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Argument Preview: Rights to Old Rights-of-Way.

At 11 a.m. Tuesday, in the second case of the day, the Supreme Court will hold one hour of oral argument on what happens to the land under railroad lines after the railroad abandons them. In the case of Marvin M. Brandt Revocable Trust v. United States, Steven L. Lechner of Lakewood, Colorado, an attorney with the Mountain States Legal Foundation, will be arguing for a private trust claiming ownership of such lands. Anthony A. Yang, an Assistant to the U.S. Solicitor General, will be arguing for the federal government. The government had urged the Court to hear the case to clear up a split among lower courts on the issue.

When the American West was being settled and developed, the laying of railroad lines had a major role in connecting the people and industry of the region to each other and to the rest of the nation. The federal government encouraged that process by giving rail companies a form of subsidy through a grant of rights-of-way on government-owned lands for railroad beds.

That program began in the 1850s, and ended in 1871. Four years later, in 1875, Congress passed the General Railroad Right-of-Way Act, giving railroads the right to use public lands up to one hundred feet on each side of the rail line. Congress explicitly reserved the right to alter the provisions of that law.

By that time, outright subsidies for the railroads had grown unpopular, and Congress had switched its policy preference to encourage homesteading on the public lands of the West. The 1875 Act was designed primarily to replace a case-by-case grant of rights-of-way to railroads.

In 1922, Congress passed the Railroad Right-of-Way Abandonment Act, to deal with forfeiture or abandonment by a railroad of the land beneath its rails and nearby. Railroads, upon ceasing operations on the lands, would give them up, once a court or Congress formally recognized that the railroad had left the lands.

That law also provided that the right to use the lands would then be transferred to the owner of the underlying land, unless it was occupied by a public highway or by a local municipal government. In Congress's most recent action on the lands issue, in 1988 it dropped the transfer requirement, and declared that — after October 4 of that year — all right, title, and interest in the former rights-0--way would remain with the federal government.

The dispute that has put the land ownership issue before the Supreme Court grows out of a land grant that the government had given in 1908 to the Laramie, Hahn's Peak, and Pacific Railroad, in southeastern Wyoming. The right-of-way crossed an eighty-three-acre parcel that in 1976 would be transferred by the U.S. Forest Service in a land swap with private landowners Melvin M. and Lula M. Brandt, who owned a sizeable tract within the Medicine Bow-Routt National Forest.

The 1976 swap resulted in a grant on about eighty acres to the Brandt family, a property located in Fox Park, Wyoming, and containing a sawmill where Mr. Brandt worked. The property later passed to their son Marvin through a trust.

The document on that grant (a land "patent") explicitly stated only one restriction: the railroad's right to use the right-of-way bisecting the land.

In November 1987, the railroad, then known as the Wyoming and Colorado Railroad, became the last occupier of the right-of-way. It abandoned its use of those lands in 2004.

Two years later, the federal government went to court to get a final ruling on title to a 28.08-mile section of the right-of-way lying within the National Forest, with the aim of extending an existing recreational trail across that property. Development of former railroad lands as recreational trails had been encouraged by Congress in 1988, allowing a state, county, city or a private group to take over abandoned rights-of-way for a trail, if they were willing to take on the cost and management of the property.

Claiming that this part of the Wyoming right-of-way had reverted to federal ownership, the government's lawsuit targeted fifty-two landowners, including the owner of the Fox Park tract, the Marvin M. Brandt Revocable Trust. Everyone except that trust either settled with the government or did not appear to contest the federal claim.

A district court judge ruled for the government, finding that its interest had been preserved by the 1875 law. The U.S. Court of Appeals for the Tenth Circuit, while conceding that there was a conflict among appeals courts on the issue, upheld the federal ownership claim.

Last April, the Brandt trust took the dispute to the Supreme Court, raising the sole question whether the federal government retained "an implied reversionary interest" in the right-of-way, under the 1875 Act, once the underlying lands had been granted to private ownership.

After the federal government in September agreed that the Court should take on the dispute, the Court granted review on October 1, presumably because of the split in lower courts that both sides had cited.

The two sides' briefs on the merits debate the actual wording of the 1875 Act, what the Brandt trust actually got in 1976, what federal policy on land ownership has been, and the Supreme Court's prior rulings on the 1875 law's meaning.

A central focus of both briefs is the Court's 1942 ecision in Great Northern Railway v. United States, involving that railroad's claim to mineral rights under the railroad bed. The Court rejected the claim, interpreting rights-of-way as an easement — a temporary right to use the lands. "Any ambiguity in a grant," the Court said, "is to be resolved in favor of the sovereign grantor." The ruling, however, did not discuss whether the federal government retained a right to reclaim ownership of abandoned rights-of-way.

The Brandt trust argued that the Great Northern decision should be understood as strengthening its legal hold on the disputed land, emphasizing the part of that ruling that treated the right-of-way grant as only an easement under the common law. Once the railroad abandoned that tract, the trust's brief contended, the controlling document was its "patent" in 1976; it emphasized that that document said nothing about returning the underlying land to the federal government, once it had moved into private ownership.

The federal government argued that the 1942 decision is not controlling, emphasizing that it did not discuss the reversionary interest question at all and that its comments about a right-of-way being only a common law easement are being exaggerated. That decision, the government added, should be read in connection with other Supreme Court rulings on federal land ownership rights and

congressional policy.

Among amici, the private trust has the support of property rights advocacy groups, conservative legal organizations, and land policy advocates and professors of property law. The federal government has the backing of local government advocacy groups, planning organizations, supporters of recreational trails, historic preservationists, and three states — New Mexico, Oregon, and Washington.

The choices before the Court seem quite clear: how to interpret the 1875 Act, how to read the Great Northern precedent and other Supreme Court rulings on that Act, the language of the Brandt family's "patent" on the Fox Park property in 1976, and competing visions of federal land use and title principles.

The dispute, in fact, is a classic one of competing interests: the personal right to own property free of restrictions that the government may assert, perhaps belatedly, versus the government's obligation to manage the public lands to maximize policy goals to serve a supposedly larger community of interest.

A central point of legal conflict arises from the fact that the 1875 Act does not, explicitly, contain language to settle the dispute about a federal "reversionary interest." For some Justices, who refuse to rely on background history of legislation, that will pose a dilemma. For them, then, the emphasis probably will be on prior Supreme Court precedents. The federal government has made an unapologetic plea to interpret what Congress meant by examining the legislative process that led to the 1875 Act. Indeed, that history may be essential to the government's case, at least so far as the 1875 Act is the focus.

Lurking somewhat in the background of this case is the federal government's "rails to trails" program — very popular with outdoor enthusiasts, conservationists, and local governments. A ruling for the Brandt trust, depending on how far it went to confine the federal claim that ownership of rights-of-way reverts to it, could intensify ongoing legal battles over the lands lying in former railroad beds and nearby.

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