

***Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. ___, 134 S.Ct. 1257 (No. 12–1173, Supreme Court of the United States, March 10, 2014)**

Chief Justice Roberts delivered the Opinion of the Court, joined (in full) by seven other Justices. Justice Sotomayor dissented.

1. Introduction and Background

In this case the Supreme Court, reversing the Tenth Circuit and aligning itself with earlier decisions of the Federal Circuit,¹ held that when a railroad easement, granted pursuant to an 1875 federal statute, is abandoned, the easement terminates and title in the holder of the servient estate becomes absolute. It rejected the Government’s argument that easements granted under this statute, the General Railroad Right-of-Way Act of 1875, created a particular kind of interest in the railroad (a limited fee as recognized in earlier decisions²) such that the Government retained an implied reversionary interest—conditioned that ownership would revert to if railroad use were abandoned. Instead it followed the approach taken—at the Government’s urging—in *Great Northern Ry. v. United States*³ labeling the railroad’s interest a mere easement.

The land in question in this case is located near Fox Park, Wyoming, and was patented to Melvin and Lulu Brandt in 1976, but was subject to “those rights for railroad purposes as have been granted to the Laramie, Hahn’s Peak & Pacific Railway Company.” Those railroad rights had been established pursuant to the General Railroad Right-of-Way Act of 1875. When the railroad was abandoned and gave notice of its intent to abandon the right-of-way, the Government brought an action in the United States District Court for the District of Wyoming seeking a declaration confirming that the railroad had abandoned, and quieting title in the United States. Marvin Brandt, son of the original patentees, defended the action, and also counterclaimed on a takings theory.⁴ The district court granted summary judgment to the

¹ *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005).

² *Northern Pacific Ry. Co. v. Townsend*, 190 U.S. 267 (1903); *Rio Grande Western Ry. Co. v. Stringham*, 239 U.S. 44 (1915).

³ 315 U.S. 262 (1942). There the government argued that the railroad’s interest was a mere easement in case in which the primary concern and dispute concerned whether the railroad had acquired the mineral rights along the right of way.

⁴ The takings counterclaim was dismissed by the district court, and then refiled in the Court of Federal Claims. See note 16 and accompanying text. The Government settled with or obtained a default judgment against every other land owner along the abandoned right of way. Only Marvin Brandt and the family trust for which he was trustee asserted that the railroad’s interest had been a mere easement and that he and the family trust now owned the land that had been subject to the easement in fee simple absolute, free of any easement or other government interest.

government,⁵ and the court of appeals affirmed,⁶ recognizing the government's implied reversionary interest and that it had become absolute. At the same time the court of appeals acknowledged that there was a division of authority on that point. That division included the contrary view of the Federal Circuit expressed in *Hash*.⁷ The Supreme Court, nearly unanimous, reversed the Tenth Circuit. Justice Sotomayor dissented.

2. The Analysis of the Supreme Court

As noted, the Court rejected the government's argument that the interests that had been granted to the railroads under the 1875 Act were different than an easement so that upon abandonment by the railroad, the fee reverted to the government instead of the former right-of-way becoming part of the fee of the adjacent estate that had been patented by the Government to the Brandt's subject to the railroad rights. The Court primarily relied upon the 1942 decision in *Great Northern* in which the Government had successfully advocated that rights-of-way granted under the 1875 General Railroad Right-of-Way Act were mere easements such that the railroad could not drill for oil underneath the right-of-way. In *Great Northern* the Court had specifically rejected the limited fee characterization of railroad rights of way under the 1875 statute. Although the Government asserted in *Brandt Revocable Trust* that that characterization had been mere dictum and was unnecessary to the result, or to the Government's argument in that case, the Court took pointed note of the Government's change of position. And it emphasized that in *Great Northern* the Court had pointedly endorsed the Government's characterization "in full."

In addition, the Court relied on common law principles concerning the operation of an easement. Most importantly, when the beneficial use of the easement is abandoned the servient fee becomes absolute, free of any easement. The Court rejected the Government's argument, embraced by the dissent, the *Great Northern* decided only that the Railroad there did not receive mineral rights, but only surface rights, and had not decisively rejected the entire limited-fee-subject-to-a-right-of-reverter-in-the-government. Moreover, subsequently enacted statutes that purport to dispose of or govern a retained government interest in such railroad rights of way were dismissed as to be irrelevant—except to the extent that they undermined the Government's position and emphasized its inconsistency over time as to the nature and effect of these railroad rights of way.

The Court concluded:

We cannot overlook the irony in the Government's argument . . . It was not until 1988—12 years after the United States patented the Fox Park parcel to the Brandts—that Congress did an about face and attempted to reserve the rights

⁵ 2008 WL 7185272 (D. Wyo. Apr. 8, 2008).

⁶ 496 Fed. Appx. 822 (10th Cir. 2012)(per curiam).

⁷ See note 1.

of way to the United States. That policy shift cannot operate to create an interest in land that the Government had already given away.⁸

Relying on *Leo Sheep Co. v. United States*,⁹ the Court “decline[d] to endorse [the Government’s] stark change in position, especially given the “the special need for certainty and predictability where land titles are concerned.”¹⁰ See also note 20, *below*.

3. Justice Sotomayor’s Dissent

Justice Sotomayor alone dissented. She faulted the majority for relying on *Great Northern* while ignoring the cases that came before, and for failing to limit *Great Northern* to the squarely presented issue of railroad control of mineral rights along their granted rights-of-way. And the dissent faulted the majority for reliance on common law property rights formulations, failing to appreciate the unique nature of the rights granted to railroads under the 1875 Railroad Right-of-Way Act and other subsequent enactments. She concluded:

Although the majority canvasses the special role railroads played in the development of our Nation, it concludes that we are bound by the common law definitions that apply to more typical property. In doing so, it ignores the *sui generis* nature of railroad rights of way.¹¹

Justice Sotomayor also decried the practical and fiscal consequences of the Court’s decision:

By changing course today, the Court undermines the legality of thousands of miles of former rights of way that the public now enjoys as means of transportation and recreation. And lawsuits challenging the conversion of former rails to recreational trails alone may well cost American taxpayers hundreds of millions of dollars.¹²

4. Why Brandt Matters

⁸ *Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1268 (2014)(quoting *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 272 (1942)).

⁹ 440 U. S. 668 (1979).

¹⁰ *Brandt Revocable Trust*, *supra*, 134 S. Ct. at 1268 (quoting *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979)).

¹¹ *Brandt Revocable Trust*, *supra*, 134 S. Ct. at 1269 (Sotomayor, J., dissenting).

¹² *Id.* at xxx (slip op at at 7-8) (Sotomayor, dissenting).

There are three or four basic reasons that the bar of the Court of Federal Claims should be aware of this recent decision of the Supreme Court of the United States:

- This is, first and foremost, a significant decision of the Supreme Court of the United States on a seemingly arcane property rights matter that is, however, likely to spawn a very significant volume of takings litigation before the Court of Federal Claims arising out of the operation of our national Rails-to-Trails program.
- Second, the decision of the Court is controversial and significant from the point of view of property rights scholars. It should also be on the radar of federalism scholars and especially those who explore the intersection of property rights and federalism.¹³
 - Here, one view of property rights, that emphasizes the importance of clearing titles, the closed nature of the system of estates and deference to the primacy of state law in defining property rights is triumphant. Property rights advocates are pleased with this decision.¹⁴

¹³ See generally, *State Land Board v. Corvallis Sand & Gravel Co.* 429 U.S. 363 (1977), overruling *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), and the literature spawned by these cases. These cases and that literature reflect a strong, longstanding and entrenched disagreement about the interaction of state and federal law in determining land titles. In addition, these cases, like *Brandt Revocable Trust*, reflect the great practical salience that these issues of theory and doctrine take on in the setting of the American west, because of the expanse of public lands and the importance of navigable waters. Note the unusual circumstance in this pair of cases of the Supreme Court overruling, after only four years, a decision favoring a stronger role for federal law in such settings in favor of an approach emphasizing the primacy of state law.

¹⁴ Brian T. Hodges, *Brandt v. United States: Will Property Law Doom Rail Trails?* (JURIST—Professional Commentary, Apr. 16, 2014), <http://jurist.org/hotline/2014/04/brian-hodges-rail-trail.php>. Brian T. Hodges is the Managing Attorney of the Pacific Legal Foundation’s Northwest Center. He celebrates the Court’s decision here for its protection of the rights of property owners and the values of “upholding certainty and predictability in land titles.” Under the Court’s decision, the author acknowledges, “lawsuits challenging the conversion of former rails to recreational trails alone may well cost American taxpayers hundreds of millions of dollars.” Arguing that “even though bike paths on former railroad easements may be good and desirable, it doesn’t mean that the public should get the land for free,” he concludes that the “[t]he only impact that *Brandt* will have on the government’s rails-to-trails policy is that, where the railroad right-of-way was acquired as an easement, the government will have to condemn the land and pay the owner just compensation.” *Id.*

Note that the Brandt Revocable Trust was represented in the Supreme Court, as well as in the parallel Federal Circuit litigation (see text accompanying note 16 below) by Stephen Lechner of the Mountain States Legal Foundation.

- A different view, anchored in a different scholarly understanding of the relevant history of nineteenth century railroad land grants and rights of way by the federal government, was pointedly rejected, to the expressed dismay of other commentators supporting this contrasting understanding of the relevant law and history.¹⁵
- Third, a related case in this litigation has already been before both the Court of Federal Claims and the Federal Circuit,¹⁶ spawning a decision in the ongoing imbroglio concerning the proper application of 28 U.S.C. §1500, addressing issues left open by the Supreme Court in *Tohono O’Odham Nation v. United States*,¹⁷ and *Keene Corp. v. United States*,¹⁸ concerning the order-of-filing rule established by the Court of Claims in *Tecon Engineers, Inc., v. United States*.¹⁹
- Finally, the decision of the Supreme Court affords an important example of the strong—indeed perhaps “aggressive”—use of historical context to interpret both statutes and conveyances in a manner that the Court considers to be faithful to the original intentions of their authors. It reflects Chief Justice Roberts fidelity to an

¹⁵ Danaya C. Wright, *A New Era of Lavish Land Grants: Taking Public Property for Private Use and Brandt Revocable Trust v. United States*, 28 PROBATE & PROPERTY NO. 5, at 30-35 (September/October 2014). See generally Alice M. Noble-Allgire, *Brandt Revocable Trust v. United States: A Victory for Private Landowners in an Abandoned Railroad Right-of-Way Case*, 28 PROBATE & PROPERTY NO. 5, at 11-14 (September/October 2014). In her commentary, Professor Wright concludes that “*the decision provides a windfall to today’s landowners: it either gives them land they never bought, expected or received a deed for, or compensation for not receiving land they never bought, expected or received a deed for.*” *Id.* at 30.

Clearly reactions to this decision reflect a strong ideological and theoretical divide. As much as it was celebrated by property rights activists and their counsel it was decried by scholars with an opposing viewpoint. Professor Wright argues that *Brandt Revocable Trust* and preceding decisions in the Federal Circuit are

wrong on the law, wrong on the history, and wrong on policy. . . . [G]reed and politics have once again trampled the public interest and taken public property for private use. *Id.* at 35.

¹⁶ *Brandt v. United States*, 710 F.3d 1369 (Fed. Cir. 2013), *rev’g Brandt v. United States*, 102 Fed. Cl. 72 (2011).

¹⁷ 131 S. Ct. 1723 (2011).

¹⁸ 508 U.S. 200 (1993).

¹⁹ 343 F.2d 943 (Ct. Cl. 1965).

approach favored by Chief Justice Rehnquist, for whom he clerked, and is particularly important in cases involving natural resources and the federal public lands and reserved lands in the western part of the United States.²⁰ Such cases – even outside the special context of rails-to-trails inverse condemnation cases are likely to spawn significant takings litigation in the Court of Federal Claims.

This last point ties this case to the other decision that I am addressing today, the decision of the Federal Circuit in *Shell Oil*. As explained in my notes on that case, one of the strong disagreements between the majority and Judge Reyna, dissenting, was the role to allowed to historical context in interpreting both statutes, and government contracts. Judge Reyna argues forcefully in his dissent that the majority opinion, per Judge Wallach, joined by Judge O'Malley, allows the court's reading of the historical context to trump what he considers to be the plain language of the government contracts involved. But the Supreme Court's decision in *Brandt Revocable Trust* here and prior cases taking a similar approach in other public lands-related disputes, such as *Leo Sheep*, suggest that the Supreme Court may be receptive to the approach taken by the Federal Circuit in *Shell Oil*.

Moreover, the other thing the two cases have in common is the strongly ideologically polarized commentary that they have, understandably, evoked. For better or for worse each case can be viewed as defining a point on the front lines of the conflict between conservative legal activists and lawyers and judges sympathetic to their perspectives, and the opposing liberal camp, and the lawyers and judges more inclined to the latter set of viewpoints.

²⁰ *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979); See also *United States v. Sioux Nation*, 448 U.S. 371 (1980)(Rehnquist, J., dissenting), for a passionate expression of Justice Rehnquist's views as to the proper and improper uses of history in judicial opinions about property rights. And see his majority opinion in *Leo Sheep*, *supra* for a fine example of his subtle use of history to understand statutes and conveyances in their historical context so as to decode the likely meaning of long-ago conveyances. *Leo Sheep* also embodies Justice Rehnquist's the strong preference for emphasizing the primacy of common law property interests over special rules designed for federal land grants, and the importance of "certainty and predictability where land titles are concerned," which strongly influenced the decision here in *Brandt Revocable Trust*.

In sum, Justice Rehnquist's jurisprudence reflected his special fascination with the history of the American west, which translated into a particular concern with the impact of the Supreme Court's case law on western property rights. Plainly we can see in *Brandt Revocable Trust* that this approach has also influenced Chief Justice Roberts, who is clearly his predecessor's faithful disciple in this case.