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

BRIEF OF PETITIONERS

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QUESTION PRESENTED

This case involves the General Railroad Right-of-Way Act of 1875 ("1875 Act"), under which thousands of miles of rights-of-way exist across the United States. In *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942), this Court held that 1875 Act rights-of-way are easements and not limited fees with an implied reversionary interest. Based upon the 1875 Act and this Court's decisions, the Federal and Seventh Circuits have concluded that the United States did not retain an implied reversionary interest in 1875 Act rights-of-way after the underlying lands were patented into private ownership. In this case, the Tenth Circuit reached the opposite conclusion and acknowledged that its decision would continue a circuit split. The question presented is:

Did the United States retain an implied reversionary interest in 1875 Act rights-of-way after the underlying lands were patented into private ownership?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners are Marvin M. Brandt Revocable Trust and Marvin M. Brandt, Trustee. Petitioners were defendants in the U.S. District Court for the District of Wyoming and appellants before the U.S. Court of Appeals for the Tenth Circuit. Petitioners are not corporate entities.

Respondent is the United States of America. The United States initiated this action against Petitioners and others, and was the appellee below.

Wyoming and Colorado Railroad Company ("WYCO") is a Utah Corporation and was a defendant below. WYCO did not participate in the Tenth Circuit proceedings.

The other defendants were: Board of County Commissioners, Albany County, Wyoming; DuWayne Keeney; Elizabeth Keeney; Susan Torres; Juan Torres; Bunn Family Trust, Debra R. Hinkel, Trustee; Roger L. Morgan; Daniel K. McNierney; Susan McNierney; Ralph L. Lockhart; Duane King; Patricia King; Marilyn Flint; Marjorie Secrest; Gary Williams; June Williams; Glenna Louise Marrs Trust; Glenna Marrs and Rondal Wayne, Trustees; Kenneth R. Lankford II; Kenneth R. Lankford, Sr.; Patrick R. Rinker; Patricia A. Rinker Flanigin; David Yeutter; Marilyn Yeutter; Snowy Range Properties, LLC; Michael Palmer; Sally Palmer; Ray L. Waits;

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT – Continued

Breazeale Revocable Trust, Vernon H. and Norma J. Breazeale, Trustees; Eugene L. Budnick; Donald Graff; Wanda Graff; Lawrence R. Otterstein; Ginny L. Otterstein; Ronald B. Yeutter; Helen D. Yeutter; Patrick R. Rinker; Lynda L. Rinker; Edmund L. Gruber; Donna Ellen Gruber; Robert S. Pearce; Dorothy M. Pearce; David M. Pearce; Steven M. Pearce; Kathlynn A. Lambert; Steven P. Taffe; Janis A. Taffe; Billy M. Ratliff; and Tobin L. Ratliff. None of these defendants participated in the Tenth Circuit proceedings.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Tenth Circuit was not selected for publication in the *Federal Reporter*, is available at 496 Fed. App'x 822, and is reproduced at Petition Appendix ("Pet. App.") 1-9. The opinion of the U.S. District Court for the District of Wyoming was not selected for publication in the *Federal Supplement,* is available at 2008 WL 7185272, and is reproduced at Pet. App. 10-56.

STATEMENT OF JURISDICTION

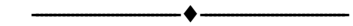
On March 2 and 3, 2009, the district court entered final judgment against Petitioners. Pet. App. 57-59. On April 29, 2009, Petitioners timely filed a Notice of Appeal. Joint Appendix ("JA") 7. On September 11, 2012, the Tenth Circuit issued a per curiam decision affirming the district court's judgment. Pet. App. 1-9. On October 24, 2012, Petitioners timely filed a petition for rehearing en banc and/or panel rehearing. That petition was denied on December 26, 2012. *Id*. 67-68. The Petition for Writ of Certiorari was timely filed on March 22, 2012, within ninety days of denial of the petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

The General Railroad Right-of-Way Act of 1875 ("1875 Act"), 18 Stat. 482-83 (1875), is codified at 43 U.S.C. §§ 934-939, and is reproduced at Pet. App. 69-71.

The Act of March 8, 1922, 42 Stat. 414-15 (1922), is codified at 43 U.S.C. § 912, and is reproduced at Pet. App. 72-73.

Relevant portions of Section 3 of the National Trails System Improvements Act of 1988, Pub. L. No. 100-470, § 3, 102 Stat. 2281 (1988), are codified at 16 U.S.C. § 1248(c) and (d), and are reproduced at Pet. App. 74.



STATEMENT OF THE CASE

I. LEGAL BACKGROUND.

A. Railroad Land Grants.

During the mid-1800s, the United States promoted, as national policy, the development and settlement of the public domain in the western United States. *See*, *e.g.*, *Leo Sheep Co. v. United States*, 440 U.S. 668, 670-77 (1979). In furtherance of this policy, between 1850 and 1871, Congress sought to encourage the private building of railroads through the immense and undeveloped public domain by granting railroads a right-of-way ("ROW") and alternating sections of lands along the ROW. *E.g.*, 1862 Pacific Railway Act, 12 Stat. 489-98 (1862); 1864 Pacific Railway

Act, 13 Stat. 356-65 (1864); 1864 Northern Pacific Railway Act, 13 Stat. 365-72 (1864). This Court originally interpreted pre-1871 railroad ROW grants as conveying a fee simple interest in the land. *Missouri, K. & T. R. Co. v. Roberts*, 152 U.S. 114, 117 (1894) (characterizing the ROW granted by the Act of July 26, 1866, 14 Stat. 289 (1866), as "absolute in terms, covering both the fee and possession"). In 1903, this Court characterized a pre-1871 ROW as a limited fee interest in the land with an implied condition of reverter. *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903) ("*Townsend*") (characterizing the ROW grant in the Northern Pacific Act as "a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted").

B. The General Railroad Right-Of-Way Act Of 1875.

Railroad land grants eventually met with public disapproval, and after 1871, Congress changed its policy in favor of homesteaders. Paul W. Gates, *History of Public Land Law Development* 379-81, 396-99, 454-57 (1968); *see Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 868 (1999) (noting that homestead acts were passed in the second half of the 19th century to "encourage the settlement of the West by providing land in fee simple absolute to homesteaders"). For example, on March 11, 1872,

the House of Representatives passed the following Resolution:

> Resolved, 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, 42nd Cong., 2d Sess., 1585 (1872) (emphasis added).

Although unwilling to make outright grants of land to railroads, Congress did not wish to stymie the development of a nationwide railroad system. To avoid this problem, Congress passed a number of special acts granting ROWs across the public lands to specific railroads. These acts generally provided for the disposal of lands over which the railroad ROW crossed "subject to" the railroad ROW. *E.g.*, Act of April 12, 1872, 17 Stat. 52 (1872) ("thereafter all lands *over* which the said line of road shall pass shall be sold, located, or disposed of by the United States, *subject to* such right of way so located as aforesaid" (emphasis added)); *see* Cong. Globe, 42nd Cong., 2d Sess., 2136-37 (1872). Finally, in 1875, to avoid the need for special legislation for each new railroad, Congress passed the General Railroad Right-of-Way Act of 1875 ("1875 Act"), 18 Stat. 482-83 (1875) (codified

at 43 U.S.C. §§ 934-939), repealed as to the issuance of new rights-of-way by the Federal Land Policy and Management Act ("FLPMA"), Pub. L. No. 94-579, Title VII § 706(a), 90 Stat. 2743, 2793 (1976).

Section 1 of the 1875 Act provides "[t]he right of way through the public lands of the United States is 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. Section 2 provides "[a]ny railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, *in common with the road first located*. . . ." *Id.* § 935 (emphasis added). Of particular importance is Section 4, which provides: "all such lands *over* which such right of way shall pass shall be disposed of *subject to such right of way*."[1] 43 U.S.C. § 937 (all emphasis added). Based upon this statutory language, the Department of the Interior ("DOI") interpreted the 1875 Act as granting an easement rather than a fee. *E.g.*, *Fremont, Elkhorn and Missouri Valley Ry. Co.*, 19 L.D. 588, 590 (1894) ("That the

[1] Section 4 also provides "[t]hat if any section of said *road* shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said *road*." 43 U.S.C. § 937 (all emphasis added).

right of way granted by the [1875 Act] is a mere easement can not [sic] be questioned, for the fourth section provides that 'thereafter all such lands, over which such right of way shall pass, shall be disposed of, subject to such right of way.'" (quoting 43 U.S.C. § 937)). Congress also expressly characterized 1875 Act ROWs as easements in passing acts in 1906 and 1909 to invoke the forfeiture provision in the 1875 Act. Act of June 26, 1906, 34 Stat. 482 (1906); Act of February 25, 1909, 35 Stat. 647 (1909) (codified at 43 U.S.C. § 940).

C. This Court's Decision In *Stringham*.

The understanding that 1875 Act ROWs are easements continued until 1915, when this Court decided *Rio Grande W. Ry. Co. v. Stringham*, 239 U.S. 44 (1915) ("*Stringham*"). That case involved a private dispute between a railroad claiming an 1875 Act ROW against the purchaser of surface rights from the owner of a patented mining claim. *Id*. at 45-46. The railroad prevailed and title to the ROW was quieted in its favor. *Id*. at 46. The railroad ultimately brought a writ of error to this Court asserting that it should have been adjudged the fee simple owner of the land and minerals underlying the railroad ROW. *Id*. at 46. Although this Court affirmed, it made the following statement based upon *Townsend*'s characterization of a pre-1871 ROW grant:

> The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, *but a limited fee, made on*

> *an implied condition of reverter* in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee.

Id. at 48 (emphasis added).

D. Congress Reacts To *Stringham*.

The "limited fee" language in *Stringham* raised concerns in Congress as to what to do with the strips of land upon abandonment by a railroad. H.R. Rep. No. 67-217 at 2-3 (1921). Because these strips of land would have "little or no value to the government[,]" *id*., and because Congress had originally intended to convey the land to homesteaders, Congress passed the Act of March 8, 1922, 42 Stat. 414-15 (1922) (codified at 43 U.S.C. § 912) ("§ 912"). Entitled "An Act To provide for the disposition of abandoned portions of rights of way granted to railroad companies" the Act was passed to dispose of any interest that the United States may still possess at the time a ROW was abandoned. Specifically, the Act provides: "[w]henever public lands of the United States have been or may be granted to any railroad company for use as a right of way . . . ," if that use should cease, "whether by forfeiture or by abandonment . . . declared or decreed by a court of competent jurisdiction . . . , then all right, title, interest, and estate of the United States in said lands shall . . . be transferred to" the person to whom title of the whole of the legal subdivision traversed by the railroad had been

conveyed "and this by virtue of the patent thereto[,]" except such part of the ROW that may be embraced in a public highway established within one year after the declaration or decree of forfeiture or abandonment. *Id*. The Act further provides that the transfer of such lands "shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land. . . ." *Id*.

E. This Court Rules That 1875 Act ROWs Are Easements.

In *Great Northern Ry. Co. v. United States*, 315 U.S. 270 (1942), the United States sought a determination of the nature and scope of 1875 Act ROWs. Based upon the text of the Act, Congress's shift in policy in 1871, the DOI's early interpretation of the 1875 Act, and similar constructions by Congress as reflected in subsequent legislation, the United States argued that 1875 Act ROWs are only easements that conveyed no right to the minerals underlying the ROW. Brief for the United States, *Great Northern Ry. Co. v. United States*, No. 149, 1942 WL 54245, **9-35.

This Court emphatically agreed with the United States' easement argument and ruled that 1875 Act ROWs are easements. *Great Northern*, 315 U.S. at 271 ("The [1875] Act . . . clearly grants only an easement, and not a fee."). This Court also rejected the statement in *Stringham* that 1875 Act ROWs were "limited fee[s], made on an implied condition of reverter":

> The conclusion that the railroad was the owner of a 'limited fee' was based on cases arising under the land-grant acts passed prior to 1871 and it does not appear that Congress's change of policy after 1871 was brought to the Court's attention. That conclusion is inconsistent with the language of the [1875] Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation. We therefore do not regard it as controlling.

Id. at 279 (footnote omitted). Fifteen years later, this Court reaffirmed its ruling in *Great Northern*. *United States v. Union Pacific R. Co.*, 353 U.S. 112, 119 (1957) ("*Union Pacific*") (In *Great Northern* "we noted that a great shift in congressional policy occurred in 1871 [and] after that period only an easement for railroad purposes was granted. . . .").

F. The National Trails System Improvements Act Of 1988.

Great Northern and *Union Pacific* established a clear demarcation of the respective property interests associated with 1875 Act ROWs. Following those decisions, litigation over the nature and scope of 1875 Act ROWs was essentially nonexistent, until 1983 when Congress passed what is commonly referred to as the "Rails-to-Trails Act" in an effort to transform abandoned railroad ROWs into recreational trails. National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 42 (1983) (codified at 16

U.S.C. §§ 1241-1251); *Preseault v. I.C.C.,* 494 U.S. 1, 6-9 (1990) ("*Preseault I*") (explaining operation of the Rails-to-Trails Act). Although laudable, that goal has often clashed with private property interests. *Preseault v. United States*, 100 F.3d 1525, 1549-53 (Fed. Cir. 1996) (en banc) ("*Preseault II*") (Rails-to-Trails Act effectuated a taking by preventing abandoned railroad ROWs from unburdening private land). Five years later, Congress passed the National Trails System Improvements Act of 1988, Pub. L. No. 100-470, 102 Stat. 2281 (1988). Section 3 of that Act provides, in relevant part:

> Commencing 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 upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such section.

16 U.S.C. § 1248(c). This provision had its critics, and some federal officials expressed concern over whether the United States retained any interest in abandoned railroad ROWs. *E.g.*, S. Rep. No. 100-408 at 15 (1988), *reprinted in*, 1988 U.S.C.C.A.N. 2607, 2617 (Director of the National Park Service explaining "we are concerned . . . that the Federal Government could be placed in the position of asserting title to that which it no longer owns, thus creating an issue of a potential

taking by the Federal Government of private property.").

II. PROCEEDINGS BELOW.

In 1908, the Laramie, Hahn's Peak & Pacific Railway Company was granted an 1875 Act ROW. Pet. App. 13. The grant was for a 200-foot-wide ROW approximately 66 miles in length, which ran from Laramie, Wyoming south to the Wyoming-Colorado border. *See* Pet. App. 13.

On February 18, 1976, the United States patented approximately 83.32 acres of land, commonly referred to as Fox Park, Wyoming, to Melvin M. and Lulu M. Brandt, parents of Marvin M. Brandt.[2] Pet. App. 76-78. The patent was issued pursuant to the General Exchange Act, 16 U.S.C. §§ 485-86.[3] Pet. App. 76. The patented land is surrounded by what is now referred to as the Medicine Bow-Routt National Forest, and is essentially bisected by the above-described 1875 Act

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[2] Marvin M. Brandt's father began working at the Fox Park sawmill in 1939, and took over ownership and operation of the sawmill in 1944. Joint Appendix ("JA") 19. Marvin M. Brandt, began working at the sawmill in 1958 and later operated the sawmill from 1976 until he closed it in 1991. *Id*.

[3] The General Exchange Act provides: "the Secretary of Agriculture is authorized . . . to accept on behalf of the United States title to any lands within the exterior boundaries of the national forests . . . , and in exchange therefor may patent not to exceed an *equal value* of such national-forest land. . . ." 16 U.S.C. § 485 (emphasis added).

ROW.[4] Pet. App. 11-13; JA 21 (depicting patented land). Although the Patent expressly reserves ROWs for ditches and canals and for two Forest Service roads, it does not reserve any interest in the 1875 Act ROW. Pet. App. 76-78. Instead, the Patent simply provides that the patented land is: "SUBJECT TO *those rights for railroad purposes* as have been granted to the Laramie Hahn's Peak & Pacific Railway Company, its successors or assigns . . . under the Act of March 3, 1875, 43 U.S.C. 934-939." Pet. App. 78 (emphasis added). Most of the patented land, including all of the patented land burdened by the 1875 Act ROW, is currently owned by Petitioners, Marvin M. Brandt Revocable Trust and Marvin M. Brandt, Trustee (collectively "Brandt"). JA 19-20.

In 1987, the Wyoming and Colorado Railroad Company, Inc. ("WYCO") acquired the 1875 Act ROW. Pet. App. 13. On May 15, 1996, WYCO filed a Notice of Intent to Abandon Rail Service with the Surface Transportation Board ("STB") seeking to abandon the 1875 Act ROW including the portion that traversed Brandt's property. *Id*. On December 31, 2003, the STB approved abandonment of the 1875 Act ROW, and, on January 15, 2004, WYCO notified the STB that it had consummated abandonment. *Id*. 13-14.

On July 14, 2006, the United States filed suit in the U.S. District Court for the District of Wyoming seeking a judicial decree of abandonment under

[4] The 1875 Act ROW covers approximately 10 acres of the 83.32 acres patented. *See* JA 21; Pet. App. 76.

§ 912, for approximately 28 miles of the 1875 Act ROW that was within the National Forest. Pet. App. 10-11. The United States also sought to quiet title against Brandt and approximately 50 other private landowners over whose lands a portion of the 1875 Act ROW crossed.[5] *See* Pet. App. 11-12. The United States alleged that the 1875 Act ROW was the type of ROW described in § 912. Dist. Ct. Dkt. No. 105 at 11-12. The United States also alleged that, pursuant to 16 U.S.C. § 1248(c), any interest of the United States remaining in the 1875 Act ROW would be retained by the United States upon a judicial decree of abandonment. *Id*.

Brandt answered and filed a counterclaim seeking to quiet title to the abandoned 1875 Act ROW.[6]

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[5] The United States also sued WYCO, which stipulated to the entry of judgment that it had abandoned the relevant segment of the 1875 Act ROW. Pet. App. 60-61; JA 14. The United States either settled with, or obtained default judgments against, all the landowners, except Brandt. Brief for the United States ("U.S. Br.") at 4.

[6] Brandt also sought to quiet title to the Forest Service road easements that burden his property. *See* Pet. App. 31-56. That claim is not at issue here. Brandt also counterclaimed for just compensation if the district court were to hold that the United States acquired some kind of property interest in the abandoned 1875 Act ROW under 16 U.S.C. § 1248(c). This counterclaim was dismissed without prejudice. Pet. App. 62-66. After final judgment by the district court, Brandt filed a takings claim in the Court of Federal Claims. That case is currently stayed in the Court of Federal Claims pending the outcome of this case. *Brandt v. United States*, No. 09-265; *see Brandt v. United States*, 102 Fed. Cl. 72 (2011), *rev'd*, 710 F.3d 1369 (Fed. Cir. 2013).

See Pet. App. 12. Brandt argued, *inter alia*, that, under this Court's decision in *Great Northern*, the 1875 Act ROW was an easement and not a limited fee with an implied reversionary interest held by the United States. Because neither the 1875 Act nor the Patent expressly reserved any interest in the ROW, Brandt acquired fee title to the patented land "subject to" the railroad easement. *Id*. And, upon abandonment, Brandt's property became unburdened by the 1875 Act ROW. *Id*. In support of that argument, Brandt relied primarily on two recent decisions applying *Great Northern*, both of which held that 1875 Act ROWs are easements and that the United States did not retain implied reversionary interests in 1875 Act ROWs after the underlying lands were patented. *Hash v. United States*, 403 F.3d 1308, 1316-17 (Fed. Cir. 2005); *Beres v. United States*, 64 Fed. Cl. 403, 427-28 (2005).

On April 8, 2008, the district court ruled in favor of the United States. Pet. App. 13-30. The district court noted that it was required to follow the Tenth Circuit's decision in *Marshall v. Chicago & N.W. Transp. Co*., 31 F.3d 1028 (10th Cir. 1994), which had ruled that § 912 applied to 1875 Act ROWs. Pet. App. 26-27. Based upon *Marshall* and 16 U.S.C. § 1248(c), the district court then ruled that the United States retained an implied reversionary interest in the 1875 Act ROW upon abandonment. Pet. App. 29-30.

Almost one year later, the district court entered judgment in favor of the United States and against Brandt. Pet. App. 57-59. That judgment provides, in

relevant part, that: (i) the 1875 Act ROW, where it traverses Brandt's property, has been abandoned; (ii) the United States retained a reversionary interest in the ROW; (iii) as a result of the abandonment, title to the ROW is "hereby vested and quieted in the United States"; and (iv) fee title to the underlying land and minerals remains with Brandt, subject to the rights of the United States in the ROW. *Id*. Although not pleaded, argued, or proven by the United States, that judgment also provides: "[t]hat the interest quieted and vested in the United States includes the right to construct and operate a *recreational trail* on the railroad right-of-way[.]" *Id*. at 59 (emphasis added).

On April 29, 2009, Brandt appealed. JA 7. On September 11, 2012, the Tenth Circuit issued a per curiam decision affirming the district court's judgment. Pet. App. 1-9. Based upon *Marshall,* the Tenth Circuit ruled that § 912 applied to 1875 Act ROWs, the United States had an implied reversionary interest in the 1875 Act ROW and, upon the judicial decree of abandonment, the United States retained that implied reversionary interest through operation of 16 U.S.C. § 1248(c). Pet. App. 3-6.

SUMMARY OF ARGUMENT

The United States does not retain an implied reversionary interest in 1875 Act ROWs after the underlying lands are patented. The 1875 Act granted an easement, not a limited fee with an implied

reversionary interest in favor of the United States. In *Great Northern*, based upon the language of the 1875 Act, the history surrounding its passage, the DOI's early interpretation of the Act, and Congress's subsequent construction of the Act, this Court unconditionally ruled that 1875 Act ROWs are easements. Fifteen years later, in *Union Pacific*, this Court reaffirmed that ruling.

It was against this legal background that the United States issued the Patent in 1976. The Patent conveyed fee simple title to the land "subject to those rights for railroad purposes" granted under the 1875 Act. The "subject to" clause merely advised that the patented land was burdened by an easement "for railroad purposes." When a grantor, such as the United States, conveys fee simple title to land burdened by an easement the grantor does not retain an implied reversionary interest in the easement. Accordingly, when the 1875 Act ROW was abandoned, the railroad easement was extinguished and Brandt's land became unburdened. These principles alone demonstrate that the Tenth Circuit erred.

Even if these principles were not sufficient, Brandt should have prevailed on the strength of his Patent. A patent from the United States is the highest evidence of title. When the United States issued the Patent, it did not reserve any interest in the 1875 Act ROW, although it could have done so. In *Leo Sheep*, this Court reiterated the cardinal principle that the United States does not retain any property interests not expressly reserved in the patent, granting

statute, or regulations. Nothing in the Patent, the 1875 Act, or the applicable DOI regulation suggested that an implied reversionary interest may be lurking in favor of the United States. The Tenth Circuit's finding of an implied reversionary interest not only violated the sanctity of Brandt's Patent, it upset the settled expectations of thousands of landowners who trace their title to patents issued by the United States "subject to" 1875 Act ROWs.

The implied reversionary interest found by the Tenth Circuit simply does not exist. It is not in the 1875 Act, the applicable DOI regulation, or Brandt's Patent. Instead, the Tenth Circuit created the implied reversionary interest from § 912, an act passed 47 years after the 1875 Act. This act did not amend the 1875 Act. Nor did it alter previously granted ROWs to include an implied reversionary interest. Instead, the language and history surrounding § 912 confirms that Congress originally intended to grant only easements to railroads under the 1875 Act. Based upon the inaccurate statement in *Stringham* that 1875 Act ROWs were limited fees, Congress mistakenly believed that the United States would be saddled with worthless strips of land as 1875 Act ROWs were abandoned. Accordingly, Congress passed § 912 to more closely effectuate Congress's original intent in passing the 1875 Act, *i.e.*, to ensure that homesteaders received all the land described in their patents, including 1875 Act ROWs upon abandonment. The Tenth Circuit's finding of an implied reversionary interest in 1875 Act ROWs completely frustrates

Congress's intent in passing the 1875 Act, as reflected in both the 1875 Act and § 912.

ARGUMENT

I. THE 1875 ACT GRANTED ONLY AN EASEMENT AND UPON ABANDONMENT THE UNDERLYING PATENTED LAND BECOMES UNBURDENED.

A. In *Great Northern*, This Court Unmistakably Ruled That 1875 Act ROWs Are Easements.

In *Great Northern*, the United States filed suit to "obtain a determination of the nature and scope of the grant made by the [1875 Act]." Brief for the United States, 1942 WL 54245, **8-9. The United States sought an answer to that question by seeking to enjoin a railroad from drilling for oil and gas on a portion of an 1875 Act ROW that crossed public lands. *United States v. Great N. Ry. Co.*, 32 F. Supp. 651, 652 (D. Mont. 1940). According to the district court, the United States argued that the 1875 Act granted "*only an easement*, or right to cross public lands of the United States, with no right whatever to the oils and minerals underlying the surface." *Id*. (emphasis added). The railroad defended by arguing that it had a right to the oil and gas because the 1875 Act ROW was a limited fee made on an implied condition of reverter that conveyed the underlying lands and minerals to the railroad. *Id*. The district court agreed with the United States' easement argument

and enjoined the railroad from drilling. *Id*. at 653-55. On appeal, the Ninth Circuit affirmed. *MacDonald v. United States*, 119 F.2d 821 (9th Cir. 1941).

Before this Court, the United States defended the judgment on two different grounds. The United States' primary argument was that the 1875 Act granted only an easement. Brief for the United States, 1942 WL 54245, **4-8. The United States supported its easement argument with the plain language of the 1875 Act, Congress's shift in policy in 1871, the DOI's interpretation of the Act, and Congress's subsequent interpretations of the 1875 Act. *Id*. **10-35. In the alternative, the United States 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. This Court unconditionally adopted the United States' easement argument. *Great Northern*, 315 U.S. at 271-77.

First, this Court looked at the plain language of the 1875 Act. This Court noted that Section 4 of the 1875 Act confirmed that only an easement was intended. *Id*. at 271-72. This section, codified at 43 U.S.C. § 937, required the DOI to note the location of 1875 Act ROWs on the plats in the local land 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 (all emphasis

added).[7] This language was "especially persuasive" because the subsequent patenting of land "subject to" a ROW would be "wholly inconsistent with the grant of a fee." *Great Northern*, 315 U.S. at 271. In fact, this Court stressed that "'[a]pter words to indicate the intent to convey an easement would be difficult to find[.]'" *Id*. (quoting *MacDonald*, 119 F.2d at 825).

Second, this Court recognized that the 1875 Act is to be liberally construed to carry out its purposes, but that the Act is also subject to the rule of construction that nothing passes in a federal grant except that which is conveyed in clear and explicit language. *Great Northern*, 315 U.S. at 272. Because the purpose of the 1875 Act – "to permit the construction of railroads through the public lands and thus enhance their value and hasten their settlement" – could be satisfied by an easement for railroad purposes, construing the Act as conveying a fee was not necessary. *Id*. ("[A] railroad may be operated though its right of way be but an easement.").

Third, this Court followed the canon of construction that public land statutes must be interpreted in light of the circumstances when they were passed. *Id*. at 273 ("The Act was the product of a period, and, 'courts, in construing a statute, may with propriety recur to the history of the times when it was passed.'"

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[7] This language first appeared in the Act of April 12, 1872, 17 Stat. 52 (1872) and the legislative history of that Act showed that only an easement was intended. Brief for the United States, 1942 WL 54245, **11-12; *Great Northern*, 315 U.S. at 271 n.3.

(quoting *United States v. Union Pac. R. Co.*, 91 U.S. 72, 79 (1875))). This Court then traced the history of railroad acts and confirmed that the 1875 Act was a "product of the sharp change in Congressional policy with respect to railroad grants after 1871. . . ." *Great Northern*, 315 U.S. at 275. Because of this "sharp change" this Court found it "improbable" that Congress intended "to grant more than a *right of passage*, let alone mineral riches." *Id.* at 275 (emphasis added). This Court further noted that "[t]he presence in the Act of Section 4, which . . . *is so inconsistent with the grant of a fee*, strongly indicates that Congress was carrying into effect its changed policy regarding railroad grants." *Id.* (emphasis added).

Fourth, this Court looked at the interpretation of the 1875 Act by the DOI, *i.e.*, the agency charged with administering the Act. *Id.* at 275-76. Although the DOI's first formal interpretation was not issued until 13 years after the Act's passage, this Court found it highly convincing that the 1875 Act conveyed only an easement:

> "The act of March 3, 1875 is not in the nature of a grant of lands; it does not convey an estate in fee either *in the 'right of way'* or the grounds selected for depot purposes. It is a right of use only, the title still remaining in the United States.
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> * * *
>
> All persons settling on public lands to which a railroad right of way has attached, take the same subject to such right of way and

> must pay for the full area of the subdivision entered, there being no authority to make deductions in such cases."

Id. at 275 n.13 (emphasis added) (quoting *Right of Way-Railroads-Act of March 3, 1875,* 12 L.D. 423, 428 (1888)). While the DOI's interpretation of the 1875 Act had deviated on occasion, this Court downplayed that because those changes were precipitated by "inaccurate statements in the *Stringham* case." *Great Northern*, 315 U.S. at 276.

Finally, this Court observed that subsequent legislation confirmed that 1875 Act ROWs were easements. This Court noted that Congress expressly characterized 1875 Act ROWs as easements in the forfeiture acts of 1906 and 1909. *Id*. This Court also referenced the Act of June 26, 1906, 34 Stat. 481 (1906) (codified at 43 U.S.C. § 944), which extended application of the 1875 Act to the Territories of Oklahoma and Arizona. *Great Northern*, 315 U.S. at 276-77. This Court found it very compelling that both the language of the Act and its legislative history expressly characterized 1875 Act ROWs as easements:

> "The right as originally conferred and as proposed to be protected by this bill simply grants an easement or use for railroad purposes. Under the present law whenever the railroad passes through a tract of public land the entire tract is patented to the settler or entryman, subject only to this easement."

Id. at 276-77 (quoting H.R. Rep. No. 59-4777 at 2 (1906)).

Based upon these factors, this Court ruled "[t]hat [the railroad] has only an easement in its rights of way acquired under the Act of 1875 is therefore clear from the language of the Act, its legislative history, its early administrative interpretation and the construction placed upon it by Congress in subsequent enactments." *Id*. at 277.

This Court then addressed the railroad's argument that it had a "limited fee" in the lands and minerals within the 1875 Act ROW. *Id*. This Court noted that most of the cases relied on by the railroad involved railroad acts that were passed prior to 1871. *Id*. at 277-78. Because of the shift in Congress's policy in 1871, this Court ruled those cases were "not controlling." *Id*. at 278. Moreover, because the shift in policy was not brought to the Court's attention in *Stringham*, this Court ruled that *Stringham* and its progeny, *Choctaw, O. & G. R.R. Co. v. Mackey*, 256 U.S. 531 (1921) and *Noble v. Oklahoma City*, 297 U.S. 481 (1936), which characterized 1875 Act ROWs as "limited fees," were entitled to no weight. *Great Northern*, 315 U.S. at 279. Instead, this Court found "[f]ar more persuasive" two cases that had interpreted post-1871 ROW acts as conveying only an easement. *Great Northern*, 315 U.S. at 279 (citing *Denver & R.G. Railway Co. v. Alling*, 99 U.S. 463, 475 (1878) ("a present beneficial easement") and *Smith v. Townsend*, 148 U.S. 490, 498 (1893) ("simply an easement, not a fee in the land")). Accordingly, this Court reiterated "[s]ince petitioner's right of way *is but an easement*, it has no right to the underlying oil and

minerals." *Great Northern*, 315 U.S. at 279 (emphasis added). By rejecting the railroad's "limited fee" argument and using the term "easement" again, this Court left no doubt that 1875 Act ROWs are easements. *Cf. New Mexico v. U.S. Trust Co. of New York*, 172 U.S. 171, 182 (1898) ("The difference between an easement and the fee would not have escaped [the] attention . . . of the whole court, with the inevitable result of committing it to the consequences which might depend upon such difference.").[8]

Because of the unmistakable clarity of this Court's ruling – that 1875 Act ROWs are easements – *Great Northern* is a landmark decision. It immediately established the respective rights between railroads and the United States involving 1875 Act ROWs that crossed public lands. It also set the framework for the Tenth Circuit's holding that 1875 Act ROWs were easements in disputes not involving the United States. *Missouri-Kansas-Texas R. Co. v. Ray*, 177 F.2d 454, 455-57 (10th Cir. 1949) (Relying on *Great Northern* to hold that where a railroad

[8] Because this Court knew the difference between an easement and a fee, its ruling in *Great Northern* eliminated any notion that the United States would retain an implied reversionary interest in 1875 Act ROWs after the underlying lands were patented. *See Preseault*, 100 F.3d at 1533 (under the common law, a reversionary interest does not exist in easement); *Nat'l Wildlife Fed'n v. I.C.C.*, 850 F.2d 694, 703 n.13 (D.C. Cir. 1988) ("Because an easement is a servitude, rather than an estate in land, it is not strictly accurate to speak of an easement 'reverting'; rather, such interests 'lapse' or are 'extinguished.' ").

acquired a ROW across school trust lands through territorial condemnation proceedings provided by 43 U.S.C. § 944, it acquired no greater interest than that allowed by the 1875 Act, *i.e.*, an easement, notwithstanding that the railroad may have paid for a fee.); *Himonas v. Denver & R.G.W.R. Co.*, 179 F.2d 171, 172 (10th Cir. 1949) ("By the grant under the [1875 Act], the [railroad] acquired only an easement for railroad purposes. . . . The fee or servient estate remained in the United States."). *Great Northern* also reestablished that ROWs for reservoirs and ditches granted under the Act of March 3, 1891, 26 Stat. 1095, 1101-02 (1891) (codified at 43 U.S.C. §§ 946-949), were easements rather than limited fees. Solicitor's Opinion M-36597, 67 I.D. 225 (1960) ("Since the reservoir right-of-way act of March 3, 1891, is comparable to railroad right-of-way acts passed subsequent to 1871, they too are now regarded as easements."). It also reestablished that mining claims could be located over 1875 Act ROWs. David G. Ebner, *Mineral Ownership Beneath Railroad Rights-Of-Way*, 31 RMMLF-INST 17-1, 17-27 (1985) ("Under the pure easement theory now associated with railroad rights-of-way granted under post-1871 acts and reservoir rights-of-way granted under the 1891 Reservoir Act, mining claims may freely be located on public lands traversed by these particular rights-of-way, so long as the lands are otherwise open to mineral entry and location.").

B. In *Union Pacific*, This Court Reaffirmed That 1875 Act ROWs Are Easements.

In 1957, this Court reaffirmed that 1875 Act ROWs are easements in *Union Pacific*. In that case, the United States sued to enjoin a railroad from drilling on its pre-1871 ROW grant to extract the underlying oil and gas. *Union Pacific*, 353 U.S. at 113. The district court ruled that the railroad's interest in the ROW was a limited fee that granted the railroad the right to underlying oil and gas, as long as the ROW was otherwise used for railroad purposes. *United States v. Union Pac. R. Co*., 126 F. Supp. 646, 647-48 (D. Wyo. 1954). On appeal, the Tenth Circuit affirmed, based upon this Court's earlier cases construing pre-1871 railroad acts as conveying a limited fee in the land and minerals within the ROWs. *United States v. Union Pac. R. Co*., 230 F.2d 690, 692-94 (10th Cir. 1956).

After granting certiorari, this Court held that the railroad did not have the right to extract the oil and gas underlying the ROW. *Union Pacific*, 353 U.S. at 113-20. This Court's holding was based on three grounds. First, drilling for oil and gas beneath the railroad ROW was not a "railroad purpose" within the meaning of the 1862 Pacific Railway Act. *Id*. at 113-14. Second, because Section 3 of the Act excepted "mineral lands" from the grant of "every alternate section of public land," this Court concluded that that exception should apply to all parts of the Act, including Section 2 that contained the ROW grant. *Id*. at 114-15. Finally, this Court noted that a ruling in favor

of the railroad would frustrate the policy of the United States in the 1860s to reserve minerals. *Id*. at 115-16.

In rejecting the railroad's argument that pre-1871 ROW grants conveyed a limited fee in all the land and minerals underlying the ROW, this Court noted: "[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. This Court then favorably acknowledged *Great Northern*'s ruling that a "great shift in congressional policy occurred in 1871[,]" and "after that period only an easement for railroad purposes was granted. . . ." *Id*. This Court went on to state, with regards to pre-1871 ROWs, that "the suggestion [in Great Northern] 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." *Id*. This Court also remarked that "'[n]one of the [limited fee] cases involved the problem of rights to subsurface oil and minerals.'" *Id*. (quoting *Great Northern*, 315 U.S. at 278). Thus, in rejecting the railroad's argument for ownership of the underlying oil and gas, this Court lessened the scope of the limited fees conveyed by pre-1871 ROW grants.[9] But,

[9] The 1864 Pacific Railway Act excluded "coal and iron" from the "mineral lands" exception in Section 3 of the 1862 Act. 13 Stat. at 358. Thus, following *Union Pacific*, the railroad retained the right to develop the coal and iron, but not the oil and gas and other minerals underlying the ROW. *Wyoming v. Udall*, 379 F.2d 635, 640 (10th Cir. 1967) ("*Udall*"). The right to

(Continued on following page)

in so doing, this Court expressly reinforced the ruling in *Great Northern* that 1875 Act ROWs are easements. *See Chicago & N. W. Ry. Co. v. Continental Oil Co*., 253 F.2d 468, 470-71 (10th Cir. 1958) ("*Continental Oil*") (noting "the decisional force" of *Great Northern*'s ruling that 1875 Act ROWs are easements survived *Union Pacific*); *Udall*, 379 F.2d at 640 (*Union Pacific* "did not overrule *Townsend*" and "[i]t recognized that under *Great Northern* the post-1871 grants were of an easement.").

C. The Department of the Interior Interpreted 1875 Act ROWs As Easements.

At the time of Brandt's Patent, the applicable DOI regulation defined 1875 Act ROWs as easements:

> A railroad company to which a right-of-way is granted does not secure a full and complete title to the land on which the right-of-way is located. It obtains only the right to use the land for the purposes for which it is granted and for no other purpose, and may hold such possession, if it is necessary to that use, as long and only as long as that use continues. The Government conveys *the fee simple title in the land over which the right-of-way is granted* to the person to whom patent issues for the legal subdivision on which the right-of-way is located, and such patentee

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the coal and iron places this pre-1871 ROW grant "in a different category from a surface easement." *Id*.

> *takes the fee subject only to the railroad company's right of use and possession*. All persons settling on a tract of public land, to part of which right-of-way has attached, take the same subject to such right-of-way, and at the total area of the subdivision entered, there being no authority to make deduction in such cases.

43 C.F.R. § 2842.1(a) (1976) (all emphasis added); *see Wyoming v. Andrus*, 602 F.2d 1379, 1383-84 (10th Cir. 1979) ("*Andrus*") ("43 C.F.R. § 2842.1(a) . . . declares that the grantee takes the fee interest in the entire legal subdivision subject only to the railroad's right of use and possession. It is unquestionably applicable to the grants to railroads pursuant to the 1875 Act.").

This easement language is identical to that which the DOI promulgated in 1909, *Right-of-Way Railroads*, 37 L.D. 787, 788 (1909), and that this Court in *Great Northern* relied on in ruling that 1875 Act ROWs are easements. 315 U.S. at 276. In 1938, this easement language was codified as 43 C.F.R. § 243.2 (1938); *see State of Wyoming*, 27 IBLA 137, 173 n.18 (1976) (Frishberg, Chief A.J., dissenting) (noting that 43 C.F.R. § 243.2 (1938) "reasserted the easement language of the May 21, 1909, regulations"). In 1970, this easement language was recodified as 43 C.F.R. § 2842.1(a). 35 Fed. Reg. 9,502, 9,649 (June 13, 1970). Although this regulation was ultimately rescinded in 1980 after passage of FLPMA, *see* 45 Fed. Reg. 44,518 (July 1, 1980), it had the force and effect of law until that time. *United States v.*

Nixon, 418 U.S. 683, 695 (1974) ("So long as [a] regulation is extant it has the force of law."); *see McLaren v. Fleischer*, 256 U.S. 477, 481 (1921) (The DOI's interpretation of a public land law "is entitled to great respect and, if acted upon for a number of years will not be disturbed except for cogent reasons.").

It was against this legal backdrop that Brandt's parents negotiated the land exchange that resulted in them, and now Brandt, owning the land "subject to those rights for railroad purposes" granted under the 1875 Act ROW. At that time, the 1875 Act, this Court's rulings, and the extant DOI regulation all defined the 1875 Act ROW as an easement.[10] Although it could have done so, the United States did not expressly reserve any rights in the 1875 Act ROW.[11] *See* Pet. App. 76-79. Thus, the intent of the parties to the exchange was clear – the 1875 Act ROW was an easement in which the United States retained no reversionary interest. That Brandt is entitled to rely on the security that his Patent provided cannot be

[10] Two months after issuing the Patent, the DOI reaffirmed that 1875 Act ROWs are easements. *Amerada Hess Corp.*, 24 IBLA 360, 365-79 (1976) (ruling that an 1875 Act ROW is an easement and the United States did not impliedly reserve the mineral estate underlying the ROW when land was patented).

[11] In authorizing exchanges, Congress did not intend for there to be any implied reservations because that would have made valuation of the properties to be exchanged impossible. *See* 16 U.S.C. § 486 ("Either party to an exchange may make reservations of timber, minerals, or easements, *the values of which shall be duly considered* in determining the values of the exchanged lands." (emphasis added)).

questioned. *Grainger v. United States*, 197 Ct. Cl. 1018, 1024 (1972) (A "patent is intended to quiet title to and secure the enjoyment of the land for the patentees and their successors.") (citing *Dominguez De Guyer v. Banning*, 167 U.S. 723, 743-44 (1897)); *see Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676, 683 (10th Cir. 1986) (New interpretations by the United States as to the scope of mineral reservations "arrived at long after a patent issued, or revealed long after a patent issued, cannot change the title the patentee received under the then prevailing practice and decisions.").

D. When An 1875 Act ROW Is Abandoned, The Underlying Patented Land Is No Longer Burdened By The Easement.

There is no doubt that Congress's intent controls the interpretation of the 1875 Act. *Missouri, K. and T. R. Co. v. Kansas Pac. R. Co.,* 97 U.S. 491, 497 (1878) ("It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress."). Yet, common law principles are still important. *Shaw v. Merchants' Nat'l Bank*, 101 U.S. 557, 565 (1879) ("No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."). Nothing in the language of the 1875 Act suggests that 1875 Act ROWs are anything but common

law easements. *See Great Northern*, 315 U.S. at 279 (looking at Section 4 of the 1875 Act and stressing "'[a]pter words to indicate the intent to convey an easement would be difficult to find[.]'" (quoting *MacDonald*, 119 F.2d at 825)); Brief of the United States 1942 WL 54245, *12 ("The 1875 Act becomes a harmonious whole if Section 1 be construed as conferring on the railroads an easement; to construe it as granting a fee would be to deprive . . . Section 4 of all meaningful content."). Application of common law principles is therefore appropriate. *Cf. Amoco,* 526 U.S. at 877 (using state common law principles to assist in interpreting a federal statutory mineral reservation).

It is axiomatic that when a landowner, such as the United States, grants an easement across its lands it does not retain a reversionary interest in the easement, but merely retains the underlying fee burdened by the easement. *Preseault II*, 100 F.3d at 1533 (When a fee owner conveys an easement across its land, the fee owner retains "a present estate in fee simple, *subject to* the burden of the easement." (emphasis added)). When the easement is abandoned, the underlying fee becomes unburdened. *Id*. at 1545 (citing *Restatement (First) of Property* § 504 (1944)); *Samuel C. Johnson 1988 Trust v. Bayfield Cnty., Wis*., 649 F.3d 799, 803 (7th Cir. 2011) ("[T]he termination of an easement restores to the owner of the fee simple full rights over the part of his land formerly occupied by the right of way created by the easement." (citing *Restatement (Third) of Property (Servitudes)* § 7.4,

Comments a, c, f (2000))). Moreover, if the underlying fee is conveyed before abandonment, the grantee steps into the shoes of the grantor and is entitled to an unburdened fee upon abandonment. *See* Sharon J. Bell, *Osages, Iron Horses and Reversionary Interests: The Impact of United States v. Atterberry on Railroad Abandonments*, 20 Tulsa L.J. 255, 275-76 (1984) ("Unless there is an expressed reversionary interest in the deed in favor of the original grantor, the common law assumes that a conveyance of the servient estate is also a conveyance of the reversionary interest in the easement."); *cf. United States v. Magnolia Petroleum Co.*, 110 F.2d 212, 217 (10th Cir. 1939) ("It is the general rule that the servient estate in a strip of land set apart for a railroad . . . passes with a conveyance of the fee to the abutting . . . tract out of which the strip . . . was carved *even though no express provision to that effect is contained in the instrument of conveyance*, and that on the abandonment of the strip . . . the dominant estate becomes extinguished and the entire title and estate vests in the owner of such abutting . . . tract." (emphasis added)).

The Patent in this case – like hundreds of other patents – conveyed fee simple title to the underlying land "subject to those rights for railroad purposes" granted under the 1875 Act. Pet. App. 78; *See* Brief for the United States, 1942 WL 54245, *23 n.27 ("Patents issued to settlers on lands crossed by railroad [ROWs] have consistently included the entire legal subdivision, generally with a notation that is was issued 'subject to' the [ROW]."). The "subject to"

clause did not reserve an interest in the United States; it merely advised that the patented land was burdened by an easement for railroad purposes. *Smith v. Townsend*, 148 U.S. at 499 (Interpreting post-1871 ROW grant and concluding, "[d]oubtless whoever obtained title from the government . . . through which ran this right of way would acquire a fee to the whole tract, *subject to the easement* of the company; and 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." (emphasis added)); 43 C.F.R. § 2842.1(a) (1976) ("the patentee takes the fee subject only to the railroad company's right of *use and possession*" (emphasis added)); *see Restatement (Third) of Property (Servitudes)* § 2.2, Comment d (2000) ("If the land conveyed was already burdened by . . . a servitude, the 'subject to' language is often included to qualify the grantor's covenant against encumbrances, rather than to create a new servitude."). When the railroad ultimately abandoned the 1875 Act ROW, Brandt's property was no longer burdened by the easement. *City of Aberdeen v. Chicago & N. W. Transp. Co*., 602 F. Supp. 589, 593 (D.S.D. 1984) ("As a mere easement, once a railroad ceases using for railroad purposes a right-of-way granted after 1871, it disappears and the underlying landowner has the *use* of property he already *owns*." (emphasis in original)); *see* 16 Op. Atty. Gen. 250, 254 (1879) (The "grantees of the United States took the fee of the lands patented to them subject to the easement created by the act of 1824; but on a discontinuance or

abandonment of that right of way the entire and exclusive property, and right of enjoyment thereto, vested in the proprietors of the soil.").

Based upon *Great Northern*, *Union Pacific*, the DOI's then-existing regulation, and Brandt's Patent, the underlying land became unburdened upon abandonment of the 1875 Act ROW. Accordingly, the decision of the Tenth Circuit should be reversed.

II. THE UNITED STATES DID NOT RETAIN AN IMPLIED REVERSIONARY INTEREST IN 1875 ACT ROWS AFTER THE UNDERLYING LANDS WERE PATENTED.

The Tenth Circuit summarily rejected the above analysis and held that the United States retained an implied reversionary interest in the 1875 Act ROW after the underlying land was patented. Pet. App. 5. This implied reversionary interest, however, does not exist. It cannot be found in the 1875 Act, the applicable DOI regulation, or Brandt's Patent. Instead, the Tenth Circuit's holding is premised on: (1) the United States' new interpretation of the 1875 Act; (2) a statute passed in 1922 when Congress was under the mistaken belief that 1875 Act ROWs were limited fees; and (3) dubious authorities that cannot withstand scrutiny under this Court's precedent.

A. The Finding Of An Implied Reversionary Interest In 1875 Act ROWs Would Negate the Security Of Title Provided By Patents Issued By The United States.

"A patent is the highest evidence of title, and is conclusive as against the Government. . . ." *United States v. Stone*, 69 U.S. 525, 535 (1864); *Moore v. Robbins*, 96 U.S. 530, 533 (1877) (When a "patent issued under the seal of the United States . . . is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed."). Because of the sanctity of patents, this Court has rejected the idea that the United States could retain property interests not expressly reserved in the patent, granting statute, or regulations. *Swendig v. Washington Water Power Co.,* 265 U.S. 322, 331 (1924) ("[I]t is true as a general rule, that when . . . entry is made and certificate given, the land covered ceased to be a part of the public lands, and that, when a patent issues in accordance with governing statutes, all title and control of the land passes from the United States . . . subject to the regulations then in force. . . ."); *Work v. State of Louisiana*, 269 U.S. 250, 255 (1925) (refusing to find an implied mineral reservation in the swamp-land acts); *see Hash,* 403 F.3d at 1315-16 ("The Court has consistently preserved the integrity of the land grant patent, in its review and application of the statutes before and after the 1875 Act. Throughout its resolution of

various disputes, the Court has required that unless a property interest was expressly reserved by the government, whether in the patent grant or by statute or regulation then in effect, *the disposition of the land was in fee simple*." (emphasis added)).

In *Leo Sheep*, this Court reaffirmed the cardinal principle that the United States does not retain any property interests not expressly reserved in the patent, granting statute, or regulations. In that case, the United States argued that Congress impliedly reserved an easement across the odd-numbered sections of lands patented under the Pacific Railway Acts to access the even-numbered sections. *Leo Sheep*, 440 U.S. at 677-79. Because neither the Acts, nor the patents, expressly reserved an easement for access, this Court ruled that it would not endeavor to "divin[e] some 'implicit' congressional intent" to reserve an easement for access. *Id*. at 679 (quoting *Missouri, K. and T. R. Co.*, 97 U.S. at 497). This Court further explained why the United States' implied reservation argument was so untenable:

> Generations of land patents have issued without any express reservation of the right now claimed by the Government. Nor has a similar right been asserted before. . . . 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.

Id. at 687-88 (footnotes omitted) (emphasis added).

Leo Sheep is dispositive of the question presented. First, the language of the 1875 Act does not so much as hint that the United States would retain an implied reversionary interest in the ROWs after the underlying lands were patented. *Hash*, 403 F.3d at 1317 ("The text of the 1875 Act . . . negate[s] the now-asserted intention on the part of the United States to retain ownership of the lands underlying railway easements when the public lands were disposed of."); *Beres*, 64 Fed. Cl. at 428 ("Congress could have reserved a reversionary interest by including a reversionary right in the 1875 Act itself. The 1875 Act contains no such language.").

Second, in accordance with Section 4 of the 1875 Act, "[g]enerations of land patents have issued without any express reservation of the right now claimed by the [United States]." *E.g*., *Hash*, 403 F.3d at 1316 (homestead patents); *Beres*, 64 Fed. Cl. at 405 (homestead patent); *see* 43 C.F.R. § 2842.1(a) (1976) ("The Government conveys the *fee simple title* in the land over which the right-of-way is granted to the person to whom patent issues for the legal subdivision on which the right-of-way is located, and such patentee takes the fee subject only to the railroad company's right of use and possession."). Moreover, it is undisputed that Brandt's Patent was issued without any express reservation of the reversionary interest found

by the Tenth Circuit.[12] Pet. App. 76-79. Instead, in accordance with Section 4 of the 1875 Act, the Patent merely provides that the Brandt's property is "subject to those rights for railroad purposes" granted under the 1875 Act. Pet. App. 78. This "subject to" clause did not reserve anything. *See* James W. Ely, Jr. and Jon W. Bruce, *The Law of Easements & Licenses in Land* § 3:8 (2013) ("'Subject to' language is commonly used in a deed to refer to existing easements, liens, and real covenants that the grantor wishes to exclude from warranties of title.").

Finally, the United States' assertion that it retained implied reversionary interests in 1875 Act ROWs after the underlying lands were patented is of very recent vintage. *See* Brief for the United States, 1942 WL 54245, *29 ("the 1875 Act granted an easement and nothing more"). What prompted the United States' new assertion is unclear. It might have been a 1989 DOI Solicitor's Opinion that concluded that 1875 Act ROWs are "tantamount to a fee interest." Solicitor's Opinion M-36964, 96 I.D. 439, 451 (1989);[13]

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[12] The United States did "reserv[e]" ROWs "for ditches or canals" and two roads in the Patent. Pet. App. 76-77. That the United States expressly reserved some property interests further refutes the existence of any implied reservations. *Leo Sheep*, 440 U.S. at 678-82.

[13] That conclusion was severely criticized in *Home on the Range v. AT&T Corp.*, 386 F. Supp. 2d 999, 1021-24 (S.D. Ind. 2005). In 2011, the 1989 Solicitor's Opinion was overruled as it pertained to 1875 Act ROWs. Solicitor's Opinion M-37025 at 9 (2011), available at http://www.doi.gov/solicitor/opinions/M-37025.pdf

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see Beres, 64 Fed. Cl. at 426 (noting that Solicitor's Opinion M-36964 was issued right after the passage of 16 U.S.C. § 1248(c)). Whatever the reason, one thing is clear: the United States' new assertion of an implied reversionary interest cannot be reconciled with this Court's ruling in *Leo Sheep,* especially considering the thousands of property owners who could be affected. *See* Petition at 17; U.S. Br. at 20; Brief of Amicus Curiae Cato Institute and the National Association of Reversionary Property Owners at 6, 18; Brief of Amicus Curiae Pacific Legal Foundation at 3.

B. Subsequent Statutes Cannot Alter Either Congress's Intent In Passing The 1875 Act Or The Nature Of Previously Granted 1875 Act ROWs.

Support for the implied reversionary interest found by the Tenth Circuit does not exist in the language of the 1875 Act, the applicable DOI regulation, Brandt's patent, or this Court's precedents. As a result, the United States is forced to argue that statutes enacted many years after 1875, primarily § 912, evince Congress's "understanding" that the United States retained an implied reversionary interest in 1875 Act ROWs after the underlying lands were patented. U.S. Br. at 15-16; *see* U.S. 10th Cir. Br. at

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(last visited Nov. 9, 2013) (1875 Act ROWs do "not include, as Opinion M-36964 opines, rights that are 'tantamount to a fee.' ").

44-47. The flaws with the United States' argument are manifest.

The ROW at issue was granted under the 1875 Act. Pet. App. 78. The nature and scope of that ROW must be determined from the language of the 1875 Act. *See United States v. Denver & Rio Grande Ry. Co.*, 150 U.S. 1, 10-12 (1893) (reviewing language of the 1875 Act to determine what rights a railroad had to remove timber from the public lands). That language must also be construed in light of the condition of the country in 1875. *Amoco*, 526 U.S. at 875 ("public land statutes should be interpreted in light of 'the condition of the country when the acts were passed'" (quoting *Leo Sheep*, 440 U.S. at 682)). At that time, there was no indication of any intent on the part of Congress to retain implied reversionary interests in 1875 Act ROWs after the underlying lands were patented.[14] Such an intent would have defeated Congress's purpose, as reflected in Section 4 of the Act, 43 U.S.C. § 937, to patent lands underlying 1875 Act ROWs to homesteaders. Although homesteaders were willing to pay for land burdened by railroad easements, it strains credulity to think they would have paid for land burdened by railroad easements in

[14] The 1875 Act was passed while the national policy was to dispose of public lands. Marion Clawson and Burnell Held, *The Federal Lands: Their Use and Management* at 22-27 (1957). It was not until 1976 and the passage of FLPMA that Congress declared a national policy to retain public lands. 43 U.S.C. § 1701(a)(1).

which the United States retained an implied reversionary interest.

Moreover, in 1875, Congress could not have foreseen the need for § 912, because, at that time, railroads were being built – not abandoned. In fact, Congress could not have perceived a real need to address abandoned railroad ROWs until this Court's 1915 decision in *Stringham*, which incorrectly extended the limited fee holding in *Townsend* to 1875 Act ROWs. With this Court characterizing 1875 Act ROWs as limited fees, Congress became concerned about what to do with the strips of land upon abandonment. The importance of this issue was elevated beginning in the early 1920s with the abandonment of railroads. *See* James W. Ely, Jr., *Railroads & American Law* at 266 (2001) ("Starting in the 1920s, railroads began to abandon unprofitable routes and curtail service. Abandoned trackage exceeded new construction for the first time.").

Even though Congress was concerned about abandoned railroads, § 912 does not prove that Congress, in 1875, intended to impliedly reserve a reversionary interest in 1875 Act ROWs. *See Beres*, 64 Fed. Cl. at 428 ("When 43 U.S.C. § 912 was passed in 1922, Congress . . . reconfirmed the absence of such a reversionary interest in the United States. . . ."). To the contrary, Congress passed § 912 primarily to alleviate the adverse effect of this Court's limited fee decision in *Stringham.* This is evident from the plain language of § 912, which limits its application to "[w]henever *public lands* of the United States have

been or may be granted to any railroad. . . ." (all emphasis added). Use of the term "public lands" indicates that § 912 was intended to apply to those railroad ROW grants that conveyed a limited fee in the land and minerals within the ROW. The mineral reservation in § 912 further supports this conclusion: "the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed. . . ." 43 U.S.C. § 912.[15]

Congress's purpose is also reflected in the legislative history of § 912:

> Under the decision of the courts railroad companies receiving such [ROW] grants take a qualified fee with an implied condition of reverter in the event the companies cease to use the lands for the purposes for which they were granted. Upon abandonment or forfeiture, therefore, of any portions of such right of way the land reverts to and becomes the property of the United States.
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> * * *
>
> It seemed to the committee that such abandoned or forfeited strips are *of little or no*

[15] The district court quieted title to the land and minerals underlying the 1875 Act ROW in favor of Brandt. Pet. App. 58-59; *see* U.S. Br. at 3 n.1 ("This case pertains only to surface rights."). The Tenth Circuit's ruling that § 912 applied to the 1875 Act ROW is therefore inconsistent with Brandt's ownership of the minerals.

> *value* to the Government and that in case of lands in the rural communities they ought in justice become the property of the person to whom the whole of the legal subdivision had been granted or his successor in interest. Granting such relief in reality gives him *only the land covered by the original patent*.

H.R. Rep. 67-217 at 1-2 (1921) (all emphasis added); *see also* S. Rep. No. 67-388 at 1-2 (1922) (quoting H.R. Rep. 67-217).[16] Thus, § 912 was Congress's attempt to rid the United States of the strips of land it would become saddled with as a result of *Stringham*. *City of Aberdeen*, 602 F. Supp. at 592-93 ("The legislative history of [§ 912] reveals that it was intended to resolve the problem of what to do with the narrow strips of land used as railroad rights-of-way once they were abandoned by the railroad company."); *see Andrus*, 602 F.2d at 1384 (considering a pre-1871 ROW and noting "[t]he reason that Congress adopted [§ 912] was because this narrow strip of land would have little use or value to the government.").

Ignoring that Congress was operating under a mistaken belief that 1875 Act ROWs were limited fees, the United States argues that § 912 reflects Congress's understanding that the United States retained

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[16] Appended to H.R. Rep. No. 67-217 was a letter from Acting Secretary of the Interior, E.C. Finney, in which he cites *Stringham* and *Townsend*. H.R. Rep. No. 67-217 at 2-3 (1921). This letter makes clear that Congress's focus was on addressing limited fee ROWs.

an implied reversionary interest in 1875 Act ROWs. U.S. Br. at 15-16, 16. The shortcoming of the United States' argument is that the language and history of § 912 confirm that it was Congress's intent in passing the 1875 Act to grant only easements to railroads.

In passing the 1875 Act, Congress intended to grant only easements to the railroads so that homesteaders could settle on the lands traversed by the ROWs and receive patents conveying fee simple title to the land subject only to the easement. 43 U.S.C. § 937 ("all such lands over which such right of way shall pass shall be disposed of subject to such right of way"); *Great Northern*, 315 U.S. at 271-75. Based upon *Stringham*, however, Congress feared that the 1875 Act would no longer achieve its intended purpose. *See* H.R. Rep. No. 67-217 at 1-2 (1921) ("under the decision of the courts railroad companies receiving [ROW] grants take a qualified fee with an implied condition of reverter"). As a result, Congress passed § 912 to more fully achieve the result it originally intended by the 1875 Act, *i.e.*, that homesteaders would receive all the land described in their patents, including abandoned 1875 Act ROWs. H.R. Rep. No. 67-217 at 2 (1921) ("Granting such relief in reality gives [the settler] only the land covered by the original patent."); 43 U.S.C. § 912 ("and this by virtue of the patent thereto"). After *Great Northern* corrected the inaccurate statement in *Stringham*, Congress's original intent in passing the 1875 Act is fully achieved without any assistance from § 912.

In any event, Congress's mistaken belief in 1922 cannot redefine the property interests granted under the 1875 Act. 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); *Rainwater v. United States*, 356 U.S. 590, 593 (1958); (The subsequent act "is merely an expression of how the 1918 Congress interpreted a statute passed by another Congress more than a half century before. Under these circumstances such interpretation has very little, if any, significance."). Granted, in *Great Northern*, this Court looked at the forfeiture acts of 1906 and 1909 and the Act of June 26, 1906, 43 U.S.C. § 944, to confirm its conclusion that 1875 Act ROWs are easements. 315 U.S. at 276-77. But this Court's reliance on those acts was at the urging of the United States. [17] Brief for the United

[17] The United States now argues the forfeiture acts of 1906 and 1909 support a finding of an implied reversionary interest. U.S. Br. at 14-15. The Federal Circuit, however, rejected the United States' new argument. *Hash*, 403 F.3d at 1315 ("[E]ven on the government's strained construction of [43 U.S.C.] § 940, the forfeited easement automatically inured to the benefit of the owner of the underlying land 'without need of further assurance or conveyance.' Even on the government's construction, this 1909 enactment cannot be viewed as overruling the 1875 Act by implication, thereby disrupting thousands of land grants and long-vested property rights." (quoting 43 U.S.C. § 940)). Moreover, the United States' new argument cannot be reconciled with the Act of June 26, 1906, 43 U.S.C. § 944, which proves that 1875 Act ROWs are easements. *See Missouri-Kansas-Texas R. Co.*, 177 F.2d at 456 (through operation of the Act of June 26, 1906, 43 U.S.C. § 944, the railroad received only "an easement for railroad purposes").

States, 1942 WL 54245, **25-29. Moreover, because this Court ruled Congress intended to grant only an easement under the 1875 Act, *Great Northern*, 315 U.S. 274-79, that is the full extent of the property interest that the railroad in this case received in 1908. *See Rivers v. Roadway Exp., Inc*., 511 U.S. 298, 312-13 (1994) ("It is this Court's responsibility to say what a statute means. . . . A judicial construction of a statute is an authoritative statement of what the statute meant *before as well as after* the decision of the case giving rise to that construction.") (emphasis added). Even if Congress could later redefine that previously granted ROW to contain an implied reversionary interest, there is no evidence that it did. In passing § 912, Congress was neither amending the 1875 Act, nor redefining previously granted property interests. Instead, Congress was trying to effectuate its original intent in passing the 1875 Act and to avoid being saddled with strips of land throughout the country in light of *Stringham*. And, although *Great Northern* may have made § 912 inapplicable to 1875 Act ROWs by effectuating Congress's original intent in passing the 1875 Act, that does not render § 912 null. Instead, as the United States acknowledges, § 912 may still apply to pre-1871 ROW grants.[18] *See* U.S. Br. 9 n.4 (listing cases that suggest § 912 applies to pre-1871 ROW grants).

[18] Even if § 912 somehow created an implied reversionary interest in the 1875 Act ROW, the United States failed to reserve that interest in Brandt's Patent. As a result, the United States

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The United States also implies that 16 U.S.C. § 1248(c) reveals Congress's understanding that the United States had an implied reversionary interest in 1875 Act ROWs. U.S. Br. 15-16. Even if a subsequent Congress could shed light on the intent of a Congress more than 100 years earlier, 16 U.S.C. § 1248(c) neither mentions nor reveals anything about the 1875 Act. The statutory language provides "any and all" interest in "all rights-of-way *of the type* described in [§ 912] shall remain in the United States upon the abandonment." 16 U.S.C. § 1248(c) (emphasis added). As demonstrated above, the type of ROWs described in § 912 are limited fees. Because Congress legislates with this Court's decisions as a backdrop, *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995), it must be presumed that Congress was aware of this Court's ruling in *Great Northern* that 1875 Act ROWs are easements when it passed 16 U.S.C. § 1248(c). Thus, Congress must have known that 1875 Act ROWs are not "rights-of-way of the type described in [§ 912]." By

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conveyed that implied reversionary interest to Brandt. *See Magnolia Petroleum Co.*, 110 F.2d at 217; Lewis M. Sines, Future Interests 70 (2d ed. 1966) ("[a] vested future interest is alienable"); Joyce Palomar, *Patton and Palomar on Land Titles* § 164 at 452-54 (3d ed. 2003) ("[W]ith every transfer of land, title also passes, without specific description or even mention, to all the appurtenances and incidents rightfully belonging to it and which are essential to the full enjoyment of the property . . . including the grantor's underlying title in railroad rights of way. . . ."). The United States' attempt to distinguish patents issued before and after passage of § 912 is simply unavailing. *See* U.S. Br. at 16 n.7.

referencing "rights-of-way of the type described in [§ 912]," Congress effectively excluded 1875 Act ROWs from the application of 16 U.S.C. § 1248(c). As a result, the United States' suggestion that 16 U.S.C. § 1248(c) reveals Congress's understanding that the United States had an implied reversionary interest in 1875 Act ROWs is meritless.[19]

C. Cases Interpreting Pre-1871 ROW Grants Cannot Create An Implied Reversionary Interest In 1875 Act ROWs.

The United States argues that *Union Pacific* eliminated any meaningful distinction between pre-1871 ROWs and 1875 Act ROWs. U.S. Br. at 11-12. From this, the United States surmises that because courts have held that the United States retains an

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[19] In passing 16 U.S.C. § 1248(c), Congress was uncertain whether the United States had an implied reversionary interest in *any* railroad ROWs. Pub. L. No. 100-470 § 2, 102 Stat. 228 (1988) ("Congress hereby finds that . . . [t]he United States should retain *any residual interest it may have* in such public land rights-of-way. . . ." (emphasis added)); S. Rep. No. 100-408 (1988) at 6, *reprinted in*, 1988 U.S.C.C.A.N. 2607, 2611 ("[16 U.S.C. § 1248(c)] provides that in the event of future abandonments of railroad rights-of-way . . . the United States would retain *whatever interest it may have* in the abandoned railroad right-of-way." (emphasis added)). Even the Secretary of Agriculture criticized 16 U.S.C. § 1248(c) because it "assumes that the United States has some remaining residual interest in certain railway rights-of-way which could be converted to recreation trail uses. That may or may not be the case." S. Rep. No. 100-408 (1988) at 10, *reprinted in*, 1988 U.S.C.C.A.N. 2607, 2614.

implied reversionary interest in pre-1871 ROWs, the United States owns a similar interest in 1875 Act ROWs. U.S. Br. at 16-17. The defects in the United States' syllogism are obvious.

In *Union Pacific,* this Court did not reject the distinction *Great Northern* noted between 1875 Act ROWs and pre-1871 ROWs. To the contrary, this Court reiterated *Great Northern*'s ruling that a "great shift in congressional policy occurred in 1871[,]" and "after that period only an easement for railroad purposes was granted. . . ." *Union Pacific*, 353 U.S. at 119. Although *Union Pacific* may have lessened the scope of some pre-1871 ROWs to exclude oil, gas, and other minerals (except coal and iron), courts continued to recognize a significant distinction between pre-1871 ROWs and 1875 Act ROWs. *Udall*, 379 F.2d at 640 ("[T]hat the result which we reach treats pre-1871 grants differently from those made later is not controlling because that difference had its origin in a change of congressional policy relating to rights-of-way for railroads crossing the public domain."); *Andrus*, 602 F.2d at 1382 ("In 1875, as a result of the changed attitude, Congress passed the [1875 Act]. This granted an easement only to railroads. . . . The 1875 Act is, therefore, somewhat significant in that it reduced the quality of the grant to the railroads. This shows that it was something more than a simple easement prior to 1875.") (internal citation and footnote omitted)).

After *Union Pacific*, the DOI also continued to recognize a distinction between pre-1871 ROWs and

1875 Act ROWs. *Compare George W. Zarak*, 4 IBLA 82, 87 (1971) (A pre-1871 ROW "is more than an easement; it is an interest sufficient to remove the land it covers from the category of public land available for disposition under the general land laws.") *aff'd sub nom*., *Rice v. United States*, 348 F. Supp. 254 (D. N.D. 1972) *aff'd*, 479 F.2d 58 (8th Cir. 1973), *with Amerada Hess Corp*., 24 IBLA at 371-78 (an 1875 Act ROW is an easement that does not remove the land it traverses from the category of public lands available for disposition). This recognition continues today. Solicitor's Opinion M-37025 at 2 ("The nature of individual ROW grants . . . is not uniform and depends upon the specific statute authorizing a particular grant."); *id*. at 6 ("After the *Union Pacific* decision, *Great Northern*'s distinction between pre-1871 and 1875 Act ROWs remains relevant to determining what rights a railroad received under the 1875 Act relative to the government grantor. . . . [W]e conclude that the rights conveyed by the 1875 Act are narrower than the pre-1871 acts, contrary to Opinion M-36964's conclusion that a railroad received 'an interest tantamount to fee ownership' in the 1875 Act ROWs.").

Despite the DOI's present-day recognition of a distinction between pre-1871 ROWs and 1875 Act ROWs, the United States brazenly cites *Townsend* and more recent cases interpreting pre-1871 ROW grants for the proposition that a reversionary interest in the 1875 Act ROW did not have to be reserved in Brandt's Patent because the land was already

appropriated. *See* U.S. Brief at 17 (citing *Mauler v. Bayfield Cnty.*, 309 F.3d 997, 1000-02 (7th Cir. 2002) and *Rice*, 479 F.2d at 59). *Townsend* and these other cases are simply irrelevant because they involved pre-1871 ROWs. *Udall*, 379 F.2d at 640 (noting that the United States "concede[d]" post-1871 railroad ROWs did not appropriate the land from disposition under the public land laws); *see Home on the Range*, 386 F. Supp. 2d at 1003-07, 1016-20 (pre-1871 ROWs appropriated the land within the ROW from disposition under the public land laws, but 1875 Act ROWs did not); *see also Samuel C. Johnson 1988 Trust*, 649 F.3d at 805 (criticizing the reasoning in *Mauler*).

The United States also relies on this Court's decision in *Stalker v. Oregon Short Line R.R. Co.*, 225 U.S. 142, 153 (1912) for the proposition that 1875 Act ROWs appropriated the land and, therefore, no reservation of a reversionary interest in the ROW had to be expressed in Brandt's Patent. U.S. Brief at 17. To the extent that *Stalker* ruled that 1875 Act ROWs appropriated the land, that ruling was effectively overruled by *Great Northern*. *See Continental Oil*, 253 F.2d at 472 (noting "appropriation theory" in *Stalker* regarding 1875 Act ROWs was another way of articulating "the limited fee concept" that was rejected in *Great Northern*).

In sum, the United States' assertion that there is no distinction between pre-1871 ROWs and 1875 Act ROWs simply cannot be squared with this Court's decisions in *Great Northern* and *Union Pacific*, the DOI's current interpretation, or decisions

by the lower courts. Thus, whether other courts may have held that the United States retained an implied reversionary interest in pre-1871 ROWs or that pre-1871 ROWs appropriated the land is irrelevant to the question presented.[20]

D. *Marshall* And *Oregon Short Line I* Provide No Support For The Finding Of An Implied Reversionary Interest In 1875 Act ROWs.

The Tenth Circuit summarily ruled that the United States retained an implied reversionary interest in the 1875 Act ROW. Pet. App. 5-6. The Tenth Circuit based its ruling on its early decision in *Marshall*, which had ruled that § 912 applies to 1875 ROWs. *Id*. *Marshall*, however, reached its conclusion based upon *Idaho v. Oregon Short Line R.R. Co*., 617 F. Supp. 207 (D. Idaho 1985) ("*Oregon Short Line I*"). *Marshall*, 31 F.3d at 1032. Neither *Marshall* nor *Oregon Short Line I* justify the finding of an implied reversionary

[20] Even if there were no present-day distinction between pre-1871 ROWs and 1875 Act ROWs, that does not support the United States' argument of an implied reversionary interest. If anything, pre-1871 ROWs are more like 1875 Act ROWs, not *vice versa*. That would make pre-1871 ROWs more like easements. *See Union Pacific*, 353 U.S. at 122 (Frankfurter, J., dissenting) (criticizing the majority opinion because it effectively lessened the nature of pre-1871 ROWs to that of an easement). And, as demonstrated above, there is no implied reversionary interest remaining in the United States once land burdened by an easement is patented.

interest that would upset the settled expectations of thousands of landowners.

Marshall involved a 1973 patent that conveyed land "subject to" an 1875 Act ROW. 31 F.3d at 1029. After the patent was issued, the railroad unlawfully deeded away all its interest in the ROW to private third parties before abandoning the ROW.[21] *Id*. Thereafter, the underlying fee owners filed suit against the railroad and its grantees seeking a judicial decree of abandonment under § 912 and a declaration quieting title to the ROW in their favor. *Id*. The railroad and its grantees defended by arguing that § 912 did not apply to 1875 Act ROWs and that they could acquire the 1875 Act ROW through adverse possession. *Id*. at 1030.

That the underlying landowners clearly had equity on their side must have influenced the Tenth Circuit's blind embrace of their argument that § 912 applied to the 1875 Act ROW. Indeed, the Tenth Circuit did not bother to analyze either the language of the 1875 Act or the applicable DOI regulation. If it had, the underlying landowners would have prevailed on the strength of their patent alone. *See* Parts I-D and II-A, *supra*. Instead, the Tenth Circuit simply adopted the conclusion in *Oregon Short Line I* that § 912 applies to 1875 Act ROWs. *Marshall*, 31 F.2d at

[21] The Tenth Circuit had previously ruled that railroads could not convey their interests in 1875 Act ROWs to private parties. *Himonas*, 179 F.2d at 173.

1032. In short, *Marshall* correctly quieted title in the 1875 Act ROW in favor of the underlying landowners, although its reliance on § 912 was improper.

Oregon Short Line I is equally deficient.[22] That case involved a dispute between a county and owners of the land underlying an 1875 Act ROW. *Oregon Short Line I*, 617 F. Supp. at 208-10. Seeking to take advantage of the provision in § 912 that allows a municipality to acquire a railroad ROW upon a judicial decree of abandonment, the county moved for summary judgment on the legal issue of whether § 912 applies to 1875 Act ROWs. *Id*. at 209. The landowners, not relying on their patents, argued that § 912 does not apply to 1875 Act ROWs because the 1875 Act conveyed only an easement. *Id*. at 209-10. Although the district court noted that *Great Northern* had ruled 1875 Act ROWs were easements, the district court was not convinced that such easements could not contain an implied reversionary interest. *Id*. at 212 ("[E]ven if the 1875 Act granted only an easement, it does not necessarily follow that Congress

[22] The United States also cites *Oregon Short Line I* for the proposition that *Union Pacific* eliminated any distinction between pre-1871 ROWs and 1875 Act ROWs. U.S. Br. at 12. Yet, even *Oregon Short Line I* recognized a continuing distinction between pre-1871 ROWs and 1875 Act ROWs. 617 F. Supp. at 211-12 (noting that the 1875 Act did not grant a fee interest (as pre-1871 ROW grants did), but granted only a ROW "suitable for railroad purposes. . . ."); *see* Solicitor's Opinion M-37025 at 7 (noting that Solicitor's Opinion M-36964's conclusion that the 1875 Act conveyed an interest "tantamount to a fee" could not be reconciled with *Oregon Short Line I*).

would or did not intend to retain an interest in that easement."). To its credit, the district court recognized the answer depended on Congress's intent. But, instead of looking at Congress's intent in passing the 1875 Act, the court looked at § 912.[23] Although the court recognized that Congress only "believed" it had "'implied reverters'" in 1875 Act ROWs based upon *Stringham*, *id*. at 210-11, the court felt compelled to apply § 912 to 1875 Act ROWs, because the court thought § 912 would "be rendered null" otherwise. *Id*. at 212; *but see* U.S. Br. at 9 n.4 (noting § 912 may apply to pre-1871 ROW grants). In so doing, the court lost sight that Congress was acting under a mistaken belief when it passed § 912.

To be sure, a court should not construe a statute so as to diminish its effect. That canon of construction, however, must yield when Congress is acting under a mistaken belief. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (Canons of construction "are not mandatory rules. They are guides that 'need not be conclusive.' They are designed to help judges determine the Legislature's intent as embodied in particular statutory language. And other circumstances evidencing congressional intent can overcome their force." (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)). When Congress

[23] The district court also looked at two other statutes passed in the 1920s, 43 U.S.C. § 913 and 23 U.S.C. § 316. *Id*. at 213. For the same reasons applicable to § 912, these statutes cannot establish an implied reversionary interest in 1875 Act ROWs.

passed § 912, it mistakenly believed, as a result of *Stringham*, that 1875 Act ROWs were limited fees and that the United States would retain a reversionary interest in the 1875 Act ROWs upon abandonment. Both the 1875 Act and § 912, however, prove that Congress never intended to retain such an interest when it passed the 1875 Act. In short, despite its attempt to effectuate what it perceived to be Congress's intent in passing § 912, the court in *Oregon Short Line I* frustrated Congress's intent in passing the 1875 Act.[24]

As other courts have noted, *Marshall* and *Oregon Short Line I* are unpersuasive because they did not analyze the 1875 Act or the patents conveying the underlying lands to determine the nature of the parties' respective property interests. *Samuel C. Johnson*, 649 F.3d at 803-04 ("If *Marshall* was correctly decided, no one in 2011 who owned land subject to the 1875 Act – that is, land over which there had once been a federal railroad right of way – has a right to prevent the federal government from recapturing the right of way

[24] The railroad in *Oregon Short Line I* never took a position on whether § 912 applied. 617 F. Supp. at 209. Instead, the railroad argued that no abandonment had occurred. *Id*. The district court agreed with the railroad two months later. *Idaho v. Oregon Short Line R.R. Co*., 617 F. Supp. 213, 215-18 (D. Idaho 1985) ("*Oregon Short Line II*"). In so doing, the district court made *Oregon Short Line I* academic, if not dicta. Unfortunately, every case that has suggested that the United States retains an implied reversionary interest in 1875 Act ROWs after the underlying lands are patented relies on *Oregon Short Line I*. *See, e.g.,* U.S. Br. at 18 (citing cases).

– of course without compensation – and giving it away or selling it."); *Beres,* 64 Fed. Cl. at 425 ("[N]one of the cases which have found a reversionary interest in the United States analyzed the words of the 1875 Act, or an intervening land patent from the United States, to determine the nature of the land interest before and after a railroad right-of-way grant."); *Home on the Range*, 386 F. Supp. 2d at 1019 (noting that *Oregon Short Line I* did not address the significance of Section 4 of the 1875 Act through which the underlying lands would be disposed of subject to the ROW). Accordingly, *Marshall* and *Oregon Short Line I* provide no support for the finding of an implied reversionary interest in 1875 Act ROWs.

CONCLUSION

For the foregoing reasons, the decision of the Tenth Circuit should be reversed.

Respectfully submitted,

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