No. 12-1173

# In the Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, ET AL.,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Under 43 U.S.C. 912 and 16 U.S.C. 1248(c), when a railroad ceases the use and occupancy of a right-of-way granted to it from the public lands, and the right-of-way's forfeiture or abandonment is declared or decreed by a court of competent jurisdiction or by Act of Congress, all surviving right, title, interest, and estate of the United States shall remain in the United States, except to the extent that any such right-of-way is embraced within a public highway no later than one year after the determination of abandonment or forfeiture or is located within a municipality. The question presented is:

Whether the United States retains a reversionary interest in rights-of-way granted from public lands to railroads under the General Railroad Right-of-Way Act of 1875, 43 U.S.C. 934-939, such that the disposition of such rights-of-way is governed by 43 U.S.C. 912 and 16 U.S.C. 1248(c).

## TABLE OF CONTENTS

Page

Opinions below ........................................ 1
Jurisdiction ........................................ 1
Statement ........................................ 2
Discussion ........................................ 8
Conclusion ........................................ 20

## TABLE OF AUTHORITIES

Cases:

*Avista Corp.* v. *Wolfe*, 549 F.3d 1239 (9th Cir. 2008) ........ 9
*Brown* v. *Northern Hills Reg'l R.R. Auth.*, 732 N.W.2d 732 (S.D. 2007) ........ 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) ........ 17
*Idaho* v. *Oregon Short Line R.R. Co.*, 617 F. Supp. 207 (D. Idaho 1985) ........ 5, 6, 7, 12
*Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979) ........ 16
*Marshall* v. *Chicago & Nw. Transp. Co.*, 31 F.3d 1028 (10th Cir. 1994) ........ 4, 5, 7
*Mary G. Arnett*, 20 Pub. Lands Dec. 131(1895) ........ 17
*Mauler* v. *Bayfield Cnty.*, 309 F.3d 997 (7th Cir. 2002), cert. denied, 538 U.S. 1032 (2003) ........ 9, 17
*New Mexico* v. *United States Trust Co.*, 172 U.S. 171 (1898) ........ 9, 10, 13
*Northern Pac. Ry. Co.* v. *Townsend*, 190 U.S. 267 (1903) ........ 6, 10, 16
*Preseault* v. *I.C.C.*, 494 U.S. 1 (1990) ........ 19
*Railroad Co.* v. *Baldwin*, 103 U.S. 426 (1880) ........ 10, 13
*Rice* v. *United States*, 479 F.2d 58 (8th Cir.), cert. denied, 414 U.S. 858 (1973) ........ 17

Cases—Continued: Page

*Rio Grande W. R.R. Co.* v. *Stringham*, 239 U.S. 44 (1915) ....6, 13
*Samuel C. Johnson 1988 Trust* v. *Bayfield Cnty.*:
520 F.3d 822 (7th Cir. 2008) ....9, 17
649 F.3d 799 (7th Cir. 2011) ....18
*Stalker* v. *Oregon Short Line R.R. Co.*, 225 U.S. 142 (1912) ....17
*Swendig* v. *Washington Water Power Co.*, 265 U.S. 322 (1924) ....17
*Tiger* v. *Western Inv. Co.*, 221 U.S. 286 (1911) ....14
*United States* v. *Union Pac. R.R. Co.*, 353 U.S. 112 (1957) ....6, 7, 11
*Vieux* v. *East Bay Reg'l Park Dist.*, 906 F.2d 1330 (9th Cir.), cert. denied, 498 U.S. 967 (1990) ....9, 18
*Western Union Tel. Co.* v. *Pennsylvania R. Co.*, 195 U.S. 540 (1904) ....10
*Whipps Land & Cattle Co.* v. *Level 3 Commc'ns, LLC*, 658 N.W.2d 258 (Neb. 2003) ....18
*Wyoming* v. *Andrus*, 602 F.2d 1379 (10th Cir. 1979) ....9
*Wyoming* v. *Udall*, 379 F.2d 635 (10th Cir.), cert. denied, 389 U.S. 985 (1967) ....5, 9, 12

Constitution and statutes:

U.S. Const. Amend. V ....17
Act of July 1, 1862, ch. 120, § 2, 12 Stat. 491 ....12
Act of July 2, 1864, ch. 217, § 2, 13 Stat. 367 ....12
Act of July 25, 1866:
ch. 241, § 1, 14 Stat. 236 ....12
ch. 242, § 3, 14 Stat. 240 ....12
Act of Apr. 12, 1872, ch. 96, § 1, 17 Stat. 52 ....13
Act of June 7, 1872, ch. 323, § 1, 17 Stat. 280 ....12

Statutes—Continued: Page

Act of June 8, 1872, ch. 364, § 1, 17 Stat. 343 ........................ 13
Act of Feb. 5, 1875, ch. 35:
§ 1, 18 Stat. 306 ........................ 12, 13
§ 2, 18 Stat. 306-307 ........................ 13
§ 3, 18 Stat. 307 ........................ 12
General Railroad Right-of-Way Act of 1875, 43 U.S.C. 934-939 ........................ *passim*
43 U.S.C. 934 ........................ 2
43 U.S.C. 936 ........................ 2
43 U.S.C. 937 ........................ 2
43 U.S.C. 939 ........................ 2
National Trails System Act, 16 U.S.C. 1241 *et seq.* ........................ 19
National Trails System Act Amendments of 1983, Pub. L. No. 98-11, § 208, 97 Stat. 48 ........................ 19
Railroad Right-of-Way Abandonment Act of 1922, 43 U.S.C. 912 ........................ *passim*
43 U.S.C. 913 ........................ 15, 16, 19
43 U.S.C. 940 ........................ 14
16 U.S.C. 1248(c) ........................ 3, 4, 5, 9, 15, 16
28 U.S.C. 1295(a) (2006 & Supp. V 2011) ........................ 18
28 U.S.C. 1346(a)(2) (Supp. V 2011) ........................ 18
28 U.S.C. 1491 (2006 & Supp. V 2011) ........................ 18

Miscellaneous:

3 Cong. Rec. 406 (1875) ........................ 14
*Deed to Railroad Company as Conveying Fee or Easement*, 6 A.L.R. 3d 973 (1966) ........................ 13
16 Op. Att'y Gen. 250 (1879) ........................ 15
S. Rep. No. 388, 67th Cong., 2d Sess. (1922) ........................ 2

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-9) is not published in the *Federal Reporter* but is reprinted at 496 Fed. Appx. 822. The opinion of the district court (Pet. App. 10-56) is not published in the *Federal Supplement* but is available at 2008 WL 7185272.

**JURISDICTION**

The judgment of the court of appeals was entered on September 11, 2012. A petition for rehearing was denied on December 26, 2012 (Pet. App. 67-68). The petition for a writ of certiorari was filed on March 26, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. This case involves whether the United States retains a reversionary interest in a right-of-way granted under the General Railroad Right-of-Way Act of 1875 (1875 Act), 43 U.S.C. 934-939, when the land traversed by the right-of-way has been conveyed into non-federal ownership. The 1875 Act specifies that "the right of way through the public lands of the United States is hereby granted to any railroad company * * * [that has met certain requirements], to the extent of one hundred feet on each side of the central line of said road." 43 U.S.C. 934. Under the statute, a railroad company must file a profile of its rail corridor with the local U.S. Department of the Interior land office within 12 months after survey or location of the road; upon Interior's approval, the right-of-way is to be noted on the plats at that 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. The statute expressly "reserve[d]" Congress's "right at any time to alter, amend, or repeal [the 1875 Act] or any part thereof." 43 U.S.C. 939.

In 1922, Congress enacted the Railroad Right-of-Way Abandonment Act, 43 U.S.C. 912, to address forfeiture and abandonment of federally granted rights-of-way. Congress intended for Section 912 to apply to the 1875 Act, under which most rights-of-way over federal lands had been granted. See S. Rep. No. 388, 67th Cong., 2d Sess. 1 (1922) (noting most rights-of-way were granted under 1875 Act); *id.* at 2 (explaining the statute's operation on 1875 Act rights-of-way).

Under Section 912, any railroad that was granted a right-of-way from the public lands for railroad use would relinquish that right-of-way when it ceased its use and occupancy and its "forfeiture" or "abandonment" was

"declared or decreed by a court of competent jurisdiction or by Act of Congress." 43 U.S.C. 912. Upon such a declaration or decree, "all right, title, interest, and estate of the United States in said lands" composing the right-of-way was to be transferred to the owner of the property traversed by the right-of-way, unless the right-of-way was either embraced in a public highway established within one year after such declaration or located within a municipality. *Ibid.*[1]

In 1988, Congress repealed Section 912's provision for the transfer of an abandoned right-of-way to the owner of the land it crosses or to a municipality. 16 U.S.C. 1248(c). Section 1248(c) permits a public highway to be established on a right-of-way within a year after a decree or declaration of abandonment is still operative, but it otherwise provides that, "[c]ommencing October 4, 1988, any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in [43 U.S.C. 912] shall remain in the United States." *Ibid.*

2. In this suit, the United States sought to quiet title to a stretch of railroad right-of-way in southern Wyoming. Pet. App. 11. The right-of-way was granted under the 1875 Act to the Laramie, Hahn's Peak and Pacific Railroad Company in 1908, when all of the surrounding land was federal or state land. *Id.* at 13; Gov't C.A. Br. 8. As relevant here, the right-of-way crossed an approximately 83-acre parcel that was, in 1976, patented to petitioners' predecessor in interest in a land exchange with the Forest Service. Pet. App. 13.

In November 1987, the Wyoming and Colorado Railroad Company became the last successor to the right-of-

[1] A proviso in Section 912 reserved to the United States "oil, gas, and other minerals in the land so transferred." 43 U.S.C. 912. This case pertains only to surface rights.

way. Pet. App. 13. Pursuant to the Surface Transportation Board's regulatory approval process, the railroad abandoned the applicable rail line in 2004. *Id.* at 13-14.

In 2006, the United States filed suit to quiet title to a 28.08-mile section of the right-of-way in order to extend a pre-existing recreational trail across it. Pet. App. 11; Gov't C.A. Br. 7-8. Consistent with 43 U.S.C. 912 and 16 U.S.C. 1248(c), the United States sought a declaratory judgment that the right-of-way was abandoned, and that all right, title, and interest in it therefore vested in the United States; the United States filed suit against 51 landowner-defendants, including petitioners (a trust and its trustee). Gov't C.A. Br. 3. With the exception of petitioners, all of the other landowner defendants settled with the United States or failed to appear and had default judgments entered against them. *Ibid.*; Pet. App. 12. Petitioners filed several counter claims, including a claim to quiet title to the right-of-way in them. *Id.* at 12.

3. The district court declared the right-of-way abandoned and entered judgment in favor of the United States on the quiet-title question. Pet. App. 57-59. On cross-motions for summary judgment, the district court recognized "an obvious split in decisions among the federal circuit courts," but followed Tenth Circuit precedent and therefore concluded that "the United States retains a reversionary interest in all 1875 Act [rights-of-way]." *Id.* at 26 (citing *Marshall* v. *Chicago & Nw. Transp. Co.*, 31 F.3d 1028, 1032 (10th Cir. 1994)). The district court further held that, upon the court's declaration of abandonment pursuant to 43 U.S.C. 912, the right-of-way reverted to the United States pursuant to 16 U.S.C. 1248(c). Pet. App. 29-30.

4. The court of appeals affirmed. Pet. App. 1-9. Like the district court, the court of appeals "recognize[d]"

that other circuits had reached contrary conclusions but determined that it was bound to follow circuit precedent in *Marshall*. *Id*. at 5-6.

In *Marshall*, the court of appeals had considered whether Section 912 governs the disposition of 1875 Act rights-of-way.[2] The defendants in *Marshall* contended, as petitioners do here, that Section 912 did not apply to the 1875 Act right-of-way because the United States retained no right, title, or interest in it, relying in large part on the characterization of an 1875 Act right-of-way as an "easement" in *Great Northern Railway Co.* v. *United States*, 315 U.S. 262 (1942). See *Marshall*, 31 F.3d at 1031.

*Marshall* rejected the contention that *Great Northern*'s characterization of an 1875 Act right-of-way barred the application of Section 912. 31 F.3d at 1031. In doing so, *Marshall* relied on a historical analysis of some 100 years of case law pertaining to federally granted railroad rights-of-way set forth in prior Tenth Circuit decisions and in *Idaho* v. *Oregon Short Line Railroad Co.*, 617 F. Supp. 207 (D. Idaho 1985). Those cases recognized that, although Congress had discontinued granting blocks of land to railroads after 1871, it still intended for railroads to have exclusive use and possession of their rights-of-way, which created inconsistencies with describing the nature of the railroads' interest in terms of a traditional easement. See, *e.g.*, *Wyoming* v. *Udall*, 379 F.2d 635,

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[2] *Marshall* was decided in 1994, several years after Section 1248(c) modified Section 912 to provide for the United States' interests in abandoned railroad rights-of-way to remain in the United States. The United States, however, was not a party to *Marshall*, and the question of the application of Section 1248(c) was not addressed in that case.

640 (10th Cir.), cert. denied, 389 U.S. 985 (1967); *Oregon Short Line*, 617 F. Supp. at 210.

As pertinent here, the definitional issue was addressed in three key cases. First, in *Northern Pacific Railway Co.* v. *Townsend*, 190 U.S. 267 (1903), this Court addressed whether owners of land traversed by a railroad right-of-way granted under an 1864 statute could gain adverse possession to a portion of the right-of-way on which they grew crops. *Id.* at 271. In holding that they could not, the Court explained that, although the right-of-way did not constitute a fee simple interest, it was a "limited fee" interest with an implied right of reverter in the United States when the right-of-way was no longer used for the purposes granted. *Ibid.*; see *Rio Grande W. R.R. Co.* v. *Stringham*, 239 U.S. 44, 47 (1915) (also describing 1875 Act rights-of-way as "limited fee" interests).

Second, in 1942 in *Great Northern*, this Court addressed whether a railroad owned the mineral estate under an 1875 Act right-of-way. The Court held that it did not, characterizing the 1875 Act rights-of-way as an "easement," and describing *Stringham*'s "limited fee" characterization as "inaccurate." 315 U.S. at 276-279. The Court distinguished the 1875 Act right-of-way from the right-of-way in *Townsend*, which had been granted under an 1864 statute, reasoning that, when Congress stopped subsidizing railroad construction with land grants after 1871, it also altered the rights-of-way to provide no fee interest to the railroads. See *id.* at 274-275.

Third, in *United States* v. *Union Pacific Railroad Co.*, 353 U.S. 112 (1957), the Court considered whether a right-of-way granted under a pre-1871 statute conveyed the underlying mineral estate to the railroad. The Court

concluded that it did not, reaching the same result as in *Great Northern* but calling into question its prior statements that the pre-1871 statutes had granted a full-fee interest to railroads. *Id.* at 119 (characterizing *Great Northern*'s "suggestion that a right of way may at times be more than an easement" as having been "made in an effort to distinguish" cases like *Stringham*).

On the basis of that history and the underlying statutes, *Oregon Short Line*—which was later followed by *Marshall*, 31 F.3d at 1032—concluded that, although Congress "did not intend [in the 1875 Act] to convey to the railroads a fee interest in the underlying lands," it nevertheless intended to convey a right-of-way that "carried with it the right to exclusive use and occupancy of the land," which goes beyond "a simple easement" "under traditional rules." 617 F. Supp. at 212. Moreover, the court explained, "[e]ven if the 1875 Act granted only an easement * * * Congress had authority * * * to grant such easements subject to its own terms and conditions" and "it did not necessarily follow that Congress would or did not intend to retain an interest in that easement." *Ibid.* The court observed that, in enacting Section 912 (and other provisions), "Congress clearly felt that it had some retained interest in railroad rights-of-way," *ibid.*, which did not need to be "shoehorned into any specific category cognizable under the rules of real property law." *Marshall*, 31 F.3d at 1032 (quoting *Oregon Short Line*, 617 F. Supp. at 212). Thus, the court concluded, even assuming that the 1875 Act granted only easements, Congress nevertheless intended to retain rights or interests in those easements, such that Section 912 applies to them. See *id.* at 1032; *Oregon Short Line*, 617 F. Supp. at 212-213.

Finding that *Marshall*'s reasoning controlled in this case, the court of appeals did not address the reasoning of more recent decisions of the Federal Circuit and Seventh Circuit on which petitioners relied. Pet. App. 5-6. It concluded that "the district court correctly held that the interest in the abandoned railroad right-of-way belongs to the United States." *Id.* at 6. It therefore affirmed, in relevant part, the decision to quiet title in favor of the United States. *Id.* at 9.[3]

**DISCUSSION**

The court of appeals' decision is correct. It relies on previous lower-court decisions that reconcile competing decisions of this Court and give effect to important federal statutes that would be rendered null under petitioners' interpretation. The courts of appeals, however, are divided on whether the United States may retain a reversionary interest in a railroad right-of-way issued under the 1875 Act. That question is sufficiently important and recurring to warrant this Court's review.

1. The court of appeals correctly held that the United States retains a reversionary interest in abandoned 1875 Act rights-of-way. Petitioners' argument to the contrary (Pet. 17-21) rests largely on this Court's characterization of an 1875 Act right-of-way as an "easement" in *Great Northern Railway Co.* v. *United States*, 315 U.S. 262, 279 (1942), and on petitioners' contention (Pet. 19-20, 24) that the right-of-way must therefore operate as a common-law easement that merges with the servient estate when abandoned. *Great Northern*, however, did not

[3] The court of appeals also addressed petitioners' appeal of the district court's decision with respect to different legal questions involving two road easements, Pet. App. 6-9, but that aspect of its decision is not at issue in this Court. See Pet. 12 n.4.

address the extent of any retained interest of the United States in 1875 Act rights-of-way, and it did not consider statutes from the 1920s, including 43 U.S.C. 912, that exercised federal control over the post-abandonment disposition of such rights-of-way. Furthermore, neither the distinction drawn in *Great Northern* (at the government's invitation) between pre- and post-1871 statutes nor the text and legislative history of the relevant statutes provide a basis for concluding that Congress intended in the 1875 Act to give up the continuing control it undisputedly exercised over previously granted rights-of-way.[4]

a. Courts have long struggled with how to characterize the nature of the property interests in federally granted railroad rights-of-way. Much of the difficulty derives from the special nature of such rights-of-way. As explained in *New Mexico* v. *United States Trust Co.*, 172 U.S. 171 (1898), a right-of-way that is subject to only intermittent and occasional use is typically deemed to be an easement, while one subject to "perpetual and continuous" use (such as a railroad right-of-way) may be deemed to require the fee for its enjoyment. *Id.* at 183. Thus, more than 20 years after the passage of the 1875 Act, this Court recognized, with respect to a railroad

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[4] Courts have consistently held that the United States retains an implied right of reverter in rights-of-way arising under pre-1871 statutes, the disposition of which is governed by 43 U.S.C. 912 and, where applicable, 16 U.S.C. 1248(c). See, *e.g.*, *Avista Corp.* v. *Wolfe*, 549 F.3d 1239, 1247-1251 (9th Cir. 2008); *Samuel C. Johnson 1988 Trust* v. *Bayfield Cnty.*, 520 F.3d 822, 831 (7th Cir. 2008); *Mauler* v. *Bayfield Cnty.*, 309 F.3d 997, 1002 (7th Cir. 2002), cert. denied, 538 U.S. 1032 (2003); *Vieux* v. *East Bay Reg'l Park Dist.*, 906 F.2d 1330, 1337 (9th Cir.), cert. denied, 498 U.S. 967 (1990); *Wyoming* v. *Andrus*, 602 F.2d 1379, 1384 (10th Cir. 1979); *Wyoming* v. *Udall*, 379 F.2d 635, 640 (10th Cir.), cert. denied, 389 U.S. 985 (1967).

right-of-way, that "if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted, one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property." *Ibid.*; see *Western Union Tel. Co.* v. *Pennsylvania R.R. Co.*, 195 U.S. 540, 570 (1904) (noting that a railroad right-of-way is "more than a mere right of passage," "is more than an easement," and has "the substantiality of the fee"); *Railroad Co.* v. *Baldwin*, 103 U.S. 426, 429 (1880) (referring to a railroad right-of-way as constituting "a present absolute grant").

In 1903, however, this Court took a step away from that characterization in *Northern Pacific Railway Co.* v. *Townsend*, 190 U.S. 267 (1903). Faced with the question whether such rights-of-way were subject to adverse possession by surface use, *Townsend* held that the rights-of-way at issue there were "limited fee" interests that did not give a railroad a fee simple interest but instead reverted to the United States when they were no longer used for the intended purposes. *Id.* at 271.

Nearly 40 years later, in *Great Northern*, this Court took another step away from the full-fee characterization of railroad rights-of-way. In that case, the Court considered whether an 1875 Act right-of-way granted the underlying oil and mineral interests to the railroad. Apparently assuming that the "limited fee" interest described in *Townsend* included the mineral interests in the right-of-way, *Great Northern* distinguished between pre- and post-1871 statutes and characterized the 1875 Act as granting an "easement" rather than a "limited fee" interest. 315 U.S. at 277-278. The Court noted, however, that none of the prior cases involved the question of rights to subsurface minerals, *id.* at 278-279,

raising a question about the extent of the differences between 1875 Act rights-of-way and their earlier counterparts.[5]

In *United States* v. *Union Pacific Railroad Co.*, 353 U.S. 112 (1957), the Court answered the mineral-rights question with respect to a pre-1871 right-of-way. The Court held that an 1862 statute granting a right-of-way to the Union Pacific—like the 1875 Act as construed in *Great Northern*—did not convey mineral interests to the railroad. *Id.* at 114-120. While *Union Pacific* relied in part on specific language in the 1862 statute, *id.* at 114-115, the Court also sought to reconcile its earlier decisions characterizing the property interest in federally granted railroad rights-of-way. *Union Pacific* rejected the argument that *Townsend* and its progeny compelled a ruling that the railroad owned the subsurface mineral rights, concluding that "[t]he most that the 'limited fee' cases decided was that the railroads received all surface rights to the right of way and all rights incident to a use for railroad purposes." *Id.* at 119. The Court also avoided applying *Great Northern*'s distinction between pre- and post-1871 Acts, reasoning that "[t]he suggestion that a right of way may at times be more than an easement was made in an effort to distinguish the earlier 'limited fee' cases," none of which had involved subsurface oil and minerals. *Ibid.*

As lower courts have since observed, "[t]he language of the 1862 Act under which the Union Pacific obtained

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[5] While the United States' brief in *Great Northern* principally contended that post-1871 railroad rights-of-way were "in the nature of an easement," U.S. Br. at 8, *Great Northern*, *supra* (No. 149), it argued in the alternative that such rights-of-way constituted limited fee interests in only "the surface and so much of the subsurface as is necessary for support," *id.* at 37.

its right-of-way and the language of the 1875 Act are identical in all important respects." *Wyoming* v. *Udall*, 379 F.2d 635, 638 (10th Cir.), cert. denied, 389 U.S. 985 (1967); see *Idaho* v. *Oregon Short Line R.R. Co.*, 617 F. Supp. 207, 210 n.1 (D. Idaho 1985). Accordingly, the Court's decision in *Union Pacific* "significantly undercut[s]" the distinction drawn in *Great Northern* between pre- and post-1871 statutes granting rights-of-way at least as they relate to the question here. *Oregon Short Line*, 617 F. Supp. at 212.

b. The statutory text and legislative history of the 1875 Act also support limiting *Great Northern*'s distinction between pre- and post-1871 rights-of-way.

*Great Northern* relied on three aspects of the 1875 Act's language. First was its provision for the grant of "'*the*,' not *a*, 'right of way through the public lands.'" 315 U.S. at 271 (quoting 43 U.S.C. 934) (emphases added). But the 1864 statute at issue in *Townsend* also granted "*the* right of way through the public lands," as did many other railroad grant statutes. Act of July 2, 1864, ch. 217, § 2, 13 Stat. 367 (emphasis added); see, *e.g.*, Act of June 7, 1872, ch. 323, § 1, 17 Stat. 280; Act of July 25, 1866, ch. 242, § 3, 14 Stat. 240; Act of July 25, 1866, ch. 241, § 1, 14 Stat. 236; Act of July 1, 1862, ch. 120, § 2, 12 Stat. 491.

Second, *Great Northern* cited language providing that a railroad whose right-of-way "passes through a canyon, pass or defile 'shall not prevent any other railroad company'" from also using or occupying that portion of the road. 315 U.S. at 271 (quoting 43 U.S.C. 935). But that language also appeared in a statute granting "a strip of land" rather than a "right-of-way" to the railroad. Act of Feb. 5, 1875, ch. 35, §§ 1, 3, 18 Stat. 306-307. The phrase "strip of land" was generally deemed to suggest the

grant of a fee interest rather than an easement. See *New Mexico*, 172 U.S. at 182 (noting "right-of-way" may be used to refer to a "right of passage" or "to describe that *strip of land* which railroad companies take upon which to construct their roadbed," which is "the land itself—not a right of passage over it") (emphasis modified); see also *Deed to Railroad Company as Conveying Fee or Easement* § 3[b], 6 A.L.R. 3d 973, 978 (1966) (question of interest conveyed turns on "whether the granting clause conveys a *designated strip or piece of land* or whether it basically refers to a right or privilege with respect to the described premises") (emphasis added).[6]

Third, *Great Northern* relied on language providing that the land crossed by the right-of-way shall be disposed of "subject to" the right-of-way. 315 U.S. at 271. But that phrase was also used in statutes granting railroads "a strip of land." See Act of Apr. 12, 1872, ch. 96, § 1, 17 Stat. 52; Act of June 8, 1872, ch. 364, § 1, 17 Stat. 343; Act of Feb. 5, 1875, ch. 35, §§ 1, 2, 18 Stat. 306-307. Moreover, this Court, too, used the phrase "subject to" to indicate that "limited fee" interests are excluded from the conveyance of lands they cross. See *Railroad Co.* v. *Baldwin*, 103 U.S. at 430 (under 1866 statute "all persons acquiring any portion of the public lands, after the passage of the act in question, took the same *subject to* the right of way conferred by it for the proposed road") (emphasis added); *Rio Grande W. R.R. Co.* v. *Stringham*, 239 U.S. 44, 46-47 (1915) (in characterizing 1875 Act rights-of-way as "limited fee" interests, explaining

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[6] The "shall not prevent any other railroad company" language, of course, is not found in pre-1871 statutes that made grants to specific railroads because those grants did not contemplate a need for multiple railroad companies to share a right-of-way.

that the lower court held that the defendants' title "was *subject to* this [limited fee] right of way") (emphasis added).

Furthermore, the legislative history of the 1875 Act reveals no intention to make rights-of-way differ depending on whether they were granted before or after 1871. To the contrary, in presenting the 1875 Act for a vote on the floor of the House of Representatives, the chairman of the responsible committee agreed that, even after the underlying lands were conveyed, the railroad rights-of-way would constitute "property of the United States," just like the rights-of-way granted in the 1862 and 1864 Union Pacific statutes. 3 Cong. Rec. 406 (1875).

c. Congress's intention that the United States retain a reversionary interest in 1875 Act rights-of-way was also made manifest in later statutes. Cf. *Great Northern*, 315 U.S. at 277 ("It is settled that 'subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.'") (quoting *Tiger* v. *Western Inv. Co.*, 221 U.S. 286, 309 (1911)). Thus, 43 U.S.C. 940, which was the product of 1906 and 1909 statutes, declares that, where a rail line had not been constructed within five years of the grant of an 1875 Act right-of-way, the right-of-way was "forfeited to the United States" and "the United States resumes the full title to the lands covered thereby free and discharged from such easement." While *Great Northern* relied on Section 940's reference to an "easement," 315 U.S. at 276-277, the Court was not presented with, and did not examine, the language providing for the United States' resumption of title to the right-of-way. Of course, the statute in turn directed the conveyance of that title to the owner of the underlying lands. But there would have been no need to convey the right-of-way if the United States had

not retained any interest in it. See 16 Op. Att'y Gen. 250 (1879) (land within right-of-way in which United States retains no interest vests in owners of tract through which right-of-way passes upon its forfeiture).

In 1922, Congress enacted Section 912, which provided a permanent statutory regime for the forfeiture and abandonment of 1875 Act and other rights-of-way. 43 U.S.C. 912. By providing for the post-abandonment conveyance of rights-of-way crossing private lands to municipalities and for public highways, and by otherwise affirmatively "transfer[ring]" them to owners of the underlying land, Section 912 again demonstrated Congress's understanding that the United States had retained an interest in those rights-of-way. See also 43 U.S.C. 913 (provision enacted in 1920 authorizing railroad companies that had received statutory grants for rights-of-way "to convey to any State, county, or municipality any portion of such right of way to be used as a public highway or street"). Finally, with the enactment of 16 U.S.C. 1248(c) in 1988, Congress continued to recognize the United States' reversionary interest in, and its right to control the disposition of, 1875 Act rights-of-way by modifying Section 912 generally to retain the United States' interest in them after they are abandoned.

The question whether the United States retains an interest in 1875 Act rights-of-way is complicated by the changing interpretations of the nature of railroad right-of-way grants made in *Townsend*, *Great Northern*, and *Union Pacific*. But the rationale underlying the court of appeals' decision provides the better view of how to resolve that tension. It eliminates sharp distinctions between pre- and post-1871 rights-of-way and gives effect to congressional intent reflected in Section 912

and the several other statutes in which Congress indicated its understanding that the United States had retained reversionary interests in post-1871 rights-of-way that were similar to those it had retained under their pre-1871 counterparts. Petitioners' reading, in contrast, relies on outdated distinctions among Congress's railroad rights-of-way and nullifies Congress's intent in Sections 912, 913, and 1248(c). The court of appeals correctly held that Section 912 applies to 1875 Act rights-of-way.[7]

2. Petitioners also contend (Pet. 21-25) that the decision conflicts with the holding in *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979), that a land patent transfers all title of the United States unless expressly reserved by statute or in the patent. As this Court explained in *Townsend*, however, it was immaterial that a homesteader was granted a full legal subdivision, without an exclusion for the right-of-way in the patent, because the grant of the right-of-way, filing of the map of definite location, and construction of the railroad took it out of the category of public lands subject to pre-emption and sale, so that "homesteaders acquired no interest in the land within the right of way," which reverted to the United States upon abandonment. 190 U.S. at 270, 271. The Seventh and Eighth Circuits have similarly held that the United States retained the reversionary interest

[7] Even if Section 912 does not apply to all 1875 Act rights-of-way, petitioner's property was not conveyed into private ownership until 1976 (Pet. App. 13)—well after the enactment of Section 912 and the other 1920s statutes indicating that the United States had retained an interest in such rights-of-way—and the underlying railroad was not abandoned until at least 2003 or 2004 (*id.* at 13-14)—well after the 1988 enactment of Section 1248(c) made clear that the reverter would remain in the United States.

in pre-1871 federally granted rights-of-way, without requiring any reservation in the land patent. See *Mauler* v. *Bayfield Cnty.*, 309 F.3d 997, 1000-1002 (7th Cir. 2002), cert. denied, 538 U.S. 1032 (2003); *Rice* v. *United States*, 479 F.2d 58, 59 (8th Cir.), cert. denied, 414 U.S. 858 (1973). In those cases, the courts determined that, by operation of the granting statutes, the United States retained a reversionary interest that did not transfer with the patent. There was accordingly no need for an express reservation of that interest in the patent. See *Swendig* v. *Washington Water Power Co.*, 265 U.S. 322, 332 (1924) (noting that "[t]he issuing of the patents without a reservation did not convey what the law reserved"); *Samuel C. Johnson 1988 Trust* v. *Bayfield Cnty.*, 520 F.3d 822, 831-832 (7th Cir. 2008) (noting that the Executive Branch, unlike Congress, cannot relinquish title to reversionary interests in railroad rights-of-way established by statute). The same principle applies to 1875 Act rights-of-way. See *Stalker* v. *Oregon Short Line R.R. Co.*, 225 U.S. 142, 153 (1912) (upon railroad's filing of map of definite location under 1875 Act, "the grounds so selected were segregated from the public lands"); *Mary G. Arnett*, 20 Pub. Lands Dec. 131 (1895) (1875 Act right-of-way reservation unnecessary in patent because statute provides land is transferred "subject to" the right-of-way).

3. As petitioners note (Pet. 32-33), and as the court of appeals (Pet. App. 5-6) and the district court (*id.* at 26) recognized, the decision below conflicts with the Federal Circuit's decision in *Hash* v. *United States*, 403 F.3d 1308 (2005), which held, in the context of a suit seeking just compensation for a taking under the Fifth Amendment, that the United States did not "retain[]" a "reversionary interest to the land underlying [1875 Act] rights-

of-way after disposing of the land by land grant patent under the Homestead Act." *Id.* at 1318. Moreover, the Seventh Circuit has, in dictum, concluded that *Hash* "make[s] better sense than [the Tenth Circuit's decision in] *Marshall*." *Samuel C. Johnson 1988 Trust* v. *Bayfield Cnty.*, 649 F.3d 799, 803 (2011). By contrast, the Ninth Circuit has, in dictum, agreed with *Oregon Short Line* that Section 912 applies to rights-of-way granted "both before and after 1871." *Vieux* v. *East Bay Reg'l Park Dist.*, 906 F.2d 1330, 1335, cert. denied, 498 U.S. 967 (1990). There is also disagreement in state courts of last resort. Compare *Whipps Land & Cattle Co.* v. *Level 3 Communications, LLC*, 658 N.W.2d 258, 265 (Neb. 2003) (following the Ninth and Tenth Circuits; holding that Section 912 "applies to rights-of-way created pursuant to the 1875 Act" and that "the United States retains all reversionary interests in such rights-of-way"), with *Brown* v. *Northern Hills Reg'l R.R. Auth.*, 732 N.W.2d 732, 740 (S.D. 2007) (finding the United States had no reversionary interest subject to Section 912 in the context of a land patent that was issued before Section 912 was enacted and did not reserve a right in the right-of-way).

That division in authorities has added significance because the Federal Circuit has exclusive jurisdiction over just-compensation claims against the United States, whether they are brought in the Court of Federal Claims or a federal district court. See 28 U.S.C. 1295(a), 1346(a)(2), 1491 (2006 & Supp. V 2011). As a result, a federal district court entertaining a just-compensation claim must, in light of *Hash*, hold that the United States has no reversionary interest in an 1875 Act right-of-way, even though that same district court may hold the oppo-

site when the question is presented outside the context of a just-compensation claim.

4. Whether the United States has reversionary interests in 1875 Act rights-of-way is a question of sufficient importance to warrant this Court's review. Although this Office has been advised that it is rare for the United States to bring a quiet-title action like the one in this case, other disputes about the ownership of 1875 Act rights-of-way—particularly about the application of Sections 912 and 913, which may arise in either federal or state court—arise with some frequency.

Actions involving 1875 Act rights-of-way are often brought against the United States by landowners seeking just compensation for actions taken to preserve railroad rights-of-way for future rail use under the National Trails System Act Amendments of 1983 (Trails Act), Pub. L. No. 98-11, § 208, 97 Stat. 48, which amended the National Trails System Act, 16 U.S.C. 1241 *et seq*. The Trails Act encourages the preservation of railroad rights-of-way by contemplating that a railroad that wishes to cease operations along a particular route may negotiate with a State, municipality, or private group that is prepared to assume financial and managerial responsibility for the right-of-way and any legal liability arising out of that entity's use of the right-of-way. See *Preseault* v. *I.C.C.*, 494 U.S. 1, 6-7 (1990). The Trails Act provides that such use shall not be deemed to be an abandonment of the right-of-way for railroad purposes. *Ibid*. Where railroad rights-of-way are held as typical common-law easements that, but for the Trails Act, would be subject to extinguishment under applicable law if abandoned, that may give rise to a just-compensation claim. *Id.* at 8. Whether a right-of-way is nothing more than a common-law easement is a critical issue in such

claims. Any rail-banked portion of a right-of-way may cross hundreds of properties, and such actions have resulted in numerous class-action suits for just compensation, involving hundreds of individual claims.

To date, thousands of claims pertaining to 1875 Act rights-of-way have been filed. Under current Federal Circuit precedent, the United States will be obligated to pay just compensation on many claims in which ownership of the right-of-way is often a determining factor. Those claims could impose considerable financial liability on the United States and the public fisc, making it appropriate for this Court to review whether the United States holds a reversionary interest in an 1875 Act right-of-way.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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