when it granted the ROW),

the interest of the railroad in the land of an 1875 Act conveyance was merely an easement.

Whether or not the railroadâ??s grant of right-of-way was only an easement is the central issue in the case. Much of the oral argument focused on this point. An item of interest in the oral argument was raised between Brandtsâ?? counsel and Justice Scalia: The Department of the Interior, the agency charged with administering federal lands, had treated 1875 Act grants as easements (and not as â??easements plusâ?•), a regulatory bodyâ??s position entitled to consideration as to the governmentâ??s definition of the parties interests in the land ahead of a grant of the fee to an individual owner. Then, later, Justice Alito read from the governmentâ??s brief filed in Great Northern:

> Here are the subject headings of the governmentâ??s brief in Great Northern. â??The right-of-way granted by the Act of March 3, 1875, is in the nature of an easement. The language of the 1875 Act shows that only an easement was granted. The legislative background and history of the 1875 Act show that the grant was an easement rather than a fee.

Also in the oral argument was an exchange between Justice Breyer and counsel for the United States that began as a government assertion that, by using the word â??right-of-wayâ?? in the 1875 Act, Congress meant something special as to the interest in the granted lands. Counselâ??s position was essentially that if Congress had meant an easement or a fee, it would have called it that. But since a railroad right-of-way was neither a fee nor an easement, it must be some hybrid of the two. Justice Breyer thereupon praised all the title attorneys in the country by claiming that Great Northern clearly resolved the easement versus determinable fee nature of the 1875 Act grant to railroads.

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> JUSTICE BREYER: Can you imagine or explain to me why a property lawyer worth his salt since 70 years ago or more, 1942, wouldnâ??t have read that case (Great Northern) and advised his client, who was buying the land, if the railroad abandons it, itâ??s yours.

Along the same line, in an aside to Brandtsâ?? counsel, Justice Breyer again applauded the title examiners by commenting that â??any reasonable property lawyer would have relied on Great Northern to think it (the government) was just conveying an easement.â?•

The Court did seem to be frustrated with the government attempting to switch positions as to easement or not to define the nature of the railroadâ??s grant under the 1875 Act. In addition to the language in the 1875 Act and the lack of reversionary language in the Brandtsâ?? patent as to the right-of-way, the Supreme Court found an 1879 Attorney Generalâ??s Opinion that, while referring to an 1824 Act, followed the common law on abandonment of an easement: â??â??Unlike most possessory estates, easements .. may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude.â?• â?¦ In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land. See Smith v. Townsend, 148 U.S. 490, 499 â?¦ (â??â?¦ (A)nd if ever the use of that right of way was abandoned by the railroad company the easement would cease, and the full title to that right of way would vest in the patentee of the land.â??)

Ultimately, the holding of the Court in Brandt can be said to be a desire to settle land titles that came out of abandoned railroad rights-of-way. The desire to settle land titles is a basic premise of property law in the United States. In confirming Great Northern on the concept that the railroadâ??s interest

under the 1875 Act was an easement only, the Court was sustaining the common law on abandonments. The last word from the majority opinion written by Chief Justice Roberts (8-1 decision) was this: â??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, especially given â??the special need for certainty and predictability where land titles are concerned.â?? Leo Sheep Co., 440 U.S. 668, 687, 99 S.Ct. 1403, 59 L.Ed.2d 677 (1979).â?•

This case could have been a property lawyerâ??s or a title examinerâ??s dream decision: Certainty of land titles sustained; caselaw will be followed so that an examiner of title will be confident of the opinion of title; an abandoned right-of-way (at least under the 1875 Act) is just an easement. For all the discussion about determinable fees, statutory interpretation, legislative history, etc., Brandt applies the simplest of real property principles found in the common law on abandonment of easements: Title in the bed reverts to the adjacent landowner. But Brandt also impacted real and current public policy issues even though the case did not address them directly.

First, it is essential to note that Brandt did not make railroad rights-of-way across the country into easement interests upon their abandonment. The decision only affected lands granted to private owners by the United States out of public lands the U.S. owned, which lands were impacted by a railroad. Generally speaking, this eliminates railroad areas east of the Mississippi. Even if all federal lands west of the Big Muddy are included, the only fee grants in play are those that (1) include a right-of-way to a railroad made under the 1875 Act, (2) which right-of-way has been abandoned after the fee grant, (3) which fee grant or right-of-way grant did not specifically reserve a reversionary interest to the United States, and (4) which fee grant occurred no later than 1976 (when Congress reserved a reversionary interest in all public lands subject to railroad or other special interests). The immediate angst after the decision that Brandt meant the death of Rails-to-Trails (more below) or possible huge condemnation payments for post hoc due process takings or future condemnations of abandoned rights-of-way was probably overblown. Brandt may have been the perfect storm but it missed the coast in essence. While the result might be costly to the United States and the taxpayer, the fact is that the government was totally unaware of the potential cost. It became clear in the oral argument that the Department of the Interior/Bureau of Land Management had no idea how much land was in a similar condition as the Brandtsâ?? property. That may explain why this action was brought as a quiet title: If the U.S. was found to hold a reversionary interest, it would owe nothing; if it lost there would still be a due process/condemnation action to determine reasonable value for the reversionary interest in the railroad right-of-way area. In Brandt all the other defendant owners settled, which means they either were paid something or simply ceded any rights to the United States. Whether or not those who quitclaimed to the U.S. have sought compensation after Brandt is unknown. If they were to do so, the government would defend in part on the basis that they voluntarily gave away a right to compensation and it would be considered a knowing waiver. The U.S. would flip the argument to state that every other landowner had the same constructive notice of the state of title after Great Northern as did the Brandts. In the final analysis, the economic cost of Brandt to the federal government is speculative, but likely not great.

Perhaps an unintended consequence of Brandt is that railroad rights-of-way are no longer going to be treated as something special at least in federal court and at least those arising under the 1875 Act. That is, such rights-of-way are only easements and subject to the commonly accepted principles of real estate law. Title examiners can rely upon this certainty going forward and title insurers or opinion writers can cite Brandt and Great Northern as assurance that an abandoned ROW under the 1875 Act is only

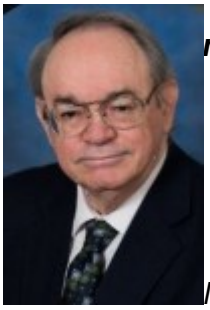
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an easement and its full title reverts to the landowner at time of the abandonment. [Note: Despite the decision, insuring abandoned railroad rights-of-way is special risk for title underwriters and Brandt is unlikely to change that position.] Railroads were special for most of the Nineteenth Century and powered the growth in the West. Today, however, they are just like any another citizen, whose property rights are to be determined on a level playing field with other property owners.

Finally, Brandt suggested to many that the Rails-to-Trails program was dead as the cost of acquiring new trails over abandoned railways or reimbursing landowners who had been impacted by construction of trails over their property without compensation was believed to be burdensome and a cost unwilling to be borne by the average citizen (non-trail user). Many articles were written right after the decision that stated this result was imminent. Whether or not this will be true is still an unknown. There does not seem to have been a groundswell of takingsâ?? claims filed for retroactive losses, but there is no effective way to gather the data as to whether or not litigation is being pursued. No doubt many landowners would willingly confirm prior cessions to the government or sign quitclaims now. The biggest problem is that the United States does not know what lands are actually involved in the process. The expense of individual eminent domain proceedings would be great and probably disproportionate to the actual value of the land.

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Brandt, however, was not a victory for private developers against public use lands. If anything, it was a victory for the small landowner/private citizen. In determining that the particular railroad rights-of-way in question in the decision, the Supreme Court simply concluded that the adjacent property ownerâ??s rights in an abandoned easement area will be determined in an equitable fashion with an equal standing with the railroad and the government, neither of the latter having a status other than that of common player in a common law resolution of real property rights. There is no special status as sovereign or railroad for Twenty-First Century determinations of Nineteenth Century policy priorities. Congress in the 1870s said private citizens as homesteaders were to be favored; which is what the Supreme Court in Brandt honored ultimately.



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Complete references

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