The Supreme Court decides rails to trails case: A new governmental attorney estoppel doctrine or a case of revisionist history?

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A new governmental attorney estoppel doctrine?

In March, the U.S. Supreme Court issued its first environmental opinion of the 2013 Term, deciding Marvin M. Brandt Revocable Trust v. U.S., 134 S. Ct. 1257; 188 L. Ed. 2d 272 (2014) (Brandt). Brandt involved the claims of a single property holder who challenged the federal government's reversionary interest in a former railroad right-of-way crossing his land. The government wanted to convert the land into a trail, hence the slogan "rails to trails."

In the 8–1 opinion, written by Chief Justice Roberts, the Court held that the U.S. lacked any reversionary interest in former railroad rights-of-way established pursuant to an 1875 statute. This ruling effectively limits the Government's current practice of converting former railroad rights of way into greenway trails and potentially exposes the U.S. to a number of "takings" suits for lands it has already acquired under that statute.

What makes this opinion noteworthy to environmental, energy, and natural resources lawyers in a broader context is the majority's aggressive use of the doctrine of attorney estoppel: If the Government argued an opposition position years ago (in this case, 70 plus years), then you can be bound to that prior position. In Brandt, the Chief Justice emphasized that the particular issue—whether the U.S. had a right of reverter to such railroad rights of way—was decisively answered by the Government's arguments to the contrary in a prior case from 74 years earlier, Great Northern Railroad Company v. U.S., 315 U.S. 262 (1942) (Great Northern).

As the Chief Justice put it: "The Government loses . . . in large part because it won when it argued the opposite before this Court more than 70 years ago . . . ." 134 S. Ct. at 1264 (emphasis added). The Chief Justice concluded the majority opinion with a further rebuke: "Now the Government argues that such a right of way is tantamount to a limited fee . . . . We decline to endorse such a stark change in position . . . ." 134 S. Ct. at 1268 (emphasis added).

During oral argument, other members of the Court chastised the Assistant Solicitor General, with Justice Alito suggesting that the Government's brief "gets the prize for understatement" in avoiding the prior contradictory arguments it made 70 years before. Transcript of Argument, No. 12-1137 at 24–25 (Jan. 14, 2014).

Does Brandt in fact portend another hurdle for the Government lawyer in environmental or resources cases—the potential obstacle of "attorney estoppel"? Or does the case involve judicial revisionist history of what was argued 70 years prior?

Brandt fights the effort to covert former rail property into a greenway

The basic facts are undisputed: Mr. Brandt inherited from his father land in Wyoming that had once had a railroad right-of-way burdening part of the property. The former railroad, the never- prosperous Laramie, Hahn's Peak and Pacific Railroad (Laramie Railroad), obtained a right-of-way pursuant to an 1875 congressional act (1875 Act) and built a railroad in 1911 that ran, in part, through what later became Mr. Brandt's property. Laramie Railroad intended to transport coal and other valuables, but instead ended up transporting less valuable cargo and ultimately was purchased by Union Pacific Railroad. By the mid-1990s, Union Pacific abandoned its use of the rail line, tore up the tracks, and abandoned the line. 134 S. Ct. at 1261–63.

Mr. Brandt, who had received title from the U.S. in 1976, thought he was literally home free. Nevertheless, the Government asserted an exception to its deed for "those rights to railroad purposes" that had been created through the 1875 Act, and asserted that it had a right of reverter in the former Laramie Railroad right-of-way. All other local landowners conceded after the Government filed a formal quiet title action seeking title to the abandoned railway line, but Mr. Brandt—with the largest amount of property at stake—contested the issue. The district court rejected his quiet title act suit as did the Tenth Circuit. Then, with the assistance of the Mountain States Legal Foundation, Mr. Brandt sought certiorari in the Supreme Court. He argued that the 1875 Act in question gave the railroads only limited easements and that under the common law property doctrine of "use it or lose it," the railroad's abandonment of the easement meant that the real property reverted to him, not back to the U.S. Petition for Writ of Certiorari, No. 12-1173, at pp. 7–9. Mr. Brandt pointed out that subsequent legislation, the National Trails System Improvements Act of 1988, which expressly created a reversionary interest by the U.S. in abandoned railroad rights-of-way, could not retroactively apply to his 1976 deed (technically a "patent") issued by the Government some 12 years earlier.

In a somewhat unusual turn, the Solicitor General also urged the Court to grant certiorari because "Whether the United States has reversionary interests in 1875 Act rights-of-way is a question of sufficient importance to warrant this Court's review." Brief for the U.S. on Petition for Certiorari, No. 12-1173 at 19. With both parties urging a grant of certiorari, the Supreme Court granted the petition.

The majority's reliance upon arguments 70 years ago

The Chief Justice in his majority opinion largely agreed with argument advanced by Mr. Brandt's counsel that, whatever might have been said about the 1875 Act and the scope of legal rights it intended to convey to railroads (with or without reversionary interests to the Government), the argument was foreclosed by the Government's contrary argument made in Great Northern. See [Brandt] Petition for Writ of Certiorari, No. 12-1137 at pp. 7–8.

In Great Northern, the Court was confronted with a claim to subsurface mineral rights made by a railroad against the Government. As Justice Murphy put it, "We are asked to decide whether petitioner has any right to the oil and minerals underlying its right of way acquired under the general right of way statute, Act of March 3, 1875 . . . ." 315 U.S. at 270. The Government had sued to enjoin the railroad from drilling for gas and oil and won below. The Supreme Court granted certiorari at the request of the property holder, a successor railroad, and held in favor of the Government. Justice Murphy for the Court held that the 1875 Act "clearly grants only an easement and not a fee" based upon the Court's review of the statutory language, its intended purposes, and legislative history. 315 U.S. at 271–72.

Context is important, and the context of this case was that the Government was trying to resist an expansion of right-of-way language to subsurface oil and gas extraction rights. The Court heard argument by the railroad's lawyer that what was intended by the 1875 Act was a "fee" interest in the extent of the right-of-way and decisively rejected that argument. Justice Murphy noted that the 1875 Act emphasized the "use and occupancy" rights of the railroad, which suggested that its interest was characterized more as an easement than an outright fee. Moreover, he noted as particularly persuasive section 4 of the 1875 Act (43 U.S.C. § 937), which provided that any recorded right-of-way "shall be disposed of subject to such right of way." As Justice Murphy put it, "This reserved right to dispose of the lands subject to the right of way is wholly inconsistent with a grant of a fee." 315 U.S. at 271. The Court held that "Since petitioner's right of way is but an easement, it has no right to the underlying oil and minerals." 315 U.S. at 279.

For the majority, however, the key point in Great Northern was the Court's decision (based upon the Government's argument) to characterize the railroad's interest under the 1875 Act as an "easement." From this point, the Chief Justice rapidly concluded that easements as a matter of real property law lapse upon lack of use. That means that someone who granted real property in fee "subject to" an easement would have the benefit of the property unburdened by the easement once it was abandoned. As the Chief Justice explained, "[t] hose basic common law principles resolve this case." 134 S. Ct. at 1266.

The dissent: Revisionist judicial history?

In dissent, Justice Sotomayor made three points. First, that the context of Great Northern is critical. Its holding was a narrow one—that "the right of way did not confer one particular attribute of fee title." 134 S. Ct. at 1270. This limited holding is critical because the majority opinion relies upon Great Northern to "disavow" (although clearly not expressly overrule) two prior decisions of the Court, Northern Pacific Railroad Company v. Townsend, 190 U.S. 267 (1903), and Rio Grande Western Railroad Company v. Stringham, 239 U.S. 44 (1915), which expressly held that rights of way granted under the 1875 Act were "made on an implied condition of reverter in the event that the company ceases to

use or retain the land . . .” 239 U.S. at 46. For the dissent, Great Northern did not disavow the prior cases; “[n]or could it have, for the Court did not have occasion to consider that question.” Thus, Justice Sotomayor implicitly suggests the majority is guilty of revisionist history—a revisionist interpretation of a 70-year old case to suit current circumstances and thereby rule in favor of a private property owner over the Government.

Second, Justice Sotomayor emphasized that language in Great Northern that referred to the type of property interest as an “easement” could not and should not be deemed to convey an “easement” in the traditional common law meaning of the word. Justice Sotomayor cited a series of cases in the Supreme Court and other courts recognizing that “in the context of railroad rights of way, traditional property terms like ‘fee’ and ‘easement’ do not neatly track common-law definitions.” 134 S. Ct. at 1270 (emphasis added). As the Government argued in its main brief, “The Court’s holding in Great Northern does not foreclose the conclusion that the right-of-way, even if labeled as an ‘easement,’ can in other respects carry characteristics of a limited fee and can. . . include an implicit condition of reverter to the United States . . . .” Brief for the United States, No. 12-1173 at 46.

Third, the dissent disagreed with the majority’s position that the U.S. was bound by its prior argument made some 70 years earlier before the Court in Great Northern. Chief Justice Roberts castigated the Government for what he termed a “stark change in position” from the position that the U.S. took in the Great Northern case, particularly where there is a “need for certainty” concerning land titles. 134 S. Ct. at 1268. But, Justice Sotomayor rejoins that such a critique is misplaced, particularly where the Government expressly reserved the possibility that it might retain a reversionary interest in the right-of-way in its brief filed more than 70 years ago. 134 S. Ct. at 1272. The Assistant Solicitor General expressly made this same point in defending the brief in the Great Northern case filed by the Government: “[T]he way that you read the brief is the way that you read opinions, which is in the context in which it was decided, particularly because footnote 4 . . . made clear that they were only addressing mineral rights where the United States held the surrounding parcel.” Tr. of Oral Argument No.12-1137 at p. 28. Justice Sotomayor expressly alluded to the reservation made in footnote 4 of the Government’s brief so many years before. 134 S. Ct. at 1272 (citing Brief for United States in Great Northern at 10, n. 4).

One can read and re-read the Great Northern case, which does indeed use the word “easement” and distinguishes that from a “fee interest” claimed by the railroad in that case. But, a close reading suggests, as did the dissent, that Great Northern was (and should have been) limited to its unique factual context and was not intended to set down the law for land holders such as Mr. Brandt some 70 years later.