No. 12-1173

In The
Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST
AND MARVIN M. BRANDT, TRUSTEE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. THE 1875 ACT AND PRE-1871 RAILROAD LAND GRANT ACTS ARE MATERIALLY DIFFERENT 2

II. THE GOVERNMENT'S RELIANCE ON *STALKER* AND *STEINKE* IS MISPLACED 13

III. THE LEGISLATIVE HISTORY SHOWS THAT 1875 ACT RIGHTS-OF-WAY ARE EASEMENTS 19

IV. SUBSEQUENT LEGISLATION NEITHER AMENDED THE 1875 ACT NOR REDEFINED PREVIOUSLY GRANTED RIGHTS-OF-WAY 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865 (1999).....7, 22

Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970).....4

Chicago & N. W. Ry. Co. v. Continental Oil Co., 253 F.2d 468 (10th Cir. 1958) 17

Cohens v. State of Virginia, 19 U.S. 264 (1821).....5

Denver & R.G. Railway Co. v. Alling, 99 U.S. 463 (1878).....5

Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546 (2005).....19

Great N. Ry. Co. v. Steinke, 261 U.S. 119 (1923).....13, 15, 16, 18

Great Northern Ry. Co. v. United States, 315 U.S. 262 (1942).....*passim*

Hash v. United States, 403 F.3d 1308 (Fed. Cir. 2005) 23

Home on the Range v. AT&T Corp., 386 F. Supp. 2d 999 (S.D. Ind. 2005).....18

Iselin v. United States, 270 U.S. 245 (1926) 24

Landgraf v. USI Film Products, 511 U.S. 244 (1994).....24

Leo Sheep Co. v. United States, 440 U.S. 668 (1979).....3, 4, 5, 22

N. Coast Ry. v. N. Pac. Ry. Co., 94 P. 112 (Wash. 1908) 21

TABLE OF AUTHORITIES – Continued

Page

N. Pac. Ry. Co. v. Townsend, 190 U.S. 267 (1903) ..... *passim*

Oregon Short Line R. Co. v. Stalker, 94 P. 56 (Idaho 1907) 13, 14, 15

Rio Grande W. Ry. Co. v. Stringham, 239 U.S. 44 (1915) 24

Smith v. City of Jackson, Miss., 544 U.S. 228 (2005) 8

Smith v. Townsend, 148 U.S. 490 (1893) 5

Stalker v. Oregon Short Line R.R. Co., 225 U.S. 142 (1912) ..... *passim*

State Oil Co. v. Khan, 522 U.S. 3 (1997) 4

United States v. Price, 361 U.S. 304 (1960) 23

Wilcox v. Jackson, 38 U.S. 498 (1839) 16

Wyoming v. Udall, 379 F.2d 635 (10th Cir. 1967) 17

STATUTES

1864 Pacific Railway Act, 13 Stat. 356 (1864) 10, 11, 12, 20

1864 Northern Pacific Railway Act, 13 Stat. 365 (1864) 21

1909 Coal Lands Act, 30 U.S.C. § 81 7

Act of March 3, 1871, 16 Stat. 573 (1871) 2

Act of April 12, 1872, 17 Stat. 52 (1872) 9, 10

TABLE OF AUTHORITIES – Continued

Page

Act of June 8, 1872, 17 Stat. 339 (1872) 5

Act of March 3, 1875 ("1875 Act"), 18 Stat. 482 (1875) (codified at 43 U.S.C. §§ 934-939) .....*passim*

43 U.S.C. § 935 9

43 U.S.C. § 936 10

43 U.S.C. § 937 2

Act of July 4, 1884, 23 Stat. 74 (1884) 5

Act of March 3, 1891, 26 Stat. 1095 (1891) (codified at 43 U.S.C. §§ 946-949) 8

General Exchange Act, 16 U.S.C. §§ 485-486 .....16, 17

43 U.S.C. § 912 .....23, 24

43 U.S.C. § 940 .....22, 23

43 U.S.C. § 944 22

REGULATIONS

43 C.F.R. § 2842.1(a) (1976) 4

LEGISLATIVE HISTORY

3 Cong. Rec. 404 (1875) 20

3 Cong. Rec. 406 (1875) 20

3 Cong. Rec. 407 (1875) 20

3 Cong. Rec. 1791 (1875) 20

Cong. Globe, 42d Cong., 2d Sess., 2137 (1872) 10

TABLE OF AUTHORITIES – Continued

Page

ADMINISTRATIVE DECISIONS

Solicitor's Opinion M-36597, 67 I.D. 225 (1960) 8

OTHER AUTHORITIES

4 *Simes and Smith, The Law of Future Interests* (3d ed. 2013).....17

Brief for the United States, *Great Northern Ry. Co. v. United States*, No. 149 (1942).....*passim*

Petition for Writ of Certiorari, *Great Northern Ry. Co. v. United States*, No. 149 (1941).....7, 11

INTRODUCTION

In *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942), the government sought to distinguish the right-of-way grant made by the 1875 Act, 43 U.S.C. §§ 934-939, from those rights-of-way granted by the earlier railroad land grant acts, which are limited fees with an implied condition of reverter. *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903) ("*Townsend*"). By emphasizing the language of the 1875 Act, Congress's shift in policy in 1871, and the Department of the Interior's interpretation of the Act, the government argued that 1875 Act rights-of-way are easements. Brief for the United States, *Great Northern Ry. Co. v. United States*, No. 149, at 8-35 (1942) ("U.S. *GN* Br."). This Court agreed. *Great Northern*, 315 U.S. at 270-79.

The government now asks for a mulligan because interpreting the 1875 Act as granting easements subjects the government to takings claims as abandoned 1875 Act rights-of-way are converted into recreational trails. By relying on many of the same arguments the railroad unsuccessfully made in *Great Northern*, the government implores this Court to redefine 1875 Act rights-of-way as limited fees in the surface with an implied reversionary interest in favor of the government. The government's new argument has no basis in law and would upset the title of thousands of landowners.

ARGUMENT

I. THE 1875 ACT AND PRE-1871 RAILROAD LAND GRANT ACTS ARE MATERIALLY DIFFERENT.

In *Great Northern*, a railroad sought to exploit the mineral wealth lying beneath an 1875 Act right-of-way that crossed public lands. 315 U.S. at 270-71, 279-80. To prevail, the government had to distinguish the 1875 Act from the pre-1871 railroad land grant acts.[1] The government focused on Section 4 of the 1875 Act, which provides that "[a]ny railroad company desiring to secure the benefits of [the 1875 Act]" shall file with the local land office "a profile of its road" and "upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way. . . ." 43 U.S.C. § 937. Relying on well-known distinctions between easements and fees, the government argued that Section 4 showed that Congress intended to grant only a common-law easement when it passed the 1875 Act. U.S. *GN* Br. at 11-12. This Court agreed. *Great Northern*, 315 U.S. at 271 ("This reserved right to dispose of the lands subject to the right of way is wholly inconsistent with the grant of a fee.").

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[1] The last railroad land grant act was passed in 1871. Act of March 3, 1871, 16 Stat. 573-79 (1871). For convenience, all railroad land grant acts are referred to as "pre-1871."

Because interpreting the 1875 Act as granting common-law easements does not serve its present-day needs, the government now seeks to upset the title of thousands of landowners by asking this Court to redefine 1875 Act rights-of-way as a property interest heretofore never recognized. Specifically, the government is asking this Court to characterize 1875 Act rights-of-way as an interest that morphs into either an "easement" or a "fee" depending on the "context." Brief for the United States at 16 ("U.S. Br."). In other words, the government is seeking *carte blanche* to determine the nature of 1875 Act rights-of-way as it sees fit.

The government's argument is untenable. The law of property in this country is based upon certainty and predictability of title. *See* Amicus Curiae Brief of Cato Institute, *et al*., at 5-11 ("Cato Br."). In a similar case in which the government sought to redefine previously granted property interests to suit its current needs, this Court flatly rejected the government's argument:

> This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.

Leo Sheep Co. v. United States, 440 U.S. 668, 687-88 (1979).

Leo Sheep controls the question presented. Over seventy years have passed since *Great Northern*, and thousands of landowners now hold title to land originally patented by the United States in fee "subject to" an easement created by the 1875 Act. "To [now] say to these [landowners], 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970).[2]

The government tries to justify the abrogation of title by suggesting that this Court really did not mean what it said in *Great Northern* when it ruled that 1875 Act rights-of-way are easements. U.S. Br. at 45-52. It strains credulity to think this Court did not recognize the significance of the common-law term "easement" when it repeatedly used that term in

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[2] The agency charged with administering the 1875 Act – the Department of the Interior – has consistently interpreted the Act as granting an easement. *Great Northern*, 315 U.S. at 275-76; *see* 43 C.F.R. § 2842.1(a) (1976); Brief of Petitioners at 28-30, 50-51; Amicus Curiae Brief of Pacific Legal Foundation at 9-11; Amicus Curiae Brief of National Association of Reversionary Property Owners at 5-16 ("NARPO Br."). Because of the government's longstanding recognition that 1875 Act rights-of-way are easements and the property interests created in reliance thereto, any implied suggestion to overrule *Great Northern* should be rejected. Indeed, "[t]his Court has expressed its reluctance to overrule decisions involving statutory interpretation, and has acknowledged that *stare decisis* concerns are at their acme in cases involving property . . . rights[.]" *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (internal citations omitted). Both concerns are present in this case.

describing 1875 Act rights-of-way. *Great Northern*, 315 U.S. at 271 ("The [1875 Act], from which [the railroad's] rights stem, clearly grants only an easement, and not a fee."); *id*. at 272 (The purpose of the 1875 Act can be achieved if the right-of-way is an easement, rather than a fee, because "a railroad may be operated though its right of way be but an easement."). This Court's clear distinction between an easement and a fee indicates that the Court did not use the term "easement" carelessly.[3]

To be sure, "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens v. State of Virginia*, 19 U.S. 264, 399 (1821). Yet, this Court's

[3] In rejecting the railroad's "limited fee" argument, *Great Northern* found "persuasive" two earlier cases that had interpreted post-1871 railroad right-of-way grants as conveying only an easement. 315 U.S. at 279 (citing *Denver & R.G. Railway Co. v. Alling*, 99 U.S. 463, 475, 478 (1878) (Act of June 8, 1872, 17 Stat. 339 (1872), granted "a present beneficial easement") and *Smith v. Townsend*, 148 U.S. 490, 498 (1893) (Act of July 4, 1884, 23 Stat. 74 (1884) granted "simply an easement, not a fee in the land")). The government ignores *Alling* and tries to distinguish *Smith* because the statute in that case contained an expressed reversionary interest. U.S. Br. at 43-44. *Smith* demonstrates that Congress – if it so desired – could have expressly reserved the reversionary interest that the government now asks this Court to find through implication. Because Congress did not expressly reserve a reversionary interest in 1875 Act rights-of-way when the lands traversed thereby are patented, proves none was intended. *See Leo Sheep*, 440 U.S. at 678-80.

ruling in *Great Northern* that 1875 Act rights-of-way are easements was not a "general expression"; it was the foundational ruling for this Court's holding that the railroad did not own the minerals underlying the 1875 Act right-of-way. 315 U.S. at 279 ("Since petitioner's right of way is but an easement, it has no right to the underlying oil and minerals."). In fact, the government specifically initiated the suit in *Great Northern* to "obtain a determination of the *nature* . . . of the grant made by the [1875 Act]." U.S. *GN* Br. at 8-9 (emphasis added). As acknowledged by the government, the answer could be one of three common-law property interests: "an absolute fee, a limited fee, or simply a surface easement." *Id*. at 9. That the government now regrets this Court's ruling that 1875 Act rights-of-way are the lesser of the three property interests does not compel a constrained application of the ruling in *Great Northern*.

This is especially true considering *Great Northern* implicitly rejected the argument the government is now making. In *Great Northern*, the government primarily argued that 1875 Act rights-of-way are easements. U.S. *GN* Br. at 8-35. In the alternative, and to distinguish this Court's earlier limited fee decisions, such as *Townsend*, the government argued that, if the 1875 Act granted a "limited fee," that interest included only "a 'fee' in the surface and so much of the subsurface as is necessary for support – a 'fee' for a railroad thoroughfare exclusively." *Id*. at 35-37. That this Court did not mention this limited-fee-in-the-surface argument demonstrates how strongly

this Court believed that the 1875 Act granted only an easement.

The government now seeks to revive its limited-fee-in-the-surface argument. U.S. Br. at 16, 22-23; *see* Dist. Ct. Dkt. No. 148 at 3 (The government is claiming only "the right-of-way itself, which comprises only the surface and as much of the subsurface as is needed to accomplish the [railroad's] purpose."). The government must rely on this argument because reversionary interests may exist only in fees, not easements. *See* Cato Br. at 26-28. Yet, the government's argument suffers from the same infirmities as it did in 1942.[4]

The government argues that because the right-of-way grant in Section 1 of the 1875 Act is "materially identical" to pre-1871 railroad right-of-way grants, the language should be read *in pari materia*. U.S. Br. at 17-18. Not only is this argument directly contrary to what the government argued in *Great Northern*, it is the argument the railroad unsuccessfully made before this Court. *See* Petition for Writ of Certiorari, *Great Northern Ry. Co. v. United States,* No. 149 at 12-13 (1941).

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[4] The limited-fee-in-the-surface argument effectively splits the surface estate. However, Congress first split estates 34 years after the 1875 Act when it passed the 1909 Coal Lands Act, 30 U.S.C. § 81. *See Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 868-70 (1999).

The pre-1871 railroad right-of-way grants upon which the government now relies were passed during a different era of American history:

> The year 1871 marks the end of one era and the beginning of a new in American land-grant history. In that year the policy of lavish grants of land to encourage railroad construction was replaced by a new policy of severe restriction of federal munificence in respect of railroads. It is in the light of this shift that the Act of 1875 must be read. . . .

U.S. *GN* Br. at 15; *Great Northern*, 315 U.S. at 273. Because of this shift in policy, the right-of-way grant in Section 1 of the 1875 Act cannot be read *in pari materia* with the right-of-way grant in pre-1871 railroad land grant acts.[5] U.S. *GN* Br. at 29-31; *see Smith v. City of Jackson, Miss*., 544 U.S. 228, 260-61 (2005) (O'Connor, J., dissenting) ("[W]e have not hesitated to give a different reading to the same language – whether appearing in separate statutes or in separate provisions of the same statute – if there is strong evidence that Congress did not intend the language to be used uniformly."). This is clear from *Great Northern,* wherein this Court ruled 1875 Act rights-of-way are easements, while leaving undisturbed

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[5] In contrast, the 1875 Act and the Act of March 3, 1891, 26 Stat. 1095, 1101-02 (1891) (codified at 43 U.S.C. §§ 946-949) are read *in pari materia* and both are construed as granting an easement. *Great Northern*, 315 U.S. at 275-76; Solicitor's Opinion M-36597, 67 I.D. 225 (1960).

its earlier rulings that rights-of-way granted by pre-1871 acts are limited fees. *See* 315 U.S. 273 n.6.

Section 2 of the 1875 Act further confirms that the right-of-way grant cannot be read *in pari materia* with the pre-1871 railroad right-of-way grants. This section, which is not found in any of the pre-1871 railroad acts, provides that under certain circumstances a railroad must share the "use and occupancy" of its 1875 Act right-of-way "in common" with other railroads, wagon roads, and highways. 43 U.S.C. § 935. This language demonstrates that 1875 Act rights-of-way granted non-exclusive "use and occupancy" rather than the land, which differentiates 1875 Act rights-of-way from the pre-1871 railroad right-of-way grants.[6] *See* U.S. *GN* Br. at 10-11.

Any lingering doubt that the 1875 Act should not be read *in pari materia* with the pre-1871 railroad right-of-way grants is dispelled by Section 4 of the 1875 Act. The importance of Section 4 cannot be understated because the right to dispose of the lands "subject to" an existing railroad right-of-way is not found in any of the pre-1871 railroad right-of-way acts. U.S. *GN* Br. at 30 n.34. Similar language first appeared in the Act of April 12, 1872, 17 Stat. 52 (1872). *Great Northern*, 315 U.S. at 271. This Court

[6] Even if 1875 Act rights-of-way are primarily "exclusive," as suggested by the government, U.S. Br. at 22 n.4, that does not make 1875 Act rights-of-way fee interests. Amicus Curiae Brief of New England Legal Foundation at 4-12 ("NELF Br.").

found the following statement as to why the "subject to" clause was included in the Act of April 12, 1872, very compelling as to why the 1875 Act granted only an easement:

> "Mr. SLATER: The point [of this clause] is simply this, the land over which this right of way passes is to be sold subject to the right of way. It simply provides that *this right of way shall be an incumbrance upon the land* for one hundred feet upon each side of the line of the road; that those who may afterward make locations for settlement shall not interfere with this right of way."

Great Northern, 315 U.S. at 271 n.3 (emphasis added) (quoting Cong. Globe, 42d Cong., 2d Sess., 2137 (1872)). That the right-of-way granted in 1875 Act is an "incumbrance" shows that the grant of a fee was not intended. *See id*. at 271.

Largely ignoring Sections 2 and 4 of the 1875 Act, the government cites Section 3 in support of its *in pari materia* argument. This section provides that, in the absence of a territorial law providing the "manner in which private lands and possessory claims on the public lands . . . may be condemned," a condemnation may proceed in accordance with Section 3 of the 1864 Pacific Railway Act, 13 Stat. 356-65 (1864). 43 U.S.C. § 936. According to the government, Section 3 of the 1864 Pacific Railway Act allows the condemnation of "full title." U.S. Br. at 24-25 (quoting 13 Stat. 357). From this, the government surmises that the 1875 Act must grant a similar interest. U.S. Br. at 26.

There are at least two flaws in the government's argument, which explains why the railroad was unsuccessful when it made the same argument in *Great Northern*. *See* Petition for Writ of Certiorari, *Great Northern, supra,* at 18-20.

First, that Section 3 of the 1875 Act provides for a condemnation in accordance with territorial laws or the 1864 Pacific Railway Act sheds no light on the property interest that may be condemned. Congress was simply identifying which procedures to be used if a condemnation were necessary. This is evident from the elaborate procedures set forth in Section 3 of the 1864 Pacific Railway Act, which provides, *inter alia*, that: (1) "three disinterested commissioners" shall make the initial determination of the amount of compensation owed; (2) the commissioner shall appraise the "premises at what would have been the value thereof if the road had not been built"; (3) upon payment of the amount awarded by the commissioners the railroad "shall thereby acquire full title to the same for the purposes aforesaid"; and (4) either party may appeal the award and demand a jury trial upon posting a bond for the costs on appeal. 13 Stat. 357-58.

Second, "full title" does not mean "fee title." This is clear when the words "full title," as used in Section 3 of the Pacific Railway Act, are placed in context:

> [U]pon the payment to the clerk thereof of the amount so awarded by the commissioners for the use and benefit of the owner

> thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire *full title to the same for the purposes aforesaid*. . . .

13 Stat. 357 (emphasis added). Because the "purposes aforesaid" are railroad purposes, *id*., a condemnation under the procedures in Section 3 of the 1864 Pacific Railway Act simply results in the railroad acquiring "full title" to an interest for railroad purposes. As the government aptly demonstrated in *Great Northern*, a railroad does not need "fee title" to successfully operate:

> Nor can it be argued that railroads, in order to operate efficiently, must have a fee in their rights of way. [The railroad] conceded in its brief in the court below . . . that railroads, when they condemn land for rights of way, "do not acquire mineral rights *or full fee ownership*." If the railroads do not need a fee in those portions of their rights of way acquired by eminent domain proceedings, and the courts have so held, the need for a fee in those portions of their right of way acquired under the 1875 Act is no more compelling. *Hence, it scarcely can be said that the purpose of the 1875 grant will be frustrated if it be construed as conveying an easement rather than a fee*.

U.S. *GN* Br. at 14 (all emphasis added) (footnote omitted). This Court agreed, observing "it has been held that railroads do not have a fee in those portions of their rights of way acquired by eminent domain

proceedings." *Great Northern*, 315 U.S. at 272 n.5 (listing cases). Thus, Section 3 of the 1875 Act merely shows that a railroad may condemn an easement for railroad purposes.

II. THE GOVERNMENT'S RELIANCE ON *STALKER* AND *STEINKE* IS MISPLACED.

The government relies on *Stalker v. Oregon Short Line R.R. Co*., 225 U.S. 142 (1912), and *Great N. Ry. Co. v. Steinke*, 261 U.S. 119 (1923), for the proposition that a patent issued subject to an 1875 Act right-of-way conveys no interest in the right-of-way. U.S. Br. at 28-32. Because *Stalker* and *Steinke* were issued before *Great Northern* and involved rival claimants seeking the same land in fee, the government's reliance on these cases is misplaced.

In *Stalker*, a railroad claimed an 1875 Act right-of-way for station grounds based upon the filing of a map thereof with the local land office under Section 4 of the 1875 Act. *Oregon Short Line R. Co. v. Stalker*, 94 P. 56, 60 (Idaho 1907). The map was submitted to the Secretary for approval and, while that approval was pending, a settler made a preemption claim on 160 acres; 12 of which included the station grounds claimed by the railroad. *Id*. The Secretary finally approved the map for the station grounds, but the local land office failed to note the approval on the plats in the local land office. *Id*. Subsequently, a patent was issued to the settler that made no reference to the station grounds. *Id*.

As acknowledged by the government, the railroad sued the settler's successors claiming that it owned the station grounds in "fee." U.S. Br. at 28-29. The Idaho Supreme Court held in favor of the railroad because the railroad had done everything required of it under the law by filing its map before the preemption claim was initiated. *Stalker*, 94 P. at 65-66. Because the railroad's claim to the station ground was first in time, the court ruled the railroad should not suffer for the delay in the Secretary's approval or for the neglect exhibited by the local land office. *Id*. at 65. In response to the argument of the conclusiveness of the patent issued to the settler, the court, mistakenly relying on *Townsend,* believed that the railroad had an inchoate right to a limited fee in the station grounds upon filing its map. *Id*. at 64-65. As the interest was a limited fee, the station grounds were not open to disposition under the public land laws when the settler entered the lands and the Land Department had no authority to transfer the lands to the settler when it issued the patent. *Id*. at 66.

This Court affirmed. *Stalker*, 225 U.S. at 154. In so doing, this Court held that neither the Secretary's delay nor the neglect of the local land office could affect the priority of the railroad. *Id*. at 150-53. In rejecting the argument that the settler's patent trumped the railroad's senior claim, this Court explained:

> [T]he subsequent issue of a patent to the land entered by [the settler] was subject to the rights of the railroad company theretofore acquired by approval of its station

> ground map. The patent is not an adjudication concluding the paramount right of the [railroad], but in so far as it included lands validly acquired theretofore, was in violation of law, and inoperative to pass title.

Id. at 154. Although this Court did not expressly mention what type of interest the railroad held in the station grounds, it may be presumed that this Court mistakenly believed the interest to be a fee. *See Stalker*, 94 P. at 64 ("The estate granted under the act of March 3, 1875, is more than a mere easement. It amounts to a base[,] qualified or limited fee. . . .").

In *Steinke,* a local land office again failed to note the Secretary's approval of a map for 1875 Act station grounds on the plats in the local land office. *Steinke*, 261 U.S. at 121. Subsequently, a settler entered a 40-acre parcel that contained the approved station grounds and, ultimately, a patent to the 40-acre parcel was issued, which made no mention of the station grounds. *Id*. at 121-22. The railroad sued to quiet title to the station grounds against the settler's grantees. *Id*. at 120.

This Court held in favor of the railroad. *Steinke*, 261 U.S. at 121. In so doing, this Court ruled "[t]he approved map is intended to be the equivalent of a patent" and the failure of "local land officers . . . to note that disposal" on the plats in the local land office could "not prejudice or affect the [railroad's] title," because "a neglect of duty affords no justification for subordinating a senior to a junior claim or for making a second disposal in disregard of a prior one." *Id*. at

125-29. This Court also reaffirmed *Stalker*'s ruling that a subsequent patent could not convey previously appropriated lands. *Id*. at 130-31. Again, it may be presumed that this Court mistakenly believed that the station grounds were held in fee. *See Steinke*, 261 U.S. at 133 (citing *Townsend*).

Stalker and *Steinke* stand for an unremarkable principle that when a senior claimant acquires a vested or inchoate right to a fee interest under the public land laws, the land is appropriated (*i.e*., no longer subject to disposition under the public land laws) and the government cannot convey to a junior claimant that which is already appropriated. *See Wilcox v. Jackson*, 38 U.S. 498, 513 (1839) (describing "appropriation doctrine"). From this, the government makes the extraordinary leap that a subsequent patent issued for lands traversed by an 1875 Act right-of-way cannot convey any interest in the right-of-way itself. U.S. Br. at 31-32. Yet, nothing in *Stalker, Steinke,* or the appropriation doctrine suggests that: (1) the government impliedly retains any interest in an 1875 Act right-of-way when it patents the lands traversed thereby in fee; or (2) that the government does not convey any interest *it* may still have in an 1875 Act right-of-way, such as an implied reversionary interest, when it patents the lands in fee without reserving that interest.[7] *See* Cato Br. at

[7] Brandt's parents did not make an entry under the public land laws; they acquired the land under the General Exchange Act, 16 U.S.C. § 485-486, Pet. App. 76-79, under which the United

(Continued on following page)

13-14; 4 *Simes and Smith, The Law of Future Interests*, § 1852 (3d ed. 2013) (reversionary interests are freely alienable). Moreover, the government does not cite a single post-*Great Northern* case for its proposition, which is not surprising because post-*Great Northern* authorities demonstrate that 1875 Act rights-of-way do not effectuate an appropriation.

In *Chicago & N. W. Ry. Co. v. Continental Oil Co.*, 253 F.2d 468, 470 (10th Cir. 1958) the government granted a 40-acre tract to Wyoming that was traversed by an 1875 Act right-of-way. An oil company acquired an oil and gas lease from Wyoming that covered the 40-acre tract and brought suit against the railroad to enjoin the railroad from drilling on the right-of-way. *Id*. Although the railroad acknowledged "the decisional force of" *Great Northern* that the interest it held in the right-of-way "was merely an easement," *id*. at 470-71, it defended on the basis of the appropriation doctrine as stated in pre-*Great Northern,* limited-fee cases, such as *Stalker* and *Steinke*. *Id*. at 471-72. The Tenth Circuit, however, rejected the railroad's appropriation argument vis-à-vis the 1875 Act right-of-way because it was "merely another way of urging the limited fee concept" that was rejected in *Great Northern*. *Id*. at 472; *see Wyoming v. Udall*, 379 F.2d 635, 640 (10th Cir. 1967) (noting that the government "concede[d]" post-1871 railroad rights-of-way did not appropriate the land

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States had to expressly reserve any interests it wished to retain. 16 U.S.C. § 486.

from disposition under the public land laws); *Home on the Range v. AT&T Corp.*, 386 F. Supp. 2d 999, 1003-07, 1016-20 (S.D. Ind. 2005) (appropriation doctrine does not apply to 1875 Act rights-of-way, but does apply to pre-1871 railroad rights-of-way).

In an effort to breathe life into *Stalker* and *Steinke*, the government argues that *Great Northern* cited both cases "favorably." U.S. Br. at 52. The government, however, fails to acknowledge the principles for which *Great Northern* cited those cases. *Stalker* was cited for the principle that an 1875 Act right-of-way may be acquired by "construction." *Great Northern*, 315 U.S. at 272 n.4. *Steinke* was cited for the principle that the 1875 Act "is to be liberally construed to carry out its purposes" but is "also subject to the general rule of construction that any ambiguity in a grant is to be resolved favorably to a sovereign grantor[,]" *i.e.*, "nothing passes but what is conveyed in clear and explicit language. . . ." *Great Northern*, 315 U.S. at 272 (internal quotation omitted). In keeping with this latter principle, *Great Northern* ruled that the 1875 Act granted the lesser of the three possible interests, *i.e.*, an easement. Ironically, the government's new interpretation of the 1875 Act violates the principle for which *Great Northern* cited *Steinke*.

III. THE LEGISLATIVE HISTORY SHOWS THAT 1875 ACT RIGHTS-OF-WAY ARE EASEMENTS.

The government argues that the legislative history shows that Congress intended to impliedly reserve a reversionary interest in 1875 Act rights-of-way. U.S. Br. at 32-34. As this Court has "repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Services, Inc*., 545 U.S. 546, 568 (2005). This is because "legislative history is itself often murky, ambiguous, and contradictory . . . [and] has a tendency to become . . . an exercise in looking over a crowd and picking out your friends." *Id*. at 568 (internal quotations omitted).

In any case, and contrary to the government's suggestion, the legislative history shows that Congress intended to grant a common-law easement. *See Great Northern*, 315 U.S. at 271 n.3. Furthermore, there is no evidence in the legislative history that Congress intended to impliedly reserve a reversionary interest in 1875 Act rights-of-way after the lands traversed thereby were patented.

When Chairman Townsend of the House Committee on Public Lands presented the bill that would become the 1875 Act, he assured the House that the bill was unlike the pre-1871 railroad grants:

> [We] have been very conservative with regard to the appropriation of public lands to railroads. A few years ago such grants of

> lands were given with a very large degree of liberality until the people put the mark of their disapprobation upon them. . . . *[We] have endeavored to preserve the public lands for the benefit of actual settlers*. . . . All our grants of public lands, therefore, have been narrowed down to rights of way.

3 Cong. Rec. 404 (1875) (emphasis added); 3 Cong. Rec. 407 (1875) (Representative Hawley describing the bill as granting railroads "the right to lay their tracks and run their trains over the public lands; it does no more"); *see also* 3 Cong. Rec. 1791 (1875) (Senator Sprague describing a similar railroad right-of-way grant as granting "no land, not an acre.").

Because the legislative history does not mention an implied reversionary interest, the government tries to create one from the colloquy between Chairman Townsend and Representative Hoar regarding an amendment proposed by Representative Hoar to give subsequently created states authority over 1875 Act rights-of-way. 3 Cong. Rec. 406 (1875). Representative Hoar hypothesized that, without the amendment, states would lack the authority to regulate or exercise the power of eminent domain over the rights-of-way. *Id*. In response, Chairman Townsend seemingly agreed that states lacked that authority vis-à-vis the right-of-way granted under the Pacific Railway Act. *Id*. According to the government, this colloquy shows that the right-of-way granted under the 1875 Act – like those granted under pre-1871 acts – would be immune from state regulation, including the power of

eminent domain, because of a continuing interest by the government in the right-of-way. U.S. Br. at 33. The government then surmises that 1875 Act rights-of-way must be identical to the pre-1871 rights-of-way "at least to the extent that the United States would hold a form of ownership interest in the right-of-way, even after" the lands traversed thereby were patented into private ownership. U.S. Br. at 33-34.

The government is misguided. First, nothing in the colloquy suggests there is an implied reversionary interest in any railroad rights-of-way. Second, the government misreads the colloquy. *See* NELF Br. at 15-17 (placing the colloquy in proper context). Finally, Representative Hoar and Chairman Townsend were wrong to the extent that they believed pre-1871 rights-of-way were immune from regulation by the states, including the power of eminent domain.

In holding that the 1864 Northern Pacific Railway Act, 13 Stat. 365 (1864), granted a "limited fee, made on an implied condition of reverter" this Court explained that the right-of-way would be subject to state regulation, including the power of eminent domain, notwithstanding the government's possibility of reverter: "nothing that has been said in anywise imports that a right of way granted through the . . . public domain within a state is not amenable to the police power of the state." *Townsend*, 190 U.S. at 272; *accord N. Coast Ry. v. N. Pac. Ry. Co.*, 94 P. 112, 114 (Wash. 1908) ("It has also been repeatedly held by other courts that a right of way of a railroad company, which has been acquired . . . through a federal grant,

is not exempt from the operation of state laws of eminent domain." (listing cases)). Because the participants in the colloquy were apparently acting under a mistake of law, the colloquy cannot be interpreted as evincing anything regarding Congress's intent, much less that Congress intended to impliedly reserve a reversionary interest in 1875 Act rights-of-way after the lands traversed thereby are patented.

IV. SUBSEQUENT LEGISLATION NEITHER AMENDED THE 1875 ACT NOR REDEFINED PREVIOUSLY GRANTED RIGHTS-OF-WAY.

It is axiomatic that the 1875 Act must be interpreted in accordance with Congress's intent in 1875. *Amoco*, 526 U.S. at 866 ("[p]ublic land statutes should be interpreted in light of the country's condition when they were passed" (citing *Leo Sheep*, 440 U.S. at 682)). In contravention of this principle, the government suggests that the nature of 1875 Act rights-of-way should be determined from the forfeiture acts of 1906 and 1909, codified at 43 U.S.C. § 940.[8] U.S. Br. at 34-37. Specifically, the government argues that 43 U.S.C. § 940 "manifest[s]" Congress's "intent that the United States retain a reversionary interest in 1875 act

[8] *Great Northern* found that these forfeiture acts *and* 43 U.S.C. § 944 confirmed that the 1875 Act granted an easement. 315 U.S. at 276-77; *see* Brief of Petitioners at 22, 24-25. The government simply ignores 43 U.S.C. § 944.

rights-of-way. . . ." U.S. Br. at 34. According to the government, 43 U.S.C. § 940 creates a two-step process: (1) upon a forfeiture, the government resumes "full title" to 1875 Act right-of-way; and (2) the right-of-way is then transferred by 43 U.S.C. § 940 to patentees who were conveyed lands "subject to" the right-of-way. U.S. Br. at 36.

Instead of creating a "two-step" process, 43 U.S.C. § 940 covers two different scenarios depending on where the forfeited right-of-way is located: (1) on lands still owned by the government; or (2) on lands that were patented "subject to" the right-of-way. Under the first scenario, the government naturally "resumes the full title to the lands covered thereby free and discharged from such easement. . . ." 43 U.S.C. § 940. Under the second scenario, however, "the forfeiture declared shall, without need of further assurance or conveyance, inure to the benefit of" the owner of the lands burdened by the easement. 43 U.S.C. § 940. Thus, 43 U.S.C. § 940 confirms Congress's intent in passing the 1875 Act that abandoned 1875 Act rights-of-way inure to the benefit of settlers. *See Hash v. United States*, 403 F.3d 1308, 1315 (Fed. Cir. 2005).

The government also argues that 43 U.S.C. § 912, passed in 1922, shows Congress believed that it had impliedly reserved a reversionary interest in 1875 Act rights-of-way. U.S. Br. at 38-40. The views of a subsequent Congress generally "form a hazardous basis for inferring the intent" of an earlier one, *United States v. Price*, 361 U.S. 304, 313 (1960), and statutes should

not be construed so as to retroactively redefine previously granted property interests. *See Landgraf v. USI Film Products*, 511 U.S. 244, 271 (1994). In any event, this Court's decisions in *Townsend* and *Rio Grande W. Ry. Co. v. Stringham*, 239 U.S. 44 (1915) and the abandonment of railroads in the 1920s triggered passage of § 912. Brief of Petitioners at 7-8. Under these decisions, the government would be saddled with narrow strips on land (surface and minerals) in fee upon abandonment. *Id.* at 42-44. To avoid this result, Congress passed § 912 to dispose of the surface *it may have* in any abandoned railroad rights-of-way under these decisions, while reserving the minerals.[9] 43 U.S.C. § 912; Brief of Petitioners at 42-44; *see* NARPO Br. at 20-34.

Nothing in § 912 or any other subsequently enacted statute suggests that Congress, in passing the 1875 Act, intended to impliedly reserve a reversionary interest in 1875 Act rights-of-way after the lands traversed thereby were patented. In short, "[w]hat the [government] asks is not a construction of [the 1875 Act], but, in effect, an enlargement of it by [this Court], so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 250-51 (1926).

[9] That Brandt owns the minerals underlying the abandoned right-of-way, demonstrates that § 912 does not apply in this case. *See* Brief of Petitioners at 43 n.15.

CONCLUSION

The judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

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