No. _____

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 Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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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 (collectively "Brandts"). The Brandts 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. The Brandts are not corporate entities.

Respondent is the United States of America. The United States initiated this action against the Brandts 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; Breazeale Revocable Trust,

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT – Continued

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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PETITION FOR WRIT OF CERTIORARI

Marvin M. Brandt Revocable Trust and Marvin M. Brandt, Trustee (the "Brandts"), respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Tenth Circuit, dated September 11, 2012, was not selected for publication in the Federal Reporter and is reproduced at Appendix ("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 and is reproduced at App. 10-56.

STATEMENT OF JURISDICTION

On March 2 and 3, 2009, the district court entered judgment in favor of the United States and against the Brandts. App. 57-59. On April 29, 2009, the Brandts timely filed a Notice of Appeal. On September 11, 2012, the Tenth Circuit issued a per curiam decision affirming the district court's decision. App. 1-9. On October 24, 2012, the Brandts filed a timely petition for rehearing en banc and/or panel rehearing. The petition was denied on December 26, 2012. App. 67-68. This Petition for Writ of Certiorari is filed within ninety days of that date. 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 App. 69-71.

The Act of March 8, 1922, 42 Stat. 414-143 (1922), is codified at 43 U.S.C. § 912, and is reproduced at 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 App. 74.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND.

A. Railroad Land Grants.

During the 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.*, Pacific Railroad Act, 12 Stat. 489-98 (1862); Amended Pacific Railroad Act, 13 Stat. 356-65 (1864); Northern Pacific Railroad Act, 13 Stat. 365-72 (1864). This Court has interpreted these pre-1871 railroad acts as granting a limited fee in the railroad ROW with an implied condition of reverter. *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903) ("In effect the [ROW] grant was of 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). 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, beginning in 1872, Congress passed a number of special acts granting to designated railroads only ROWs through the public lands.[1] These acts generally provided for the disposal

[1] 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

(Continued on following page)

of lands over which the railroad ROW crossed "subject to" the railroad ROW. *E.g.*, Act of April 12, 1872, 17 Stat. 52 (1872) ("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"); *see* Cong. Globe, 42nd Cong., 2nd Sess., 2136-37 (1872). Finally, in 1875, in order 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 ROWs by the Federal Land Policy and Management Act, Pub. L. No. 94-579, 90 Stat. 2743, 2793 (1976).

Of particular importance is Section 4 of the 1875 Act, which provides: "all such lands over which such right of way shall pass shall be disposed of subject to such right of way." App. 70-71. Based upon this statutory language and the history surrounding that passage of the 1875 Act, the Department of the Interior ("DOI") consistently interpreted the 1875 Act as granting an easement rather than a fee. *E.g.*, Circular,

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> 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., 2nd Sess. 1585 (1872) (emphasis added).

Right of Way – Railroads – Act of March 3, 1875, 12 L.D. 423, 428 (1888) ("The act of March 3, 1875 is not in the nature of a grant of lands; it does not convey an estate in fee. . . . It is a right of use only, the title still remaining in the United States."); *Fremont, Elkhorn and Missouri Valley Ry. Co*., 19 L.D. 588, 590 (1894) ("That the right of way granted by the [1875 Act] is a mere easement cannot 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.'"). Congress also recognized that the 1875 Act granted only an easement. *E.g*., Act of June 26, 1906, 34 Stat. 482 (1906) (expressly characterizing 1875 Act ROWs as "easements"); Act of February 25, 1909, 35 Stat. 647 (1909), codified at 43 U.S.C. § 940 (same).

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

That 1875 Act ROWs were easements for railroad purposes was well recognized by the courts and administrative agencies until 1915, when this Court decided *Rio Grande W. Ry. Co. v. Stringham*, 239 U.S. 44 (1915). *Stringham* involved a private dispute brought by a railroad claiming an 1875 Act ROW against the purchaser of surface rights from a mining claimant. *Id*. at 45-46. The railroad prevailed and title to the ROW over the mining claim 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 strip of land through the mining claim. *Id*. at 46-47.

Although this Court affirmed, relying on cases interpreting pre-1871 railroad acts, it stated, arguably in dictum:

> 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).[2]

D. Congress Responds To *Stringham*.

The "limited fee" language in *Stringham* naturally raised concerns in Congress as to what to do with the strips of land upon abandonment by a railroad. H.R. Rep. No. 217, 67th Cong., 1st Sess., quoted in S. Rep. No. 388, 67th Cong., 2nd Sess., at 1-2 (emphasis added). Because these strips of land would have "little or no value to the government[,]" *id*., and Congress had originally intended to convey the underlying land to homesteaders, Congress passed the Act of March 8, 1922, 42 Stat. 414-15 (1922), codified at 43 U.S.C. § 912, to transfer those strips of lands to

[2] This misstatement was likely made because *Stringham* involved only private parties and this Court did not have the benefit of a brief from the United States.

whom the adjacent lands had been patented. App. 72-73. This statute provides, in relevant part:

> *Whenever public lands of the United States have been or may be granted to any railroad company* for use as a right of way for its railroad . . . , and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall . . . be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, . . . *Provided further*, *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 so transferred and conveyed, with the right to prospect for, mine, and remove same*.

Id. (all emphasis added).

E. This Court Rejects *Stringham* And Reaffirms That 1875 Act ROWs Are Easements.

In *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 270 (1942), the United States sought to enjoin a railroad from removing the oil and gas from

underneath an 1875 Act ROW. Based upon Congress' shift in policy in 1871, the text of the 1875 Act, contemporary constructions of the 1875 Act by the DOI, and similar constructions by Congress as reflected in subsequent legislation, the United States argued that 1875 Act ROWs are merely easements for railroad purposes 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' persuasive arguments 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."). In reaching this conclusion, this Court noted that Section 4, which allowed for the subsequent patenting of the lands "subject to" a ROW, was "especially persuasive" because such actions would be "wholly inconsistent with the grant of a fee." *Id*. 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 v. United States*, 119 F.2d 821, 825 (9th Cir. 1941)). Accordingly, this Court also expressly rejected the "limited fee" language in *Stringham*:

> The conclusion [in *Stringham*] 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' change of policy after

> 1871 was brought to the Court's attention. . . . We therefore do not regard it as controlling. Statements in [other cases] that the 1875 Act conveyed a limited fee are dicta based on the *Stringham* case and entitled to no more weight than the statements in that case.

Id. at 279 (footnotes and internal citations omitted).

F. The National Trails System Improvements Act Of 1988.

In 1983, Congress amended the National Trails System Act to transform abandoned railroad ROWs into recreational trails. National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 42, codified at 16 U.S.C. §§ 1241-1251. Although laudable, that goal has often clashed with private property interests. *See generally*, *Preseault v. I.C.C.*, 494 U.S. 1 (1990) ("*Preseault I*"); *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (en banc) ("*Preseault II*"). 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); App. 74. The Secretary of Agriculture, in opposing this provision, noted 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. 408, 100th Cong., 2nd Sess. at 10, *reprinted in*, 1988 U.S.C.C.A.N. 2607, 2614. The Secretary further explained, "[i]n our experience and from review of selected railroad grants affecting National Forests, it appears that the United States has residual property interests in few, if any, rights-of-way over private land within National Forest boundaries.").

II. PROCEEDINGS BELOW.

Around 1908, the Laramie, Hahn's Peak and Pacific Railway Company was granted an 1875 Act ROW. App. 13. The grant was for a two-hundred-foot-wide ROW approximately 66 miles in length, that ran from Laramie, Wyoming south to the Wyoming-Colorado border. *See id*.

On February 18, 1976, the United States patented approximately 80 acres of land to Melvin M. and Lulu M. Brandt, parents of Marvin M. Brandt. App. 76-78. The patented land, which now comprises Fox Park, Wyoming, is surrounded by the Medicine

Bow-Routt National Forest, and is essentially bisected by the above-described 1875 Act ROW. App. 11-13. Although the Patent expressly reserves certain ROWs and road easements, it does not reserve any interest in the 1875 Act ROW. 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.

App. 78.

In November 1987, Wyoming and Colorado Railroad Company, Inc. ("WYCO"), acquired the 1875 Act ROW. 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 the Brandts' 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. App. 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 43 U.S.C. § 912, for approximately 28 miles of the 1875 Act ROW that was within the National Forest. App. 10-11. The United States also sought to quiet title against the Brandts and approximately 50 other private landowners over whose lands that 28-mile

segment of the 1875 Act ROW crossed.[3] *See* App. 11-12. The United States' claim was based primarily on the Tenth Circuit's decision in *Marshall v. Chicago & Northwestern Transportation Co.*, 31 F.3d 1028 (10th Cir. 1994), which had ruled that the United States retained an implied reversionary interest in an 1875 Act ROW and, upon a judicial decree of abandonment, that implied reversionary interest was transferred to the underlying fee owner pursuant to 43 U.S.C. § 912. App. 15-18. The United States' claim was also based upon 16 U.S.C. § 1248(c), which, according to the United States, modified 43 U.S.C. § 912, so the United States retained the implied reversionary interest in 1875 Act ROWs upon a judicial decree of abandonment. App. 18-21.

The Brandts answered and filed a counterclaim seeking to quiet title to the abandoned 1875 Act ROW.[4] App. 12. The Brandts argued, *inter alia*, that,

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[3] 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. App. 60-61. The United States either settled with, or obtained default judgments against, all the landowners except the Brandts.

[4] The Brandts also sought to quiet title to two road easements that burden their property. App. 31-56. That claim is not at issue here. The Brandts 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. App. 62-66. After final judgment by the district court and before filing their Tenth Circuit appeal, the Brandts filed a takings claim in the Court of Federal Claims,

(Continued on following page)

under this Court's decision in *Great Northern*, the 1875 Act ROW was an easement. App. 21-24. As such, 43 U.S.C. § 912 and 16 U.S.C. § 1248(c) did not apply. *Id*. Instead, because neither the 1875 Act nor the Patent expressly reserved any interest in the ROW, the Brandts acquired fee title to their patented land "subject to" the railroad easement. *Id*. And, upon abandonment by WYCO, the Brandts' property became unburdened by the 1875 Act ROW. *Id*. In support of that argument, the Brandts relied primarily on the Federal Circuit's decision in *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) and the Court of Federal Claims decision in *Beres v. United States*, 64 Fed. Cl. 403 (2005) ("*Beres I*"), both of which held that the United States did not retain implied reversionary interests in 1875 Act ROWs and when 1875 Act ROWs are abandoned the underlying fee is unburdened by the easement.

On April 8, 2008, the district court ruled that, under the Tenth Circuit's decision in *Marshall*, the United States had an implied reversionary interest in

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alleging that the district court's actions in vesting title in favor of the United States and expanding the scope of the 1875 Act ROW to include a recreational trail effectuated a taking. That case was initially stayed pending the outcome of this case. After this Court's ruling in *United States v. Tohono O'odham Nation*, ___ U.S. ___, 131 S. Ct. 1723 (2011), the stay was lifted and the case was dismissed. *Brandt v. United States*, 102 Fed. Cl. 72 (2011), *appeal pending*, No. 2012-2050 (Fed. Cir.). If the Brandts are successful here, that would necessarily render their takings case moot.

the 1875 Act ROW under 43 U.S.C. § 912. App. 26-30. Then, through application of 16 U.S.C. § 1248(c), the district court declared that the implied reversionary interest became vested in the United States. *Id*. Although the district court acknowledged "the split in the circuits" it was compelled to "follow the law promulgated by the Tenth Circuit. . . ." App. 27.

Almost one year later, the district court entered judgment in favor of the United States and against the Brandts. App. 57-59. That judgment provides that: (i) the 1875 Act ROW, where it traverses the Brandts' property, has been abandoned by WYCO for all purposes, including 16 U.S.C. § 1248(c) and 43 U.S.C. § 912; (ii) the United States retained a reversionary interest in the ROW; (iii) as a result of the abandonment by WYCO, title to the ROW is "hereby vested and quieted in the United States"; and (iv) fee title to the Brandts' property remains with the Brandts 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[.]" App. 59 (emphasis added).

On April 29, 2009, the Brandts timely appealed. Over three years later, on September 11, 2012, the Tenth Circuit issued a per curiam decision affirming the district court's judgment. App. 1-9. Based upon *Marshall,* the Tenth Circuit ruled that 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 43 U.S.C. § 912 and 16 U.S.C. § 1248(c). App. 3-6. In so doing, the Tenth Circuit acknowledged the circuit split, which now includes the Seventh Circuit:

> Though we recognize that the Seventh Circuit, the Federal Circuit and the Court of Federal Claims have concluded that the United States did not retain any reversionary interest in these railroad rights-of-way, we are bound by our precedent. Thus, the district court correctly held that the interest in the abandoned railroad right-of-way belongs to the United States.

App. 5-6 (internal citations omitted).

On October 24, 2012, the Brandts filed a petition for rehearing en banc and/or panel rehearing in an effort to try to resolve the circuit split. That petition was denied on December 26, 2012, prompting this Petition for Writ of Certiorari. App. 67-68.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted because the Tenth Circuit's decision conflicts with this Court's precedent in two important respects. First, the Tenth Circuit's decision conflicts with this Court's decision in *Great Northern*, wherein this Court, *at the urging of the United States*, held that 1875 Act ROWs were

easements and not limited fees with an implied condition of reverter. It is axiomatic that when 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. When the underlying fee is subsequently patented into private ownership without a reservation, the patentee receives full fee title burdened by the easement. Thus, the Tenth Circuit's ruling that the United States retained an implied reversionary interest in the 1875 Act ROW cannot be reconciled with this Court's ruling in *Great Northern*.

Second, the Tenth Circuit's decision is inconsistent with this Court's ruling in *Leo Sheep* that a patent conveys all right, title, and interest of the United States, except those interests *expressly reserved* in the granting statute or the patent itself. Neither the 1875 Act, nor the Patent, expressly reserved a reversionary interest in the 1875 Act ROW. Thus, when the United States issued the Patent to the Brandts' predecessors "subject to" the ROW, the United States conveyed the underlying fee burdened by the easement and retained no right, title, or interest in the 1875 Act ROW. Therefore, the Tenth Circuit's ruling that the United States retained an implied reversionary interest in the 1875 Act ROW conflicts with this Court's ruling in *Leo Sheep*.

This Court's review is also necessary because the Tenth Circuit acknowledged that its decision conflicts with decisions of the Federal Circuit and the Seventh

Circuit. There is also uncertainty in the state courts regarding whether the United States retained an implied reversionary interest in 1875 Act ROWs. The split between the circuits and the uncertainty in the state courts justifies this Court's review.

Finally, this Court's review is necessary because the Tenth Circuit's decision upsets the settled expectations of potentially thousands of landowners who trace their title to patents that were issued "subject to" 1875 Act ROWs. If the Tenth Circuit's decision is allowed to stand, those landowners' only recourse would be to seek just compensation, with the concomitant burden on the taxpayers. Even if available, just compensation is cold comfort for the disruption and inconvenience of having a public recreational trail on one's property. Because Congress did not intend for this result when it passed the 1875 Act and authorized the patenting of land "subject to" 1875 Act ROWs, this Court's review is imperative.

I. THE TENTH CIRCUIT'S RULING THAT THE UNITED STATES RETAINED AN IMPLIED REVERSIONARY INTEREST IN 1875 ACT ROWS CONFLICTS WITH THIS COURT'S RULING IN *GREAT NORTHERN*.

In *Great Northern*, this Court emphatically ruled that 1875 Act ROWs were easements. 315 U.S. at 277. Fifteen years later, this Court reaffirmed that ruling. *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: that after that period only an easement for railroad purposes was granted. . . .").[5] Even the Tenth Circuit has recognized this Court's ruling in *Great Northern* that 1875 Act ROWs were easements. *Chicago & N. W. Ry. Co. v. Continental Oil Co*., 253 F.2d 468, 470-71 (10th Cir. 1958) ("[T]he appellants acknowledge, as indeed they must, the decisional force of [*Great Northern*] to the effect that the interest acquired by the railroad under the 1875 Act was merely an easement. . . ."); *Wyoming v. Udall*, 379 F.2d 635, 638 (10th Cir. 1967); *Wyoming v. Andrus*, 602 F.2d 1379, 1382 (10th Cir. 1979). More importantly, the DOI regulation in effect when the United States issued the Brandts' Patent confirmed that 1875 Act ROWs were easements: "[a] railroad company to which a[n] [1875 Act] 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*

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[5] *Union Pacific* involved the 1862 Pacific Railroad Act. 353 U.S. at 113. Although this Court ruled that the railroad did not own the minerals underneath the ROW (*id*. at 114-17) and thereby, perhaps, lessened pre-1871 railroad ROWs, this Court did not alter the ruling in *Great Northern* that 1875 Act ROWs are easements. *See* Solicitor's Opinion M-37025*, Partial Withdrawal of M-36964 – Proposed Installation of MCI Fiber Optic Communications Line Within Southern Pacific Transportation Co.'s Railroad Right-of-Way*, 6 (Nov. 4, 2011), *available at* http://www.doi.gov/solicitor/opinions/M-37025.pdf (last visited Mar. 14, 2013) ("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. . . .").

use the land for the purposes for which it was granted and for no other purpose. . . ." 43 C.F.R. § 2842.1(a) (1976), reproduced at App. 75 (emphasis added).[6]

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.[7] *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.").

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[6] This regulation was originally published in 1909, *Right-of-Way Railroads*, 37 L.D. 787, 788 (1909) and was later codified as 43 C.F.R. § 243.2 (1938). In 1970, it 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 after passage of FLPMA, *see* 45 Fed. Reg. 44,518 (July 1, 1980), it had the force and effect of law when the Brandts' Patent was issued. *United States v. Nixon*, 418 U.S. 683, 695 (1974) ("So long as [a] regulation is extant it has the force of law.").

[7] At common law, a reversionary interest in a non-freehold estate, such as an easement, could not exist. *Preseault*, 100 F.3d at 1533; *see Restatement (First) of Property* § 154, comment f (1936). These common law principles are important because "[n]o 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." *Shaw v. Merchants' Nat. Bank*, 101 U.S. 557, 565 (1879). Thus, "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quotation omitted). There is no evidence that Congress sought to abrogate the common law definition of easement in passing the 1875 Act.

When the easement is abandoned, the underlying fee becomes unburdened. *Id*. at 1545 (citing *Restatement (First) of Property* § 504 (1944)); *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004) ("[A]s a matter of traditional property law terminology, a termination of the easements would not cause anything to 'revert' to the landowner. Rather, the burden of the easement would simply be extinguished, and the landowner's property would be held free and clear of any such burden."); *Nat'l Wildlife Fed'n v. ICC*, 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.'").

Thus, the Tenth Circuit's ruling that the United States somehow retained an implied reversionary interest could be sustained only if the 1875 Act ROW were a limited fee – a concept this Court expressly rejected in *Great Northern*. Moreover, the United States has recently again embraced this Court's ruling in *Great Northern* that 1875 Act ROWs are easements. *See Geneva Rock Products v. United States*, 107 Fed. Cl. 166, 170 (2012) (class action in which the United States stipulated that an 1875 Act ROW was an "easement"); Solicitor's Opinion M-37025, *supra*, at 2-9 (recognizing the ruling in *Great Northern* that 1875 Act ROWs are easements and rejecting an 1989 Solicitor's Opinion that had characterized them as an interest "'tantamount'" to a fee.); App. 82 (same). Therefore, this Court should grant review to ensure

consistency with *Great Northern*, especially considering the important property interests at stake and that the United States has now disavowed the concept upon which the Tenth Circuit's ruling was necessarily premised.

II. THE TENTH CIRCUIT'S RULING THAT THE UNITED STATES RETAINED AN IMPLIED REVERSIONARY INTEREST IN 1875 ACT ROWS CONFLICTS WITH THIS COURT'S PRECEDENT REGARDING THE SANCTITY OF PATENTS AND THIS COURT'S RULING IN *LEO SHEEP*.

"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). In addition, when a patent is issued, all right, title, and interest passes from the United States, except only those interests expressly reserved in the granting statute or the patent itself. *See 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."); *Swendig v. Washington Water Power Co.*, 265 U.S. 322, 331 (1924) ("[W]hen a patent issues in accordance with governing statutes, all title and control of the land passes from the United States").

For example, in *Leo Sheep,* this Court expressly rejected the idea that the United States could retain property interests not expressly reserved in the land grant statute or patent. In that case, the Tenth Circuit ruled that the United States impliedly reserved an easement for access across lands patented under the Pacific Railroad Acts. *Leo Sheep*, 440 U.S. at 678. As that ruling affected 150 million acres of land in the western United States, this Court granted certiorari. *Id*. at 678, 688. Because neither the Pacific Railroad 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. & T. R. Co. v. Kansas Pacific R. Co*., 97 U.S. 491, 497 (1878)); *cf. St. Joseph & Denver City R. Co. v. Baldwin*, 103 U.S. 426, 430 (1880) (Had Congress intended to qualify a pre-1871 ROW grant, "it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists."); *United States v. Great N. Ry. Co*., 343 U.S. 562, 575 (1952) ("It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written."). Thus, in reversing the Tenth Circuit, this Court concluded:

> 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 (footnote omitted) (emphasis added).

Leo Sheep is equally applicable here. First, the United States' assertion that it retained implied reversionary interests in 1875 Act ROWs is of recent vintage. *See Amerada Hess Corp.,* 24 IBLA 360, 365-370 (1976) (ruling an 1875 Act ROW is an easement and the United States did not impliedly reserve the mineral estate when the underlying land was patented into private ownership); *Wyoming v. Udall*, 379 F.2d at 640 (noting that the United States conceded that with post-1871 ROW grants, "title to the servient estate passes without express mention in a subsequent grant by the United States of the traversed tract"); *Beres I*, 64 Fed. Cl. at 426 (suggesting that the United States' assertion that it retained an implied reversionary interest in 1875 Act ROWs may have been prompted by passage of the National Trails System Improvements Act of 1988).

Second, it is undisputed that the United States did not expressly reserve a reversionary interest in the 1875 Act. App. 69-71. Nor did the Patent expressly reserve a reversionary interest in the 1875 Act ROW. App. 76-79. Instead, in accordance with Section 4 of the 1875 Act the Patent merely provides that the Brandts' property is "SUBJECT TO those rights for railroad purposes as have been granted to

the Laramie Hahn's Peak & Pacific Railway Company. . . ." App. 78. As explained by the extant DOI regulation, this language does not reserve an interest; it merely advises that the patented land is burdened by an easement. App. 75 ("the patentee takes the fee subject only to the railroad company's right of use and possession"); *see Smith v. Townsend*, 148 U.S. 490, 499 (1893) (Interpreting post-1871 railroad ROW act 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)); *Home on the Range v. AT&T Corp.,* 386 F. Supp. 2d 999, 1016-24 (S.D. Ind. 2005) (patentee receives land underlying 1875 Act ROW "subject to" an easement for railroad purposes). Once the easement is abandoned, the easement is extinguished and the underlying fee is no longer burdened. *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)). As a result, if the United States had wanted to retain a reversionary interest in the 1875 Act ROW, it had an obligation to expressly reserve such an interest, just as it "reserv[ed]" a ROW "for ditches or canals" and two road easements in the Patent. App. 76-77; *Leo*

Sheep, 440 U.S. at 678-82 (expressed reservations in a patent negate the existence of implied reservations).

Accordingly, the Tenth Circuit's ruling that the United States retained an implied reversionary interest in the 1875 Acts ROW is in conflict with this Court's precedent regarding the sanctity of patents and this Court's ruling in *Leo Sheep*. Therefore, this Court should grant review to resolve this conflict.

III. THE TENTH CIRCUIT'S RULING THAT THE UNITED STATES RETAINED AN IMPLIED REVERSIONARY INTEREST IN 1875 ACT ROWS CONFLICTS WITH DECISIONS FROM THE FEDERAL AND SEVENTH CIRCUITS.

In affirming the district court that the United States retained an implied reversionary interest in the 1875 Act ROW, the Tenth Circuit ruled that it had to follow "circuit precedent[,]" primarily *Marshall*.[8]

[8] Other Tenth Circuit decisions after *Marshall* have not independently analyzed whether the United States retained an implied reversionary interest in 1875 Act ROWs. *Phillips Co. v. Denver & Rio Grande Western R.R. Co*., 97 F.3d 1375 (10th Cir. 1996); *Nicodemus v. Union Pac. Corp*., 440 F.3d 1227 (10th Cir. 2006). In *Phillips*, the issue was whether authorization from the ICC to abandon an 1875 Act ROW was a prerequisite for judicial decree of abandonment under 43 U.S.C. § 912. 97 F.3d at 1376. In *Nicodemus*, the issue was whether the interpretation of federal railroad acts involved a federal question. 440 F.3d at 1234-37. In a footnote, the Tenth Circuit stated only that 43

(Continued on following page)

App. 5-6. As demonstrated below, the Tenth Circuit's reasoning in *Marshall* was erroneous and has been rejected by the Federal and Seventh Circuits.

A. The Tenth Circuit Incorrectly Ruled That The United States Retained An Implied Reversionary Interest In 1875 Act ROWs.

In *Marshall*, a railroad holding an 1875 Act ROW applied to the ICC for abandonment of its ROW. 31 F.3d at 1028-29. Before the ICC approved the abandonment, the railroad had transferred all its interest in the ROW to third parties. *Id*. at 1029. Thereafter, the underlying fee owners filed suit against the railroad and its grantees seeking a judicial decree of abandonment under 43 U.S.C. § 912 and a declaration quieting title in the ROW in their favor. *Id.* The railroad and its tranferees defended by arguing that 43 U.S.C. § 912 did not apply to 1875 Act ROWs. *Id*. at 1030. The district court ruled that 43 U.S.C. § 912 applies to 1875 Act ROWs, issued a judicial decree of abandonment, and quieted title in favor of the underlying fee owners. *Id*. at 1029-30.

On appeal, the Tenth Circuit affirmed that 43 U.S.C. § 912 applies to 1875 Act ROWs. *Id*. at 1032. In so doing, the Tenth Circuit concluded that 43 U.S.C. § 912 evinces Congress' belief that the United

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U.S.C. § 912 applied to pre-1871 ROWs that were limited fees. *Id*. at 1236 n.9.

States retained an implied reversionary interest in 1875 Act ROWs. *Id*. at 1031 (In passing 43 U.S.C. § 912, "'Congress clearly felt that it had some retained interests in [1875 Act] railroad right-of-way.'" (quoting *State of Idaho v. Oregon Short Line R.R. Co*., 617 F. Supp. 207 (D. Idaho 1985) ("*Oregon Short Line*"))). Based upon *Oregon Short Line*, the Tenth Circuit also suggested that 43 U.S.C. § 912 must apply to 1875 Act ROWs, otherwise 43 U.S.C. § 912 would have no meaning. *Marshall*, 31 F.3d at 1032. Then, by applying 43 U.S.C. § 912, the Tenth Circuit ruled that this implied reversionary interest was transferred to the underlying fee owners. *Id*. at 1031-32. Although the outcome that the underlying fee owners owned the ROW was correct, the Tenth Circuit's reasoning reveals three fundamental errors.

First, the Tenth Circuit erred when it ruled that 43 U.S.C. § 912 was "designed to cover the situation where the United States grants a railroad company a right of way *over* public lands and thereafter conveys" the underlying fee. *Id*. at 1032 (emphasis added). This ruling cannot be squared with the plain language in 43 U.S.C. § 912, that it applies only when "*public lands* of the United States have been or may be *granted* to any railroad company for use as a right of way for its railroad. . . ." App. 72 (all emphasis added). Use of the terms "public lands" and "granted," indicates that Congress intended 43 U.S.C. § 912 to apply only to those ROWs that were limited fees. This conclusion is supported by other language in 43 U.S.C. § 912 that provides "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. . . ." App. 73. ROWs that are easements do not afford the United States the luxury of reserving minerals. *Great Northern*, 315 U.S. at 275 ("[I]t is improbable that Congress intended by [the 1875 Act] to grant more than a right of passage, let alone mineral riches."). It is undisputed that the Brandts own the minerals underlying the ROW. App. 59. This is entirely consistent with the conclusion that the 1875 Act ROW was an easement; yet, entirely inconsistent with the Tenth Circuit's ruling that the United States retained an implied reversionary interest.

Second, the Tenth Circuit erred when it ruled that 43 U.S.C. § 912 must apply to 1875 Act ROWs, otherwise 43 U.S.C. § 912 would have no meaning. *Marshall*, 31 F.3d at 1032. The flaw with this ruling is that the Tenth Circuit was trying too hard to give 43 U.S.C. § 912 meaning vis-à-vis 1875 Act ROWs while ignoring what happened before and after passage of 43 U.S.C. § 912. Congress passed 43 U.S.C. § 912 to remedy this Court's decision in *Stringham* that 1875 Act ROWs were limited fees made on an implied condition of reverter. Indeed, this is evident from 43 U.S.C. § 912's plain language (App. 72-73) and its legislative history:

> The [1875 Act], *under which most of the rights of way over public lands have been granted* contains a provision for forfeiture. . . . Under the decision of the courts

> railroad companies receiving such 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.
>
> * * *
>
> It seemed to the committee that such abandoned or forfeited strips are *of little or no 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. No. 217, 67th Cong., 1st Sess., quoted in S. Rep. No. 388, 67th Cong., 2nd Sess., at 1-2 (all emphasis added). Thus, 43 U.S.C. § 912 was Congress' attempt to rid the United States of the little strips of land it was saddled with as a result of *Stringham*. *Id*.

In fact, this is the very conclusion reached by the Court of Federal Claims in *Beres I,* 64 Fed. Cl. at 419 ("It would appear that the language of the [43 U.S.C. § 912] was intended to address, clarify, and resolve issues created by the imprecise language employed by the courts on this subject in the early part of the

twentieth century. . . .");[9] *see also City of Aberdeen*, 602 F. Supp. at 592-93 ("The legislative history of [43 U.S.C. § 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."). Moreover, in *Great Northern* this Court effectively eliminated Congress' perceived problem vis-à-vis 1875 Act ROWs when it rejected *Stringham* and reaffirmed that 1875 Act ROWs were easements. That *Great Northern* may have ended any application of 43 U.S.C. § 912 to 1875 Act ROWs is immaterial.[10] Indeed, this Court can limit the applicability of statutes simply because it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *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

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[9] Importantly, the Court of Federal Claims rejected the reasoning in *Marshall* and held that the United States did not retain an implied reversionary interest in 1875 Act ROWs. *Beres I*, 64 Fed. Cl. at 419-28. The Court of Federal Claims later reaffirmed this conclusion when it held that the scope of an 1875 Act ROW did not include the right to construct a public recreational trail. *Beres v. United States*, 104 Fed. Cl. 408, 443-57 (2012) ("*Beres II*").

[10] Arguably, 43 U.S.C. § 912 still applies to pre-1871 ROWs that are "tantamount" to fee interests. *See* Solicitor's Opinion M-37025, *supra*, at 2-9.

meant before as well as after the decision of the case giving rise to that construction.").

Third, the Tenth Circuit placed too much emphasis on Congress' intent in 1922 when it passed 43 U.S.C. § 912. *Marshall*, 31 F.3d at 1032. Congress' intent in 1922 could not alter Congress' intent in passing the 1875 Act or redefine previously granted property interests. *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 875 (1999) ("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); *United States v. Price*, 361 U.S. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."); *see Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676, 683 (10th Cir. 1986) (New views as to the scope of property interests "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."). As explained in *Great Northern*, after 1871, Congress intended to grant railroads only an easement and that is exactly what it did in passing the 1875 Act. 315 U.S. at 274-79. Thus, in 1908, when the United States granted the 1875 ROW in this case, it granted an easement. Even if Congress could later redefine that previously granted ROW to be a limited fee with an implied condition of reverter, there is no evidence that it did. Instead, the plain language of 43 U.S.C. § 912 proves that Congress was not redefining property interests, but

trying to avoid being saddled with little strips of land. Therefore, notwithstanding what Congress may have intended in passing 43 U.S.C. § 912, that could not alter Congress' intent in passing the 1875 Act or redefine previously granted 1875 Act ROWs.

B. The Federal And Seventh Circuits Have Rejected The Tenth Circuit's Reasoning And Concluded That The United States Did Not Retain An Implied Reversionary Interest In 1875 Act ROWs.

In *Hash*, the Federal Circuit dealt with a class action that included landowners who traced their title to patents issued "subject to" an 1875 Act ROW. 403 F.3d at 1313-17. These landowners sought just compensation for a taking arising from the conversion of an 1875 Act ROW into a recreational trail. *Id*. at 1310. The United States defended by arguing that, under *Marshall* and 43 U.S.C. § 912, it retained an implied reversionary interest in the 1875 Act ROW. Brief for Appellee the United States, *Hash v. United States*, Federal Circuit No. 03-1395, 2003 WL 25291552. The Federal Circuit rejected the United States' argument that it retained an implied reversionary interest:

> We conclude that the land . . . is owned in fee by the landowners, subject to the railway easement. . . . On the railway's abandonment of its right-of-way these owners were disencumbered of the railway easement. . . .

Hash, 403 F.3d at 1318; *accord Ellamae Phillips Co. v. United States,* 564 F.3d 1367, 1370-74 (Fed. Cir. 2009).

More recently, in *Samuel C. Johnson 1988 Trust v. Bayfield County, Wisconsin*, 649 F.3d 799, 803-04 (7th Cir. 2011), the Seventh Circuit concluded that 1875 Act ROWs are easements and that the United States did not retain a reversionary interest after the underlying land was patented into private ownership. In reaching this conclusion, the Seventh Circuit considered, but rejected, the reasoning in *Marshall*:

> [*Hash*] and [*Beres I*] . . . make better sense than *Marshall*, as well as being supported by the characterization in [*Great Northern*], of the rights of way created under the 1875 Act as "easements." . . . 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 – of course without compensation – and giving it away or selling it. . . .

Id.

As the foregoing demonstrates and as acknowledged by the Tenth Circuit, there is a split in the circuits as to whether the United States retained an implied reversionary interest in 1875 Act ROWs. App. 5-6; *see also City of Aberdeen*, 602 F. Supp. at 592-93 (no implied reversionary interest in 1875 Act ROWs); *Vieux v. East Bay Reg'l Park Dist.*, 906 F.2d 1330,

1335 (9th Cir. 1990) (stating in dictum that 43 U.S.C. § 912 applies to both pre- and post-1871 railroad ROWs). In addition, there is uncertainty among the state courts on this same issue. *Compare Brown v. N. Hills Reg'l R.R. Auth.,* 732 N.W.2d 732, 740 (S.D. 2007) (no implied reversionary interest) *with Whipps Land & Cattle Co. v. Level 3 Communications, LLC*, 658 N.W.2d 258, 266-67 (Neb. 2003) (implied reversionary interest); *Brown v. State*, 924 P.2d 908, 916 (Wash. 1996) (same). Accordingly, this Court's review is vital to resolve the circuit split, dispel the uncertainty in the state courts, and to restore "certainty and predictability" regarding lands patented "subject to" 1875 Act ROWs. *See* Petition of the United States for Panel Rehearing, *Hash v. United States*, Federal Circuit No. 03-1395, 2005 WL 4814437, *8 (United States arguing that, because the Federal Circuit disagreed with *Marshall* and, thereby, created a split, similarly situated landowners could own different property interests).

IV. THE ISSUE WHETHER THE UNITED STATES RETAINED AN IMPLIED REVERSIONARY INTEREST IN 1875 ACT ROWS IS OF NATIONAL IMPORTANCE AND THIS CASE PRESENTS THE IDEAL OPPORTUNITY TO RESOLVE THAT ISSUE.

The 1875 Act was a huge success as thousands of miles of 1875 Act ROWs exist across the United

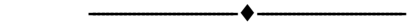
States.[11] App. 80 (DOI advising that thousands of miles of 1875 Act ROWs still exist); *see* Cecilia Fex, *The Elements of Liability in A Trails Act Taking: A Guide to the Analysis*, 38 Ecology L.Q. 673, 687 (2011) (The 1875 Act "resulted in railroads crisscrossing public lands nationwide."); U.S. Department of the Interior, *Annual Reports of the Department of the Interior for the Fiscal Year Ended June 20, 1904*, 494-502 (1904) (listing over 400 railroad companies that had been granted 1875 Act ROWs). In accordance with Congress' intent, most of the lands underlying these ROWs were patented to settlers under the various Homestead Acts "subject to" the 1875 Act ROW. *See* App. 70-71, 78. Through the years, many of these homesteads were subdivided, so the number of landowners whose land is burdened by 1875 Act ROWs could be in the thousands, if not more. *See Beres II*, 104 Fed. Cl. at 413 (listing over 30 landowners who traced their title to one patent issued "subject to" an 1875 Act ROW). As these railroad ROWs are abandoned, the issue of ownership will necessarily arise. Landowners within the Seventh Circuit may be able to quiet title to abandoned 1875 Act ROWs and, thereby, prevent their land from becoming a public recreational trail. In contrast, similarly situated landowners in the Tenth Circuit will not be able to quiet title, but will have to try to seek just compensation – which would be paid for by the

[11] The issue in the case affects more than just 1875 Act ROWs. It is generally applicable to post-1871 railroad ROWs.

taxpayers.[12] Just compensation, however, is cold comfort for having to endure the disruption and inconvenience of having essentially a "linear park" on one's property:

> [I]t appears beyond cavil that use of these easements for a recreational trail – for walking, hiking, biking, picnicking, frisbee playing, with newly-added tarmac pavement, park benches, occasional billboards, and fences to enclose the trailway – is not the same use made by a railroad, involving tracks, depots, and the running of trains.

Toews, 376 F.3d at 1376. Because Congress did not intend for this result when it passed the 1875 Act and authorized the patenting of land "subject to" 1875 Act ROWs, this Court's review is imperative.



[12] Just compensation is not guaranteed because the statute of limitations could be an obstacle for many landowners. *See* Comment, *Statutes of Limitations in Rails-to-Trails Act Compensation Claims: The U.S. Court of Appeals for the Federal Circuit Bends the Rules of Takings Law*, 56 Cath. U. L. Rev. 1307, 1324-38 (2007).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Counter-Defendant-Appellee,

v.

MARVIN M. BRANDT, Trustee of the Marvin M. Brandt Revocable Trust, MARVIN M. BRANDT REVOCABLE TRUST,

Defendants-Counter-Claimants-Appellants,

and

DANIEL K. McNIERNEY, SUSAN McNIERNEY; GINNY L OTTERSTEIN; LAWRENCE R OTTERSTEIN; NORMA J. BREAZEALE,

Defendants-Counter-Claimants,

and

WYOMING AND COLORADO RAILROAD COMPANY, INC.; GARY WILLIAMS; JOAN WILLIAMS; GLENNA MARRS; KENNETH R. LANKFORD, II; KENNETH R. LANKFORD, SR.;

No. 09-8047
(D.C. No. 2:06-CV-00184-ABJ)
(D. Wyo.)

PATRICK R RINKER; PATRICIA A. RINKER; RONDAL WAYNE; EDMUND L GRUBER; KATHLYNN A. LAMBERT; DAVID M. PEARCE; DOROTHY M. PEARCE; ROBERT S. PEARCE; STEVEN M. PEARCE; TOBIN L. RATLIFF; LYNDA L. RINKER; PATRICK R RINKER; JANIS A. TAFFEE; STEVEN P. TAFFEE,

Defendants.

RAILS TO TRAILS CONSERVANCY,

Amicus Curiae.

ORDER AND JUDGMENT*

(Filed Sep. 11, 2012)

Before **KELLY**, **O'BRIEN**, and **HOLMES**, Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

The Marvin M. Brandt Revocable Trust and Mr. Brandt, Trustee, appeal from the district court's judgment quieting title in the United States to certain property that crosses the trust's property. *United States v. Marvin M. Brandt Revocable Trust*, 2008 WL 7185272 (D. Wyo. 2008). The parties are familiar with the facts and we need not restate them here. Suffice it to say that the subject property is part of an abandoned right-of-way granted a railroad pursuant to the General Railroad Right-of-Way Act of 1875, 43 U.S.C. § 934 ("1875 Act") and a nearby government road, Forest Service Road 512.

A. The Railroad Right-of-Way

The trust argues that the 1908 right-of-way granted to the railroad (pursuant to the 1875 Act) is like an ordinary easement that has been extinguished. It reasons as follows. The 1976 patent issued to the trust's predecessors-in-interest did not reserve to the United States any interest in this easement; it merely provided that the property was subject to the easement for railroad purposes.[1] Thus, when the

[1] The pertinent portions provide:

> EXCEPTING AND RESERVING TO THE UNITED STATES from the land granted a right-of-way thereon for ditches or canals constructed by the authority of the United States; and
>
> RESERVING TO the United States, and its assigns, a right-of-way for the existing Platte Access Road No. 512 over and across Tract No. 37 . . . containing 3.30 acres, more or less; and

(Continued on following page)

railroad administratively abandoned the easement (by notifying the Surface Transportation Board ("STB") on January 15, 2004 that it would exercise its authority to abandon the line), the easement was extinguished and the trust's property was disencumbered. Because the United States lacked any ownership interest (as of October 4, 1988) in the right-of-way, it could not claim through 16 U.S.C. § 1248(c) which generally provides that the United States retains rights in abandoned or forfeited railroad grants. Nor could the United States claim through 43 U.S.C. § 912, which generally provided that the interest in the right-of-way went to the adjacent landowner

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> RESERVING TO the United States, and its assigns, a right-of-way for the existing Dry Park Road No. 517, over and across Tract 37 . . . containing 0.71 acres, more or less.
>
> Provided, that if for a period of five years, the United States, or its assigns, shall cease to use the above roads, or any segment thereof, for the purposes reserved, or if at any time the Regional Forester determines that the roads, or any segment thereof, is no longer needed for the purposes reserved, the easement traversed thereby shall terminate. In the event of such nonuse or such determination by the Regional Forester, the Regional Forester shall furnish to the patentees or, their heirs or assigns, a statement in recordable form evidencing termination.
>
> SUBJECT TO those rights for railroad purposes as have been granted to the Laramie Hahn's Peak & Pacific Railway Company, its successors or assigns by permit Cheyenne 04128 under the Act of March 3, 1875, 43 U.S.C. 934-939.

Aplt. App. 92-93.

given abandonment decreed by a court of competent jurisdiction or an Act of Congress. The trust argues that the district court should have quieted title in it, not the United States.

Much of the trust's argument is foreclosed by circuit precedent which we are bound to follow. *See United States v. Spedalieri*, 910 F.2d 707, 709 n.2, 710 n.3 (10th Cir. 1990). In *Marshall v. Chicago & Northwestern Transportation Co.*, 31 F.3d 1028, 1030-32 (10th Cir. 1994), we held that § 912 applies to grants under the 1875 Act. Relying upon *Idaho v. Oregon Short Line R.R.*, 617 F. Supp. 207 (D. Idaho 1985), we concluded that the United States retained an implied reversionary interest. *Marshall*, 31 F.3d at 1032. We subsequently applied § 912 on the issue of whether a railroad had abandoned its right-of-way such that adjacent landowners would take in *Phillips Co. v. Denver & Rio Grande Western R.R.*, 97 F.3d 1375 (10th Cir. 1996). And we have recognized that § 912 was modified by 16 U.S.C. § 1248(c) to provide that, as of October 4, 1988, interests in abandoned railroad rights-of-way generally revert to the United States rather than adjacent landowners. *See Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227, 1236 n.9 (10th Cir. 2006); *Phillips*, 97 F.3d at 1376 n.4. We are unpersuaded by the remainder of the trust's other arguments and efforts to distinguish and limit the obvious contrary precedent. Though we recognize that the Seventh Circuit, the Federal Circuit and the Court of Federal Claims have concluded that the United States did not retain any reversionary

interest in these railroad rights-of-way, we are bound by our precedent. *See Samuel C. Johnson 1988 Tr. v. Bayfield County*, 649 F.3d 799, 803-04 (7th Cir. 2011); *Hash v. United States*, 403 F.3d 1308, 1317 (Fed. Cir. 2005); *Beres v. United States*, 64 Fed. Cl. 403, 427-28 (2005). *But see* Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's "1871 Shift"*, 82 U. Colo. L. Rev. 85, 150-64 (2011) (criticizing this interpretation). Thus, the district court correctly held that the interest in the abandoned railroad right-of-way belongs to the United States.

B. Forest Service Road 512

The trust argues that the 1976 patent reserved a certain right-of-way in Road 512 and provided that it would terminate if the United States ceased to use the road or any segment. *See supra* n.1. The trust argues that it made a conclusive showing that an obliterated segment of the Road 512 easement had not been used for five years and therefore, title should have been quieted in the trust, not the United States. Aplt. Br. 48; Aplt. Reply Br. 25. The trust relies upon the following: (1) the Forest Service published a decision memorandum closing and obliterating a portion of the road and removed the road surface, leveled the area, and planted grass on a smaller portion, and (2) Mr. Brandt declared that, to the best of his knowledge, the Forest Service had not used any part of the easement for five years and took issue with certain statements of Forest Service

personnel about some of the claimed use. Aplt. App. 101; Aplee. Supp. App. 1-2. The trust argues that the United States failed to present any evidence that the obliterated portion had been used, and therefore the entire Road 512 easement terminated.

The district court considered the trust's argument that non-use of Road 512 terminated the easements for Roads 512 *and* 517. *Marvin M. Brandt Revocable Trust*, 2008 WL 7185272 at *16 & *17-18. That is precisely the argument the trust made in response to the United States' motion for summary judgment. 2:06-cv-00184-ABJ, ECF Doc. 147 at 25-26. In its own motion for summary judgment, the trust argued, consistent with its counterclaim, that non-use of Road 512 terminated the easement for only Road 512. Aplt. App. 72; 2:06-cv-00184-ABJ, ECF Doc. 140 at 22-23.

The district court held that the trust could not create a genuine issue of material fact as to non-use of Road 512 based upon Mr. Brandt's affidavit that the Forest Service did not use the closed portion of Road 512. *Marvin M. Brandt Revocable Trust*, 2008 WL 7185272 at *17-18. The trust admits that Road 512 has been used as a private road and Mr. Brandt allows the Forest Service, law enforcement, and emergency personnel to enter through a gate at the south end. Aplt. App. 71; Aplee. Supp. App. 2; Aplt. Reply Br. 24-25. Instead, the trust argues that the evidence submitted by the United States, Aplt. App. 151-56, listing over 30 incidents of use simply does

not establish that the obliterated segment of Road 512 was used from 1996-2003.

Even assuming that the trust could create a genuine issue of material fact as to use of the obliterated portion of Road 512,[2] we would reject the contention that non-use of part of the road is sufficient to terminate the entire easement, be it Road 512 or Road 517, or both. The meaning of "the easement traversed thereby," which defines what terminates upon non-use, is the operative language. So as to give effect to all of the terms, "the easement traversed thereby" refers back to non-use of "the above roads [Road 512 or 517], *or* "any segment thereof." The trust's reading essentially eliminates "any segment thereof." Moreover, the language refers to easement in the singular which is completely at odds with the argument the district court considered: that non-use of one of the roads, or a segment thereof, results in termination of both easements, no matter the use being made of each. We note that the trust did not contend (either in its counterclaim or in the briefing) that non-use of a segment of Road 512 results in the termination of the easement in that segment, and we do not address it.

[2] We reject the trust's contention that the United States failed to provide any evidence of use of the obliterated portion. *See* Aplt. App. 151-56; Aplee. Supp. App. 8-11. Such a conclusion would be particularly anomalous given summary judgment standards which require that the evidence be viewed in the light most favorable to the non-movant. *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009).

See Somerlott v. Cherokee Nation Distribs. Inc., 686 F.3d 1144, 1151-52 (10th Cir. 2012).

AFFIRMED.

Entered for the Court

Per Curiam

O'BRIEN, J. concurring.

I join the Order and Judgment. I write separately for a collateral reason. After oral argument I was designated as author. Recently, because he was concerned with the delay in disposition, Judge Kelly reassigned the case and prepared the Order and Judgment. I am solely responsible for, and deeply regret, all delay in resolving this matter.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, vs. MARVIN M. BRANDT REVOCABLE TRUST, and MARVIN M. BRANDT, Defendants.	Case No. 06-CV-184-J

MEMORANDUM OPINION AND ORDER

(Filed Apr. 8, 2008)

This matter comes before the Court on cross motions for summary judgment. The Court, having carefully reviewed the motions and the materials filed in support thereof and opposition thereto, and being fully advised in the premises, **FINDS** that plaintiff's Motions for Summary Judgment on cross claims should be **GRANTED** and defendant's Motion for Summary Judgment should be **DENIED** for the reasons stated below:

BACKGROUND OF CASE

Plaintiff United States (the "Government") brings this action seeking a judicial declaration of abandonment

of approximately 66 miles of railroad right-of-way running from Laramie, Wyoming to the Colorado border by way of Fox Park, Wyoming. Upon abandonment, the United States also seeks to quiet title to the abandoned railroad right-of-way in the Government. Defendant, Marvin M. Brandt Revocable Trust and Marvin Brandt, trustee, (collectively "the Trust") assert that the Trust has a vested interest in the railroad right-of-way and opposes the Government's claim. The Trust also seeks to have the title to the railroad right-of-way quieted in its favor. Pursuant to Fed. R. Civ. P. 13(b), the Trust also filed a counterclaim seeking to quiet title to a right-of-way easement for Forest Service Road ("FSR") 512. The Trust claims the easement has been terminated by the United States Forest Service. The road at issue also runs through land owned by the Trust in Fox Park, Wyoming. The Government disputes the road easement has been terminated and alleges that the express conditions of abandonment contained in the original deed have not been met. The Government filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56(b) on the railroad right-of-way and FSR issues and the Trust reciprocated in kind.

PROCEDURAL BACKGROUND

The Government filed its complaint with this Court in July of 2006. It seeks a declaratory judgment that the Wyoming-Colorado ("WYCO") Railroad Company, Inc. right-of-way, lying within the Medicine Bow National Forest in the State of Wyoming, had

been abandoned. The Government also initiated this action against twenty-six separate parties who may have claimed an interest in the right-of-way. On August 8, 2006, the Trust filed a counterclaim seeking to quiet title to the railroad right-of-way in the Trust. Also on August 8, 2006, the Trust filed a second counterclaim against the Government seeking to quiet title to a 0.2 mile section of FSR 512. On October 1, 2007, the Trust amended its second counterclaim regarding the 0.2 mile section of FSR 512 to include the entirety of FSR 512 that crosses the Trust's property (approximately 0.7 miles).

On October 10, 2007 the Government filed a motion for summary judgment and a brief in support of its motion against the Trust. Also on October 10, 2007, the Trust filed a motion for and brief in support of summary judgment on its railroad right-of-way counterclaim and its FSR 512 counterclaim against the Government. On November 13, 2007 the Trust filed its "Brief In Opposition" to the Government's motion for summary judgment disputing the Government's interest in the railroad right-of-way and seeking to have all right, title, and interest in the railroad right-of-way quieted in the trust. Further, the Trust argues that to quiet title in the Government would constitute a Fifth Amendment taking requiring just compensation. That same day, the Government filed its response to the Trust's motion for summary judgment on the railroad right-of-way. Since the parties' last motions were filed, all parties but the Trust have settled with the Government. Thus, the

current action between the Government and the Trust is the only matter remaining for this Court to decide.

APPLICABLE FACTS AND PARTIES' ARGUMENTS ON RAILROAD RIGHT-OF-WAY REVERSION

FACTUAL BACKGROUND

HISTORY OF THE RAILROAD RIGHT-OF-WAY

In 1908, the Laramie, Hahn's Peak and Pacific Railroad Company ("LHPPR") was granted a right-of-way (ROW) for railroad purposes through the public lands of the United States under the General Railroad Right-of-Way Act of 1875, 43 U.S.C §§ 934-030 ("1875 Act"). The grant was for a two-hundred foot wide ROW, approximately 66 miles long. LHPPR completed construction of the railroad from Laramie to Colorado in 1911. Later, the Trust's predecessor in interest acquired Tract 37, Township 13 North, Range 78 West 6th P.M. by a patent issued from the United States under 16 U.S.C. § 485 for 83.32 acres on February 18, 1976. In November 1987, WYCO became the latest successor to the LHPPR Company.

On May 15, 2001, WYCO filed a Notice of Intent to Abandon Rail Service with the Surface Transportation Board ("STB"). The STB approved the abandonment petition subject to satisfaction of certain abandonment conditions. The STB removed the last condition thus effecting its approval of the abandonment of the rail line on December 31, 2003. On January 15, 2004, WYCO notified the Secretary of the STB

that it had completed its abandonment of the rail line.

RELEVANT STATUTES

In 1922, Congress passed the Abandoned Railroad Right-of-Way Act, codified at 43 U.S.C. § 912.[1] Section 912 granted to landowners adjacent to previous railroad right-of-way grants any right and title that the United States would have retained upon abandonment. Congress later modified § 912 by passing the National Trails System Improvement Act

[1] 43 U.S.C. § 912 (1922). Section 912 states in relevant part:

> Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad . . . and use or occupancy of said lands for such purposes has ceased, or shall hereafter cease, whether by forfeiture or abandonment by said railroad company *declared or decreed by a court of competent jurisdiction or by Act of Congress,* then and thereupon all right, title, and interest, and estate of the United States, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions *traversed or occupied* by such railroad or railroad structures.

Id. (emphasis added).

of 1988, codified at 16 U.S.C. § 1248(c).[2] By modifying § 912, the United States retained any and all rights and interests in abandoned railroad rights-of-way that would have been otherwise granted to adjacent landowners under § 912 so long as those rights-of-way had not been utilized as a public highway within one year of abandonment. Section 912 requires a judicial decree or Act of Congress to relinquish the claim the Government retained upon abandonment. As of the date of this memorandum no judicial decree of abandonment of the railroad ROW has occurred.

THE GOVERNMENT'S ARGUMENTS

The Government contends that Tenth Circuit case law supports its position that, upon abandonment, all right, title, and interest in the railroad ROW reverts to the Government. The Government relies on *Marshall v. Chi. & Nw. Transp. Co.,* 31 F.3d

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[2] 16 U.S.C. § 1248(c). Section 1248(c) states:

> Abandoned railroad grants; retention of rights: Commencing upon 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 section 912 of Title 43, 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.

Id.

1028 (10th Cir. 1994); *Phillips Co. v. Denv. & Rio Grande W. RR Co.,* 97 F.3d 1375 (10th Cir. 1996); and *Nicodemus v. Union Pac. R.R.,* 440 F.3d 1227 (10th Cir. 2006).

In *Marshall,* the owners and successors in interest of property adjacent to an abandoned railroad ROW in Natrona County, Wyoming, brought an action to quiet title against Chicago and Northwestern Transportation Company ("CNWT"). *Marshall v. Chi. & Nw. Transp. Co.,* 31 F.3d 1028 (10th Cir. 1994). In 1980, CNWT assigned a 60-foot-wide strip of its 200-foot-wide ROW to an unaffiliated partnership. *Id.* at 1028. The partnership then assigned its interest to Casper Creek Development, Inc. *Id.* CNWT filed an application for abandonment of the ROW with Interstate Commerce Commission, which was approved on November 30, 1988. *Id.* CNWT discontinued its use of the ROW on January 15, 1989. *Id.* In June of 1990, CNWT conveyed the remaining 140 feet width of the ROW to Forgey Ranch Company. *Id.* The company completed track removal near the end of August, 1990. *Id.*

In *Marshall,* the Tenth Circuit affirmed this Court's holding that 43 U.S.C. § 912 applies to both pre-1871 and post-1871 grants for railroad rights-of-way.[3] The Tenth Circuit held in favor of the owners of the adjacent land. The Court reasoned that:

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[3] *See supra* note 1.

> [Section] 912 provides in essence that when public lands of the United States have been granted to any railroad company for use as a right-of-way, and the railroad company thereafter ceases to use and occupy the right of way by, for example, abandonment, as decreed by a court of competent jurisdiction, then all right, title, interest, and estate in the right of way shall be transferred to and vested in anyone to whom or to which title of the United States may have been granted by way of patent to convey the whole of the legal subdivision previously traversed by the right of way.

Marshall, 31 F.3d at 1031. The Tenth Circuit also stated that:

> [Section 912] is designed to cover the situation where the United States grants a railroad company a right of way over public lands and thereafter conveys . . . to another the whole of the legal subdivision[s] . . . traversed or occupied by such railroad. [Which] appears to cover the instant case.

Marshall, 31 F.3d at 1032 (internal citations omitted). Finally, the Tenth Circuit stated: "In enacting these statutes, Congress clearly felt that it had some retained interest in railroad rights-of-way." *Marshall,* 31 F.3d at 1032 (citing *State of Idaho v. Or. Shortline R.R.,* 617 F. Supp. 207 (D. Idaho 1985). Thus the Tenth Circuit held that § 912 applied to rights-of-way like those at issue in *Marshall* and that when those rights-of-way are abandoned, the Government

conveys its *retained* interest to the adjacent landowners. *See id.*

The Government contends the holding in *Marshall* is significant in the instant case because the Tenth Circuit held that under § 912, the United States retained an interest in abandoned 1875 Act railroad rights-of-ways. The instant case concerns a grant for a railroad ROW made under the 1875 Act. Therefore, under the Tenth Circuit's interpretation of § 912 in *Marshall,* the United States retained an interest in the WYCO ROW.

The Government cites *Phillips* for the proposition that under § 1248(c) any right to an abandoned railroad ROW remains in the United States. *Phillips Co. v. Denv. & Rio Grande W. RR Co.,* 97 F.3d 1375 (10th Cir. 1996). In *Phillips,* the owner of land adjacent to a railroad ROW sought a retroactive determination of abandonment and to quiet title to the ROW pursuant to 43 U.S.C. § 912 in order to avoid the effects of 16 U.S.C. § 1248(c). *Id.* The court stated that before § 912 can be given effect it must receive authorization from the Interstate Commerce Commission ("ICC") to abandon the railroad ROW. *Id.* at 1377. The ICC, the agency responsible for approving the abandonment, stated that it had no authority to declare the railroad ROW abandoned retroactively. *Id.* The Tenth Circuit held that it was compelled to defer to the agency. *Id.* (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984)). The Court also held that once § 1248(c) had been enacted, the reversionary interest was held by the

United States and not adjacent landowners. *Id.* at 1376 n. 4.

The Government contends *Phillips* is relevant to the instant case because the plaintiff sought a retroactive declaration of abandonment of the rights-of-way in order to circumvent the grasp of 16 U.S.C. § 1248(c). The Tenth Circuit did not address what role § 1248(c) plays in the final analysis of the case. However, based on the language the Court employed, any right an adjacent landowner received under § 912 was removed by Congress's passage of § 1248(c) in 1988. The Government's reasoning seems in accord with this interpretation.

The Government points to the Tenth Circuit's decision in *Nicodemus v. Union Pacific Corp.,* 440 F.3d 1227 (10th Cir. 2006). In *Nicodemus,* landowners sued Union Pacific Corp. for trespass and unjust enrichment arising from the railroad's grant of subsurface easements to telecommunications providers for the right to install fiber-optic cables in its railroad ROW. *Nicodemus,* 440 F.3d 1227. The District Court of Wyoming dismissed the action for lack of federal question jurisdiction. *Nicodemus v. Union Pacific Corp.,* 204 F.R.D. 479, 493 (D. Wyo. 2001) (holding the interpretation of federal land grants to railroads is not a substantial question of federal law so as to afford federal question jurisdiction over state law claims). The Tenth Circuit disagreed with this Court's decision. *Nicodemus,* 440 F.3d at 1229 (10th Cir. 2006). It held that the interpretation of federal land

grants involved a substantial federal issue deserving of the federal forum for resolving the issue. *Id.*

The Tenth Circuit stated that under 43 U.S.C. § 912:

> [L]and given by the United States for use as a railroad right-of-way in which the United States retained a right of reverter under *N. Pac. R.R. v. Townsend,* 190 U.S. 267 (1903) must be turned into a public highway within one year of . . . abandonment or be given to the adjacent land owners.

Nicodemus, 440 F.3d at 1236. The *Nicodemus* court further explained that:

> Subsequently Congress enacted the National Trails System Improvement Act of 1988, 16 U.S.C. § 1248(c), under which those lands not converted to public highways within one year of abandonment revert back to the United States, not adjacent private landowners.

Id. Thus, that court held that "the United States has a reversionary interest in the lands when no longer used for the designated purposes . . . [t]hus the government has a direct interest in the determination of property rights granted to the railroad." *Id.* The Government relies on the holding in *Nicodemus* to support its claim of a reversionary interest in the railroad ROW at dispute in the instant case.

Finally, the Government denies the Trust's assertion that to quiet title in the Government constitutes

a Fifth Amendment taking requiring just compensation. The thrust of the Government's argument seems to be that (1) under *Marshall* and *Phillips,* the United States retained a reversionary interest to **all** railroad rights-of-way; (2) under § 912, if the ROW was abandoned by the railroad then the United States conveyed its reversion to the adjacent landowner; (3) section 912 as modified by § 1248(c), retains the reversion held by the United States under § 912 and does not convey it to adjacent landowners; (4) following the reasoning of the Tenth Circuit, the United States never relinquished its reversion prior to abandonment, the railroad ROW never vested in the adjacent landowner, and having never vested, retention of the reverter cannot be viewed as a taking, i.e., you cannot lose what you never possessed. Retaining this reversionary interest, the Government asks this Court to decree the ROW abandoned and to quiet title in the ROW in the Government.

THE TRUST'S ARGUMENTS

The Trust argues that the Government did not retain a reverter in rights-of-way granted under the Act of 1875. Citing recent federal decisions in support of its argument, the Trust contends that this Court should hold consistent with these decisions and grant summary judgment in favor of the Trust. The Trust also offers its line of decisions to support its argument that to quiet title in the Government constitutes a taking requiring just compensation.

The Trust argues that WYCO received only an easement in the Act of 1875. The Trust claims that the Patent reserved a reversion to the owner of the surrounding land and its predecessor-in-interest and reserved nothing for the United States. Citing *Hash v. United States,* 403 F.3d 1308 (Fed. Cir. 2005), the Trust argues that 43 U.S.C. § 912:

> require[d] the United States to convey any rights it may have, to the patentee of the land traversed by the abandoned ROW; it does not say what rights the United States had after the land patent was granted. Indeed, if the United States did have residual rights despite the patented land grant, then the statute, [43 U.S.C. § 912], required that the rights be conveyed to the private owner.

Hash, 403 F.3d at 1318. In *Hash,* landowners brought a class action against the United States challenging the conversion of an abandoned railroad ROW. The district court held in favor of the United States and the plaintiffs appealed. The plaintiffs argued on appeal that the ROW across their land was simply an easement. When the railroad abandoned the ROW the easement would have reverted to them but for the 1983 provisions of the National Trails System Act.

Citing to the United States Supreme Court's reasoning in *Presault v. I.C.C.,* the Federal Circuit Court of Appeals concluded that the land at issue was

owned in fee by the landowners, subject to a railway easement.[4] Upon the railway's abandonment of its ROW, the burdened estate owners were "disencumbered of the railway easement, and upon conversion of this land to a public trail, these owners' property interests were taken for public use, in accordance with the principles set forth in the *Preseault* cases." *Hash,* 403 F.3d at 1318. The *Hash* court remanded the case to the district court to determine just compensation on the taking. *Id.*

The Trust also points to *Beres v. United States,* 64 Fed.Cl. 403 (2005), decided shortly after *Hash.* In *Beres,* the plaintiffs were fee owners of land that was patented subject to a railroad ROW. *Beres,* 64 Fed.Cl. at 403 (2005). The ROW at issue was transferred pursuant to § 1247(d) to a land conservancy. *Id.* at 407. Looking to legislative history, statutory construction, precedent, and the patent at issue, the *Beres* court held inapposite to this Court and the Tenth

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[4] *Preseault v. ICC,* 494 U.S. 1,4-5 (1990) (holding that *if* abandonment of railway *and* application of the Trails Act effects a taking when the easement would otherwise revert to the owner of the servient estate, the landowner may sue for compensation under the Tucker Act). *See also* 28 U.S.C. § 1491(a)(1) (1982). The Tucker Act provides that the United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. *Id.*

Circuit.[5] In essence, the *Beres* court held that when Congress passed 43 U.S.C. § 912 it did so to confirm the absence of any reversionary interest in the United States and that the land, in agreement with congressional intent, was reserved for homesteaders and for educational purposes. *Id.* at 425-27. Moreover, the *Beres* court held that when Congress passed 16 U.S.C. § 1248(c) in 1988, the federal government no longer held any reversionary rights in the land granted to the plaintiff's predecessor-in-interest and that 16 U.S.C. § 1248(c) should not apply to the 1875 Act which "intentionally omitted any words to create a reversionary right in the United States." *Id.*

Finally, the Trust refutes the arguments and case law the Government offers as support relying instead on *Beres* and *Hash*. In essence, the Trust lobbies this Court to find the favorable holdings in *Beres* and *Hash* persuasive even though the controlling Tenth Circuit's reasoning was rejected in those cases.

STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue of material fact to be resolved at trial. FED. R. CIV. P. 56(c); *Nebraska v. Wyoming,* 507 U.S. 584, 590 (1993). Thus, a district court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file,

[5] *See e.g. Marshall,* 31 F.3d 1028 (10th Cir. 1994).

together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Nelson v. Geringer,* 295 F.3d 1082, 1086 (10th Cir. 2002). "An issue of material fact is genuine where a reasonable jury could return a verdict for the party opposing summary judgment." *Seymore v. Shawver & Sons, Inc.,* 111 F.3d 794, 797 (10th Cir. 1997).

In applying these standards, the district court will view the evidence in the light most favorable to the party opposing summary judgment. *Jenkins v. Wood,* 81 F.3d 988, 990 (10th Cir. 1996). The movant bears the initial burden of demonstrating the absence of evidence to support the non-moving party's claims. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). When the non-moving party bears the burden of proof at trial, the burden then shifts to it to demonstrate the existence of an essential element of its case. *Id.* To carry this burden, the non-moving party must go beyond the pleadings and designate specific facts to show there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251 (1986); *Ford v. West,* 222 F.3d 767, 774 (10th Cir. 2000). The mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient to create a "genuine" issue of disputed fact. *Lawmaster v. Ward,* 125 F.3d 1341, 1347 (10th Cir. 1997).

DISCUSSION

Three points seem significant in analyzing the parties' arguments. First, the case law offered by the Government is the law of this circuit. Second, the case law offered by the Trust is inapposite to the law of this circuit. In fact, the Tenth Circuit's reasoning is expressly rejected in both *Hash* and *Beres.* Third, the conditional statement proffered by the United States Supreme Court in *Preseault,* which *Hash* relies on, does not result in a finding for the Trust.

Points one and two illustrate that there is an obvious split in decisions among the federal circuit courts. The Ninth Circuit has held that the United States retains a reversionary interest in ROW grants. *See Vieux v. East Bay Regional Park District,* 906 F.2d 1330, 1335 (9th Cir. 1990) (holding that § 912 applies to grants made both before and after 1871 and the United States retains a reversionary interest in those grants of ROW). The Tenth Circuit has held that the United States retains a reversionary interest in all 1875 Act ROWs. *See e.g. Marshall,* 31 F.3d at 1032 (10th Cir. 1994) (holding that § 912 was specifically enacted to dispose of the United States retained interest in 1875 Act rights-of-way). The Seventh Circuit also has held that § 1248(c) "modifies § 912 to the extent that now those lands not converted to public highways . . . revert to the United States." *Mauler v. Bayfield County,* 309 F.3d 997, 999 (7th Cir. 2002) ("Clearly Congress assumed the United States retained a reversionary interest in railroad rights-of-way, else it would make little sense for Congress to

have passed laws like § 912 . . . [and] § 1248(c)). Interestingly, the Tenth Circuit points directly to *Mauler* as a guide to the statutory framework regarding disposition of railroad ROWs. *Nicodemus,* 440 F.3d at 1236 n. 9 ("For a general overview of this statutory scheme, *see Mauler v. Bayfield County.*").

Conversely, the Federal Circuit and the Federal Claims Court have held that unless the patent granting the adjacent land expressly retains a reversion, no reversion can be inferred. *See e.g. Hash,* 403 F.3d at 1314 (stressing the "well-recognized rule that property rights that are not explicitly reserved by the grantor cannot be inferred to have been retained"). Even in light of the split in the circuits, this Court is bound to follow the law promulgated by the Tenth Circuit and to hold that the government retained a reversionary interest in 1875 Act rights-of-way even in light of the language contained in § 912.

Point three illustrates how the Federal Circuit's *Hash* decision relies on the United States Supreme Court's holding in *Preseault v. United States* for the general rule that where a taking occurs, just compensation should be received. *See Hash,* 403 F.3d 1308 (Fed. Cir. 2005); *Beres,* 64 Fed. Cl. 403 (2005). However, while the Supreme Court does offer that "even if the rails-to-trails statute gives rise to a taking, compensation is available to petitioners," the primary issue that faced the Court was whether reversions under the Rails-to-Trails act were constitutional under the Commerce Clause. *See generally Preseault,* 494 U.S. 1 (1990). The issue was not whether they constituted a compensable taking. *See id.* Further,

the *Preseault* Court noted that The Tucker Act, 28 U.S.C. § 1491(a)(1), provides exclusive jurisdiction in the United States Claims Court "for any claim against the Federal Government to recover damages" in excess of $10,000. *Id.* at 11. The Court also held that the Federal Claims Court has jurisdiction over any 16 U.S.C § 1247(d) takings claims in light of the Tucker Act. *Id.* Thus the Court failed to address the takings issue as the petitioner had not exhausted all available remedies. *Id.*

Finally, *Preseault* is distinguishable from the instant case. At issue in *Preseault* was 16 U.S.C § 1247(d).[6] Conversely, 16 U.S.C. § 1248(c) is the

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[6] *Compare* 16 U.S.C, § 1247(d) *with* 16 U.S.C. § 1248(c). § 1247(d) states in relevant part:

> Consistent with the purpose of this Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for any purpose of any law or any rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified subdivision is prepared to assume full responsibility for management of such rights-of-way . . . then the Commission . . . shall not permit abandonment.

16 U.S.C. § 1247(d). While § 1248(c) states:

> Abandoned railroad grants; retention of rights: Commencing upon October 4, 1988, any and all right, title,

(Continued on following page)

section at issue in the instant case. This is significant because under § 1247(d) no reversion or abandonment ever takes place prior to ROW being retained and employed as a trail. *See Preseault,* 494 U.S. at 7. Unlike § 1247(d), § 1248(c) pursuant to § 912 requires a judicial declaration of abandonment as a prerequisite to the United States' retention of its § 912 ROW reversionary interest. This difference seems to highlight the inapplicability of the reasoning in *Preseault* and subsequently *Hash* to the instant case.

CONCLUSION ON RAILROAD RIGHT-OF-WAY REVERSION

For the reasoning enumerated above, the Court concludes that the Government has met its burden in proving that it retains a reversionary interest in the Fox Park railroad ROW pursuant to 43 U.S.C. § 912, 16 U.S.C. § 1248(c), and previous decisions of the Tenth Circuit. However, this Court is aware that there is a split among the circuit courts. As the Trust points out, the Federal Circuit and the Federal Court

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> interest, and estate of the United States in all rights-of-way of the type described in section 912 of Title 43, 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).

of Claims, under *Hash* and *Beres* held that the conversion from a railroad ROW to public trail as mandated under 16 U.S.C. § 1248(c) constituted a taking. The Trust's argument relies predominantly on this line of cases as support for its argument. However, these decisions are not consistent with the prevailing authority in this circuit. Moreover, the Court finds that *Preseault,* and subsequently *Hash,* are distinguishable from the instant case. In light of the controlling Tenth Circuit case law, the Government's Motion for Summary Judgment is **GRANTED** and title to the railroad ROW is quieted in the Government.

On a final note, should the Trust decide to pursue a takings claim, under the Tucker Act, 28 U.S.C. § 1491(a)(1), the Federal Claims Court would have exclusive jurisdiction provided that the compensation sought is greater than $10,000.00.[7] With this in mind, any takings issues brought before this Court would be dismissed for want of subject matter jurisdiction. *See* 28 U.S.C. § 1491(a)(1); *Preseault,* 494 U.S. at 11-14.

[7] 28 U.S.C. § 1346. The Little Tucker Act provides concurrent jurisdiction to the Federal District Courts for claims of $10,000.00 or less. *Id.*

APPLICABLE FACTS AND PARTIES' ARGUMENTS ON FOREST SERVICE ROAD COUNTERCLAIM

FACTUAL BACKGROUND

As stated *supra,* the predecessors of the Trust were granted "land with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto said claimants . . . forever."[8] Prior to October 21, 1996, Marvin M. Brandt contacted the Laramie Ranger District of the Medicine Bow-Routt National Forest ("MBRNF") in

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[8] Patent No. 49-76-0031. The patent also contains the following excerpted provisions:

> EXCEPTING AND RESERVING TO THE UNITED STATES from the land granted a ROW thereon for ditches or canals constructed by the authority of the United States; and
>
> RESERVING TO the United States, and its assigns, a ROW for the existing Platte Access Road No. 512 over and across Tract No. 37 . . . approximately 420 feet [in length and] with a ROW width 10 feet to the left of the centerline and 20 feet to the right of the centerline.
>
> Provided, that if for a period of five years, the United States, or its assigns, shall cease to use the above roads, or any segment thereof, for the purposes reserved, or if at any time the Regional Forester determines that the roads, or any segment thereof, is no longer needed for the purposes reserved, the easement traversed thereby shall terminate. In the event of such nonuse or such determination by the Regional Forester, the Regional Forester shall furnish to the patentees or, their heirs or assigns, statement in recordable form evidencing termination.

Id.

Albany County, Wyoming, and requested that Forest Service Road ("FSR") 512 be closed through Fox Park, Wyoming for safety reasons.

On October 2, 1996, the Laramie Ranger District of the MBRNF published a Decision Memorandum closing FSR 512 from its junction with FSR 517 through Fox Park, Wyoming. Specifically, the Decision Memorandum provides that the Forest Service is "closing and obliterating roughly 0.2 miles of FSR 512 from the junction of FSR 512 and FSR 517 to the Fox Park Resort.[9] Subsequently, the Forest Service closed FSR 512 and opened Access Road 512-C in its place. Access Road 512-C runs west of Fox Park and joins with the remaining unclosed portion of FSR 512 to the north of the Trust's property. Since at least October 21, 1996, the 0.2 mile portion of FSR 512 has been gated and used as a private road. The Forest Service employees installed barricades preventing access to FSR 512 from FSR 517. Additionally, the Forest Service employees removed and graded the paved road surface and planted native grasses over the 0.2 miles of FSR 512 that crosses the Trust's property on November 1, 1996.

Each party has filed numerous briefs in support/opposition to the other party's motion for summary

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[9] *See* Exhibit 2. The Decision Memorandum also provides: "The Forest Service currently has an easement allowing access across the road. By implementing this proposal, the Forest Service would relinquish the easement and access would be provided on National Forest Service lands." *Id.*

judgment. Rather than go through each parties' arguments and counterarguments in serve-volley manner, the Court has reorganized their arguments for the sake of clarity and brevity.

The parties rely on varying interpretations of the language in the patent which granted the Trust its property subject to the road easement. This disparity revolves around the express conditions for termination of the easement in the patent and the argument of whether these conditions have been triggered/satisfied. The patent reads in relevant part:

> Provided, that if for a period of five years, the United States, or its assigns, shall cease to use the above roads, or any segment thereof, for the purposes reserved, or if at any time the regional Forester determines that the roads, or any segment thereof, is no longer needed for the purposes reserved, the easement traversed thereby shall terminate. In the event of such nonuse or such determination by the Regional Forester, the Regional Forester shall furnish to the patentees or, their heirs or assigns, a statement in recordable form evidencing termination.

Def.'s Statement of Undisputed Fact at Ex. 1. Both parties agree that the patent states two conditions for termination. These conditions are (1) nonuse of the road by the United States for a five-year period or (2) a determination by the Regional Forester that the road or a segment of it is no longer needed for the purposes reserved.

THE TRUST'S ARGUMENTS

CONDITION NUMBER 1:

The Trust contends that the first termination condition has been triggered and as a result the easement has terminated. The Trust claims that the Forest Service has not used FSR 512 since at least 1996 when it took steps to obliterate the 0.2 mile segment. Further, according to the Trust, upon removing the portion of FSR 512, the Forest Service instructed Marvin Brandt to install a gate at the south end of the road. At their behest, Brandt installed a gate and posted "No Trespassing" signage. He also enclosed the Trust's property with a "Buck-and-Pole" fence. In addition to claiming he acted upon the Forest Service's request, Brandt has also stated that to "the best of his knowledge, the Forest Service has not used that portion of [FSR] 512 that it closed through Fox Park, Wyoming." Decl. of Marvin Brandt (Ex. 3) at ¶ 17. The Trust also claims that the Forest Service has performed no maintenance on the road since 1996.

In light of the instructions Brandt received from the Forest Service combined with removal of the 0.2 mile segment of FSR 512 and the claim that Brandt has no knowledge of the presence of the Forest Service on the land since the time of the Decision Memorandum, the Trust argues that the United States has not used the easement in at least the required five-year period. Thus, the Trust claims the second

condition of the patent has been triggered and the easement has terminated.

In addition to the initial claim, the Trust argues that the words "any segment thereof," as contained in the patent indicate that when the Forest Service obliterated the 0.2 mile segment of FSR 512 it triggered the non-use condition for both FSR 512 and FSR 517.[10] The Trust asserts that if the Court should find that the easement for FSR 512 has terminated, based on the language of the patent, the easement for FSR 517 also must necessarily terminate. However, this contention was not included in the Trust's initial counterclaim.

CONDITION NUMBER 2:

On the issue of whether the second condition of the patent has been met, the Trust contends that the Decision Memorandum published by the District Ranger triggered the second condition in the patent and terminated the easement. The Trust relies on the language in the Decision Memorandum which expressly relinquished the easement. The memorandum stated: "The Laramie Ranger District . . . is proposing to re-route the transportation system in the vicinity

[10] Def.'s Statement of Undisputed Fact at Ex. 1. The patent states in relevant part that "if for a period of five years, the United States . . . shall cease to use the above roads, or any segment thereof . . . the easement traversed thereby shall terminate." *Id.*

of Fox Park." Def.'s Statement of Undisputed Fact at Ex. 1. The memorandum also states: "The proposal includes closing and obliterating roughly 0.2 miles of FSR 512 from the junction of FSR 512 and FSR 517 to the Fox Park Resort." *Id.* "The purpose of the project is to reduce traffic concerns next to the Fox Park Resort . . . [and] [t]he proposed reroute would alleviate these problems." *Id.* "By implementing this proposal, the Forest Service would relinquish the easement and access would be provided on National Forest System lands." *Id.*

Additionally, the Trust argues the growth of the Forest Service since 1976 (the year the patent was issued) has required a delegation of authority from the Regional Forester to lower levels of authority. In light of this growth, the Trust argues the Decision Memorandum issued by the District Ranger and later implemented by the Forest Supervisor is within the scope of authority for these individuals.[11] Being within the scope of authority for these officials, their actions trigger the second condition of the patent.

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[11] *See* http://www.fs.fed.us/im/directives/fsh/7709.59/20.1-23.23.txt. The relevant part of the handbook states:

> The Chief, Regional Foresters, Experiment Station Directors, the Administrator of the Lake Tahoe Basin Management Unit, and Forest Supervisors are authorized to issue orders closing or restricting the use of any Forest development road (36 CFR 261.50). *See also* FSM 1013, which covers policy and responsibilities for issuance of such orders.

Id.

Thus, the Trust argues that the Decision Memorandum satisfies the patent's second termination condition and that the easement for FSR 512 (and apparently FSR 517) has been terminated.

WYOMING'S ABANDONMENT LAW APPLIES TO THE INSTANT CASE:

The Trust also argues that federal statutory law is inapplicable. It claims the Federal Property and Administrative Service Act of 1949, as triggered by the Government's reliance on *United States v. 434.00 Acres,* 792 F.2d at 1009-10, is inapplicable because the purpose of the act is inconsistent with the instant case. Specifically, the Trust points to the stated purpose of the act as "disposing of surplus property." 40 U.S.C. § 101. Under the act, property is defined as "any interest in property except [] land reserved or dedicated for national forest or national park purposes." 40 U.S.C. § 102(A)(ii). The Trust argues that since the land at issue was previously reserved for national forest purposes the Federal Property and Administrative Services Act does not apply. Further, the Trust argues that since no federal statute makes state law controlling in the instant action, federal common law should govern. However, since there has been little federal common law developed under these facts, Wyoming's law should prove instructive. *See United States v. Standard Oil Co. of Cal.,* 332 U.S. 301, 309-10 (1947).

Should this Court hold that neither condition has been satisfied, the Trust asserts that Wyoming law requires this Court to find that the easement has been abandoned. *See Mueller v. Hoblyn,* 887 P.2d 500 (Wyo. 1994). The Trust offers *Mueller* for the rule that abandonment of an easement requires intentional relinquishment indicated by conduct which discloses intent to surrender the right to use the land. *Id.* The Trust offers another Wyoming decision for the proposition that abandonment is a question of intent and conduct. *See Seven Lakes Development v. Maxson,* 144 P.3d 1239, 1248 (Wyo. 2006) (holding that the question of abandonment is one of fact, depending on intention and conduct). Under *Mueller,* Wyoming law states that "[e]asements may be terminated by abandonment." *Mueller,* 887 P.2d at 505. "Abandonment of easements requires an intentional relinquishment indicated by conduct which discloses the intention to surrender the right to use the land authorized by the easement." *Id.* The Trust argues that by its actions, the United States clearly indicated its intention to abandon the 0.2 mile segment of road. Further, the Trust argues this Court should adopt the standard set forth by the Supreme Court of Wyoming in *Mueller* and quiet title to FSR 512 through Fox Park in favor of the Trust.

Applying these rules to the instant case, the Trust claims that the Decision Memorandum is indicative of the Forest Service's intention to abandon the easement. Further, obliterating the 0.2 mile segment of FSR 512 and the installation of gates at

the behest of the Forest Service is conduct required to effectuate the abandonment of the easement. The Trust claims a simple syllogism: (1) if the Government has intent to abandon and does abandon the easement then the easement is terminated; (2) the United States expressed its intent to abandon and it did abandon the road easement; (3) therefore, the easement has been terminated by abandonment.

ESTOPPEL SHOULD BAR THE GOVERNMENT:

The Trust argues the Government should be estopped from asserting any claim to the FSR 512 against the Trust because the Trust relied on the Decision Memorandum and the subsequent actions of the Forest Service officials. The Trust cites a United States Supreme Court decision for the proposition that estoppel may be asserted against the United States. *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.,* 467 U.S. 51 (1984). The Trust points to this language of the United States Supreme Court:

> Estoppel is an equitable doctrine invoked to avoid injustice in particular cases. While a hallmark of the doctrine is its flexible application, certain principles are tolerably clear . . . (b) to regain property or its value that the other acquired by the act, if the other in reliance upon the misrepresentation and before discovery of the truth has so changed his position that it would be unjust to deprive him of that which he thus acquired . . . thus, the party claiming the estoppel must have

> relied on its adversary's conduct in such a manner as to change his position for the worse.

Id. Applying this to the instant case, the Trust argues its estoppel claim is proven against the Government. For example, when the Forest Service requested that Brandt install locking gates at the south end of FSR 512, he obliged at his own expense. Also, once the Decision Memorandum was published, Brandt enclosed the entirety of the property in a "Buck and Pole" fence to keep out wandering livestock, again at his own expense. The Trust contends that these facts prove that it relied upon the actions of the Forest Service and to deny quieting title in favor of the Trust would be an injustice. Thus, estoppel should bar the Government's claim of a continued ownership of FSR 512.

CONCLUSION OF THE TRUST:

The Trust argues the Government has failed to provide a shred of evidence for its claim that the segment of road at issue has been in continuous use. Additionally, the Trust claims that the Decision Memorandum by the District Ranger and subsequent actions by the Forest Supervisor are equivalent to a decision by the Regional Forester. The Trust also argues that Mr. Brandt installed a fence around the property, a gate at the south end, etc., which indicates non-use. Further, should this Court find that the patent's conditions have not been triggered the Trust argues that Wyoming law compels a finding the

easement has been abandoned. Finally, if this Court refuses to adopt state law in this action, then the Government should be estopped from claiming any right or title to FSR 512.

THE GOVERNMENT'S ARGUMENTS

The Government argues against the Trust's second counterclaim asserting that neither condition set forth in the patent has been met. The Government also contends that before the easement reserved to the government can be extinguished at least one of these conditions must be satisfied. In essence, the Government argues "if neither condition has occurred the easement for the road through Fox Park is still extant." The Government rebuts the Trusts arguments that state law should apply. Similarly, the Government asserts the Trust has failed to meet its burden to prove an estoppel claim against the Government.

CONDITION NUMBER 1:

As to the first condition, non-use by the United States for five years, the Government contends that factual evidence suggests that the non-use condition has not occurred. The Government presents the affidavits of Jerry Schmidt, Pete Winters, and Curtiss Orde as proof of the continuous use of FSR 512 and to refute the testimony of Brandt that "to the best of his knowledge the Forest Service has not used" FSR 512.

Jerry Schmidt states that as Forest Supervisor he issued the travel order closing FSR 512 to public traffic. However, according to Schmidt, this order was not intended to prohibit federal personnel from using the road. Rather, the order was solely intended to exclude public access to FSR 512. Furthermore, Schmidt states that the Forest Service never abandoned the road. The Government argues that had the road been abandoned, the Forest Service would have no authority to close the road, i.e., you cannot close a road that you do not own.

Pete Winters, a long time Forest Service employee, states that he gained access to FSR 512 through the unlocked gate. He also states that in the last decade he has used FSR 512 to inspect the condition of the easements for Forest Service use and for encroachments. Finally, Curtiss Orde, another long term Forest Service employee, states that he knew of the planned re-route of FSR 512. He also claims that he has used FSR 512 for a number of reasons over the past ten years including law enforcement and livestock retrieval.

In essence, the Government claims that the testimony of these individuals show the intention and actions of the Forest Service are consistent with the retention of the easement for FSR 512. Moreover, the Government contends these individuals prove that the Forest Service has not ceased to use FSR 512 for the required five-year period and the non-use condition has not been met.

The Trust has argued that to abandon any "segment thereof" of FSR 512 abandons the entirety of the easement. The Government claims that in pursuing this argument the trust is advocating for a broad interpretation of the language contained in the patent. It argues that federal grants are to be strictly, not broadly, construed. *Delaware Nation v. Commonwealth of Pennsylvania,* 446 F.3d 410, 418 (3d Cir. 2006) (holding that where the terms of the patent are unambiguous there is no need to look beyond the four corners of the document and any ambiguities in a public land grant must be resolved strictly against the grantee and in favor of the Government). Accordingly, unless the Court finds the language of the patent ambiguous, under the cases cited, the grant will be narrowly construed.

Likewise, the Government claims there is no ground for the Trust to assert a claim over FSR 517 at this juncture. The Trust has not attempted to amend the complaint under Fed. R. Civ. P. 15. Further, FSR 517 was not at issue in the 1996 Decision Memorandum and has remained open for public access. *See Forman v. Davis,* 371 U.S. 178, 182 (1962) (holding that a district court may deny a motion to amend for reasons such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment."); *see also Smith v. Aztec Well Servicing Co.,* 462 F.3d 1274, 1285 (10th Cir. 2006) (holding

that denial to amend is appropriate solely on untimeliness where the party requesting the addition of new claims has no adequate explanation for delay). Under these Tenth Circuit decisions, the Government contends that the Trust's "failure to follow the proper procedure is another reason to prohibit a new claim at this juncture." Reply Br. of Pl. at 11 n. 2. The Government asks that any claim regarding FSR 517 should be barred.

The Government contends there is no material factual dispute regarding the usage of FSR 512. It asserts that in disputing the facts the Trust is merely attempting to fabricate a genuine issue of material fact to overcome the Government's motion for summary judgment. As an example of alleged overstatement, the Government points to the Trust's description that FSR 512 has been obliterated and is now non-existent The Government contends that the Forest Service only *altered* 0.1 mile of FSR 512 through Fox Park at the north end. A 1/10th mile segment is 528 feet in length whereas the whole segment of the road is 1825 feet. The altered section of the road is less than one third of the entire road and the remainder of the road remained useable and used. Further, the Government offers the statements of Casey Hull, another Forest Service Employee. According to Hull, FSR 512 is "still visible on the ground and if the wood barricades were removed, it could be easily re-opened and used." Hull Decl. at ¶¶ 5, 6. Finally, the Government offers photographs of the "obliterated" segment of FSR 512. The

Government contends these photos "belie [the Trust's] exaggerated assertions about the road, e.g., that for one to travel that segment would require an off-road adventure through the existing tall grasses and over, or around, the trees planted by the Forest Service." Reply Br. of Pl. at 21.

The Government rebuts the declaration of Marvin Brandt that he has no knowledge of the Forest Service using the FSR 512 since at least 1996 by pointing to the suspiciousness of such a self-interested statement. *See, e.g., Argo v. Blue Cross and Blue Shield of Kansas,* 452 F.3d 1193, 1199-2001 (10th Cir. 2006) (citing *Tavery v. United States,* 32 F.3d 1423, 1427 n. 4 (10th Cir. 1994) for the proposition that statements of mere belief in an affidavit must be disregarded by the Court under the personal knowledge standard and that a self-serving affidavit is insufficient to defeat summary judgment). For the reasons aforementioned, the United States claims that the Trust has failed to prove satisfaction of the first condition and that no genuine issue of material fact exists.

CONDITION NUMBER 2:

On the second termination condition, the Government argues that the Decision Memorandum issued by the District Ranger simply closed FSR 512 to the public and that it did not end the Forest Service's use of the road. First, the Government claims that the District Ranger did not have authority to

relinquish the easement. The language of the patent specifically states the only official with the authority to terminate the easement was the Regional Forester. *See United States v. California,* 332 U.S. 19 (1947) (holding government officers who do not have authority to dispose of property cannot do so). To bolster its argument, the Government offers the proposition that absent strict compliance with federal law there can be no disposition of property. *See U.S. v. 434.00 Acres,* 792 F.2d 1006 (11th Cir. 1986). Additionally, the Government contends if this Court finds the Decision Memorandum was an attempt to dispose of FSR 512, the Government cannot be bound by the Decision Memorandum because neither the District Ranger nor the Forest Supervisor had authority to dispose of the road. *Id.* Further, as the District Ranger is two tiers lower than the Regional Forester, his Decision Memorandum could only be a recommendation.

The Government also offers the affidavit of the Regional Forester, Rick D. Cables, to show that neither the District Ranger nor the Forest Supervisor had the authority to terminate the easement for FSR 512. *See* Decl. of Rick D. Cables ¶¶ 3, 4. Cables states:

> [T]here are no implied authorities within the Forest Service to dispose of any Federal real property interest.
>
> Where rights-of-way are reserved in the United States in federal land patents with provisions for termination by the Regional Forester when no longer needed for public purposes, those termination authorities have

> not been delegated to Forest Supervisors or District Rangers. A decision to terminate a right-of-way is reserved to the regional office so that broader policy implications and regional needs may be considered above the exigencies and conveniences of a local management situation.

Id. Applied to the instant case, the Government asserts that the unambiguous language of the patent reserves the right to terminate the easement to FSR 512 in the Regional Forester. Further, the Government claims that no such determination was ever made by the Regional Forester. *Id.*

The Government acknowledges the Forest Service handbook cited by the Trust which states that the Forest Supervisor has the authority to *close* or *restrict* the use of Forest Service roads.[12] However, the Government contends that an action by the Forest Supervisor to close a road does not equate to an action by the Regional Forester to terminate a real

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[12] http://www.fs.fed.us/im/directives/fsh/7709.59/20.1-23.23.txt. The relevant part of the handbook states:

> The Chief, Regional Foresters, Experiment Station Directors, the Administrator of the Lake Tahoe Basin Management Unit, and Forest Supervisors are authorized to issue orders closing or restricting the use of any Forest development road (36 CFR 261.50). *See also* FSM 1013, which covers policy and responsibilities for issuance of such orders.

Id.

property right reserved to the United States in a federal land patent.

WYOMING LAW DOES NOT ADVANCE THE TRUST'S POSITION:

The Government does not believe there is any reason to look beyond the four corners of the patent in deciding this case. According to the Government, the decision cited by the Trust necessarily requires this Court to find against the Trust. *See Mueller v. Hoblyn,* 887 P.2d 500 (Wyo. 1994). In *Mueller,* Mueller owned a single undivided tract of property that was subject to a road easement granted prior to his acquisition of the parcel. *Id.* at 502-03. Subsequently, the benefited parcel was subdivided and the divided parcels continued to use the road easement. *Id.* However, the road easement was improperly located. *Id.* When Hoblyn, the owner of the benefited land, approached Mueller about relocating the road, Mueller claimed that he had been using the easement for agricultural purposes and that he had installed a well on the easement. *Id.*

Mueller filed an action to quiet title to the easement on adverse possession grounds. *Id.* The district court held that only the section of the easement utilized for the well had been extinguished. *Id.* Mueller appealed and the Wyoming Supreme Court reversed the district court holding the adverse possession period (ten years in Wyoming) is not tolled until the holder of the easement seeks to use it. *Id.* at

504. Moreover, the *Mueller* court held the burden to show abandonment of a road easement is high and the evidence must be strong and convincing. *See id.* at 508-10. The Court held that in the absence of evidence of a permanent obstruction, such as a building, the drilling of the well and planting of crops were not inconsistent with the rights held by the owners of the dominant estates. *Id.* Thus, there was no portion of the easement that was terminated by adverse possession and the easement remained extant. *Id.*

In the instant case as in *Mueller,* there were no permanent structures blocking the route of the easement, only gate-like barriers. While the Trust relies on *Mueller* for the proposition that abandonment requires intent and conduct, the Government asserts that as in *Mueller,* the Trust's use of the easement has not been inconsistent with the Government's interest in the road. Thus, the Government contends that *Mueller* is inapplicable to the instant case. Moreover, applying *Mueller* to the instant case necessitates a ruling in favor of the Government because the obstructions to FSR 512 are not permanent.

THIS COURT SHOULD NOT APPLY ESTOPPEL AGAINST THE GOVERNMENT:

The Government contends the instant case is inappropriate for estoppel. The Government states that "equitable estoppel is an extraordinary remedy and [the United States] may not be estopped on the same terms as other litigants." Reply Br. of Pl. at 22 (citing

Board of Comm'rs v. Isaac, 18 F.3d 1492, 1498 (10th Cir. 1994)). Further, the Government offers that it is "far from clear that the Supreme Court would ever allow an estoppel against the government under any set circumstances." *See DePaolo v. United States ex rel. IRS (In re DePaolo),* 45 F.3d 373, 376 (10th Cir. 1995); *See also FDIC v. Hulsey,* 22 F.3d 1472, 1489 (10th Cir. 1994). The Government claims that in addition to the usual criteria of estoppel, applying estoppel to the Government requires a showing of affirmative misconduct or concealment of a material fact. *Sweeten v. U.S. Dep't of Agriculture,* 684 F.2d 679, 682 (10th Cir. 1982); *DePaolo,* 45 F.3d at 377. Moreover, affirmative misconduct is a high hurdle for the asserting party to overcome. *Id.*

Relying on these cases, the Government contends that there was no misconduct or concealment by the Forest Service. There being no legal obligation to close the road to public access, the Forest Service did so at the Trust's behest and at public expense. Further, the installation of the gate and fence around the Trust's property were not in reliance on the Government's actions. Rather, the Trust was simply taking full advantage of the opportunity it was given by the rescindable closure of FSR 512. Moreover, the Government claims the only error by the Forest Service in this matter was the District Ranger's erroneous belief that closing FSR 512 terminated the reserved easement. While this error was a mistaken belief, it was not misconduct or concealment of material facts. "Mere negligence, delay, or failure to follow agency

guidelines does not constitute affirmative misconduct." *DePaolo,* 45 F.3d at 377; *Isaac,* 18 F.3d at 1498. Finally, the Government asserts the plain language of the patent requires the Regional Forester to record the action in the county register. The Regional Forester never made such a recording. Thus, under the terms of the patent, there has never been a relinquishment of the easement through Fox Park.

CONCLUSION OF THE GOVERNMENT:

For the aforementioned reasons the Government argues that there are no genuine issues of material fact. Thus, summary judgment should be held in favor of the Government and title to the road should be quieted in the Government.

DISCUSSION ON THE COUNTERCLAIM

Several road issues are appropriate for summary judgment. These are the estoppel argument, the issue of whether state law should apply to the instant action, and whether the "any segment thereof" clause terminates the easements for FSR 512 and 517.

The Trust claims the Wyoming Supreme Court's decision in *Mueller* compels this Court to find the Government has shown the necessary intent and conduct to abandon the FSR 512 easement. However, a close reading indicates the Supreme Court of Wyoming required more than just a superficial relinquishment of an easement. *See Mueller,* 887 P.2d at

507. Under *Mueller,* abandonment requires the construction of permanent structures which obstruct the easement for enough time to satisfy the adverse possession period. *Id.* Further, the *Mueller* Court held the statutory period is not tolled until the easement holder asserts their right to the easement. *Id.*

Applied to the instant case, the construction of wooden barricades at one end of the FSR 512 and the installation of the gate at the south end of the road would not satisfy the permanent structure requirement of *Mueller.* Similarly, according to the affidavit of Hull, the supposed obliteration of the 0.2 mile segment of FSR 512 is easily remediated. Under these facts, this Court fails to see how the Trust has carried its burden. The Court agrees with the Government that to apply *Mueller* to this case necessarily requires a holding in its favor.

While the Trust's installation of the gate and the buck and pole fence are indicative of reliance on the actions of the Forest Service, the Court fails to see how it matters whether FSR 512 is deemed closed or whether the easement has terminated. Either way, the Trust retains the benefit of the closure. By closing the road to public access, the Forest Service has effectuated the increased safety result sought by the Trust in its initial letter to the District Ranger. Therefore, the Court fails to see how the Trust's reliance was in any way detrimental to it.

Furthermore, the Government cites controlling Tenth Circuit law that plainly states that the asserting

party must prove the Government engaged in behavior that qualifies as affirmative misconduct *or* concealment of a material fact. *See Sweeten v. U.S. Dep't of Agriculture,* 684 F.2d 679, 682 (10th Cir. 1982); *DePaolo,* 45 F.3d at 377. The Government is correct in its reliance on this case law. The District Ranger's error does not meet the affirmative misconduct standard. The facts do not show any indication that an inference could be drawn to support an assertion of concealment of material facts.

Only one issue remains for analysis: whether either condition of the patent has been triggered terminating the easement. The Government fairly and succinctly stated these conditions in its brief as (1) non-use of the road by the United States for a five-year period *or* (2) a determination by the Regional Forester that the road or a segment of it is no longer needed for the purposes reserved. The Court will deal with the conditions in reverse order.

The second condition states that the easement terminates in the event the Regional Forester determines the road is no longer needed. The only evidence the Trust offers in support of its argument that the Decision Memorandum by the District Ranger satisfies this condition is a citation to an online Forest Service handbook which states that the Forest Supervisor and the District Ranger may close roads. However, the handbook fails to mention the authority of these officials to terminate easements. Absent the express authority to terminate the easement, the Trust has failed to meet its burden in proving the

Decision Memorandum qualifies as a relinquishment of the easement by the Regional Forester.

Conversely, the Government offers significant support for its assertion that the only person with authority to terminate the easement is the Regional Forester. For example, the Government offers the affidavit of the Rocky Mountain Regional Forester Rick Cables to clarify that where a federal land grant specifies the Regional Forester is the position with the authority to terminate real property rights held by the Government, there can be no delegation of that authority. The Government also offers case law in support of its position that only the Regional Forester has such authority. *See United States v. California,* 332 U.S. 19 (1947) (holding government officers who do not have authority to dispose of property cannot do so). Given the weight of the arguments offered by the Government, this Court agrees that the patent's second termination condition has not been met.

The first condition presents a more difficult problem to resolve. In order to prevail on the first condition the Trust must show that the Government has not used FSR 512 for a period of five years.[13] In support of its position the Trust offers the testimony of the trustee, Marvin Brandt, for the assertion that "to the best of his knowledge the Forest Service has not used" FSR 512. In response the Government submits the affidavits of several Forest Service employees

[13] *See supra* note 8.

who describe their use of FSR 512 on multiple occasions.

If we rely on the testimony of Brandt and the Forest Service employees alone, it seems that there is a genuine issue of material fact making summary judgment inappropriate on the second counterclaim of the Trust. The lack of knowledge of Trustee Brandt fails to contradict the Forest Service affidavits of continued use of the closed sections of the road. However, as indicated *supra,* the Government offers Tenth Circuit case law, the gist of which is that a statement made by a self-interested party is insufficient to overcome a motion for summary judgment. *See, e.g., Argo v. Blue Cross and Blue Shield of Kansas,* 452 F.3d 1193, 1199-1201 (10th Cir. 2006) (holding that statements of mere belief in an affidavit must be disregarded by the Court under the personal knowledge standard and that a self-serving affidavit is insufficient to defeat summary judgment). Applied to the instant case, the statements of Marvin Brandt are clearly self-serving. When considered against the affidavits of the employees the conclusion that the Forest Service has not used the road easement fails.

CONCLUSION ON FSR 512

The Trust has failed to present a genuine issue of material fact on the second condition. However, the Trust has attempted to present an issue of material fact on the first (non-use) condition of the patent with Brandt's belief that the Government has not used

FSR 512 since 1996. In consideration of this statement alone, neither the Government nor the Trust has met its burden for summary judgment. However, since the issue of fact arises from the self-serving statement regarding Brandt's belief, under Tenth Circuit case law, this statement must be disregarded at the summary judgment stage and the Government must prevail on its motion. *Argo,* 452 F.3d at 1200 (citing *Tavery,* 32 F.3d at 1427 n. 4 (10th Cir. 1994)). Accordingly, under the Tenth Circuit's decision in *Argo,* it is therefore **ORDERED** that the Government's motion for summary judgment shall be, and is, **GRANTED** on the FSR 512 counterclaim.

Dated this 8th day of April, 2008.

/s/ Alan B. Johnson
ALAN B. JOHNSON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, v. WYOMING AND COLORADO RAILROAD COMPANY, INC., et al. Defendants.	)	No. 06-CV-0184J and Consolidated Case No. 06-CV-171J

JUDGMENT IN FAVOR OF THE UNITED STATES ON ITS CLAIMS AGAINST MARVIN M. BRANDT REVOCABLE TRUST AND MARVIN M. BRANDT, TRUSTEE AND ON THE FIRST AND SECOND COUNTERCLAIMS OF MARVIN M. BRANDT REVOCABLE TRUST AND MARVIN M. BRANDT, TRUSTEE

(Filed Mar. 2, 2009)

In accordance with the Court's Memorandum Opinion and Order entered on April 8, 2008, it is hereby ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That on or before January 15, 2004, defendant Wyoming and Colorado Railroad Company, Inc. ("WYCO"), abandoned its railroad right-of-way, being the same right-of-way granted under the General Railroad Right-of-Way Act of 1875 to the Laramie,

Hahn's Peak and Pacific Railroad Company, documented by the "Proof of Construction and Relinquishment of certain Grants accepted" certificate as per Bureau of Land Management File No. WYC04128 and as shown on the Second Amended Definite Location Plat of February 4, 1915 (hereinafter "the railroad right-of-way"), traversing the property owned by the Marvin M. Brandt Revocable Trust ("the Trust") and Marvin M. Brandt, Trustee ("Brandt") (the same land conveyed to Melvin M. Brandt and Lula M. Brandt by Patent Number 49-76-0031 dated February 18, 1976).

2. That WYCO has not conveyed any portion of the railroad right-of-way, where it traverses the above-described property of the Trust and Brandt, to a state, county, or municipality.

3. That the Court hereby declares and decrees that the railroad right-of-way, where it traverses the above-described property of the Trust and Brandt, has been abandoned by WYCO for all purposes including the National Trails System Improvements Act of 1988, 16 U.S.C. §1248(c), and the Abandoned Railroad Right-of-Way Act of 1922 (43 U.S.C. § 912).

4. That the United States retained a reversionary interest in the railroad right-of-way referenced in paragraph 1.

5. That as a result of the abandonment by WYCO, title to the railroad right-of-way is hereby vested and quieted in the United States, and the

United States is entitled to the quiet and peaceful use and possession of the railroad right-of-way.

6. That the interest hereby quieted and vested in the United States includes the right to construct and operate a recreational trail on the railroad right-of-way.

7. That title to the right-of-way for Forest Service Road 512, called Platte Access Road No. 512, which was reserved in Patent Number 49-76-0031, traversing the property owned by the Trust and Brandt, and the only road which is the subject of the Trust and Brandt's Second Counterclaim, is hereby quieted in the United States, and the United States is entitled to the quiet and peaceful use and possession of the right-of-way for Forest Service Road 512 for any and all National Forest and public purposes.

8. That fee title to the above-described property of the Trust and Brandt remains with the Trust and Brandt, subject to the rights of the United States in both the railroad right-of-way and the right-of-way for Forest Service Road 512 as described above.

DATED this 2d day of March, 2008.

/s/ Alan B. Johnson
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, v. WYOMING AND COLORADO RAILROAD COMPANY, INC., et al. Defendants.	)	No. 06-CV-0184J and Consolidated Case No. 06-CV-171J

JUDGMENT AND DECREE ON CLAIMS OF THE UNITED STATES AGAINST THE WYOMING AND COLORADO RAILROAD COMPANY, INC., DECLARING ABANDONMENT OF THE RAILROAD RIGHT-OF-WAY

(Filed Mar. 2, 2009)

Upon the motion of the United States for entry of Judgment on its claims against the Wyoming and Colorado Railroad Company, Inc. (WYCO), and in accordance with the stipulation between the United States and WYCO, which was filed in this action on November 28, 2006, it is hereby ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That defendant Wyoming and Colorado Railroad Company, Inc. ("WYCO"), on or before December 31, 2003, abandoned its right-of-way, being the same right-of-way granted under the General Railroad Right-of-Way Act of 1875 to the Laramie, Hahn's

Peak and Pacific Railroad Company, documented by the "Proof of Construction and Relinquishment of certain Grants accepted" certificate as per Bureau of Land Management File No. WYC04128 and as shown on the Second Amended Definite Location Plat of February 4, 1915 (hereinafter "the right-of-way").

2. That WYCO did not convey any portion of the right-of-way to a state, county, or municipality within one year of such abandonment.

3. That WYCO has abandoned all rights, title and interests it may have had in the right-of-way, in accordance with 43 U.S.C. § 912.

DATED this 2d day of ~~January~~, March 2009.

/s/ Alan B. Johnson
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, vs. WYOMING AND COLORADO RAILROAD COMPANY, INC., et al., Defendants.	Case No. 06-CV-184-J & 06-CV-171-J

ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS THE THIRD COUNTERCLAIM OF MARVIN M. BRANDT REVOCABLE TRUST AND MARVIN M. BRANDT WITHOUT PREJUDICE

AND

ORDER DENYING DEFENDANT MARVIN M. BRANDT REVOCABLE TRUST'S, MARVIN M. BRANDT, TRUSTEE, MOTION TO TRANSFER THE THIRD COUNTERCLAIM TO THE UNITED STATES COURT OF FEDERAL CLAIMS

(Filed Mar. 4, 2009)

This matter comes before the Court on Defendant Marvin M. Brandt Revocable Trust's, Marvin M. Brandt, Trustee, Motion to Transfer the Third Counterclaim

to the United States Court of Federal Claims and the Plaintiff's Motion to Dismiss the Third Counterclaim of Marvin M. Brandt Revocable Trust and Marvin M. Brandt, and United States' Opposition to Transfer. The Court, having carefully reviewed the motions and the materials filed in support thereof and opposition thereto, and being fully advised in the premises, **FINDS** that the Plaintiffs Motion to Dismiss the Third Counterclaim of Marvin M. Brandt Revocable Trust and Marvin M. Brandt shall be **GRANTED** and the Defendant's Motion to Transfer the Third Counterclaim to the United States Court of Federal Claims shall be **DENIED** for the reasons stated below:

PROCEDURAL BACKGROUND

On July 14, 2006, Plaintiff United States of America filed its complaint for Declaratory Judgment of Abandonment and to Quiet Title seeking, *inter alia,* a declaratory judgment that the Wyoming and Colorado Railroad Company, Inc., abandoned a right-of-way lying within the Medicine Bow National Forest in the State of Wyoming and that all right, title, and interest in and to the right-of-way is vested in the United States.

On August 8, 2006, Defendant Marvin M. Brandt Revocable Trust, Marvin M. Brandt, Trustee (the "Trust"), filed an answer and counterclaims, essentially denying Plaintiff's claims and asserting that, *inter alia,* title to the right-of-way should be quieted

in its favor. In the alternative, the Trust included a counterclaim requesting compensation be awarded for the taking of the right-of-way.

On February 28, 2007, the Court ordered the case bifurcated, the quiet title action was to be decided first, and takings claims were stayed pending resolutions of the quiet title claims.

On April 8, 2008, the Court granted Plaintiff's Motion for Summary Judgment on Cross Claims and denied the Trust's Motion for Summary Judgment.

On April 18, 2008, the Trust filed a Motion to Transfer the Third Counterclaim to the United States Court of Federal Claims pursuant to 28 U.S.C. § 1631. On that same day, the United States filed a Motion to Dismiss the Third Counterclaim of Marvin M. Brandt Revocable Trust and Marvin M. Brandt, without prejudice for lack of subject matter jurisdiction. It is these motions that the Court now considers:

ANALYSIS

The Trust contends that 28 U.S.C. § 1631 compels transfer of the third counterclaim. According to 28 U.S.C. § 1631:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court

> shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

If the Court finds that it is "in the interest of justice" to transfer the third counterclaim it has the discretion to do so. However, if no such interest is found, then the Court is empowered with the discretion to dismiss for want of subject matter jurisdiction. *Phillips v. Seiter,* 173 F.3d 609, 610-611 (7th Cir. 1998) (citing *Christianson v. Colt Industries Operating Corp.,* 486 U.S. 800, 818 (1988)).

In this case, the Trust's argument is predicated upon the belief that injustice will result if the third counterclaim is barred in the United States Court of Federal Claims for violating the statute of limitations under 28 U.S.C. § 2501 (the statute of limitations for filing an action for a "take" against the United States is "six years after such claim first accrues"). However, the Trust is unable to indicate the date on which the statute of limitations began. Without such a date, the Trust cannot demonstrate that justice demands granting the Motion to Transfer. The phrase "in the interest of justice" is meant, among other things, to prevent dismissal of claims that would be time-barred upon filing in the correct court. *See Texas Peanut*

Farmers v. United States, 409 F.3d 1370, 1374-1375 (Fed. Cir. 2005). Without providing a date on which the statute of limitations began, the Trust is unable to effectively argue that its motion is in the interest of justice.

Upon motion of the United States, and good cause appearing, it is hereby

ORDERED that Defendant Marvin M. Brandt Revocable Trust's, Marvin M. Brandt, Trustee, Motion to Transfer the Third Counterclaim to the United States Court of Federal Claims is **DENIED**,

IT IS FURTHER ORDERED that Plaintiff's Motion to Dismiss the Third Counterclaim of Marvin M. Brandt Revocable Trust and Marvin M. Brandt, Trustee, is **GRANTED**.

IT IS FINALLY ORDERED in accordance with the above rulings that the Third Counterclaim of Marvin M. Brandt Revocable Trust and Marvin M. Brandt, Trustee, is, and shall be **DISMISSED WITHOUT PREJUDICE**.

In light of the dismissal of the final claim before this Court, this case is now fully adjudicated before this Court and no matters remain outstanding.

Dated this 4th day of March, 2009.

/s/ Alan B. Johnson
ALAN B. JOHNSON
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Counter-Defendant-Appellee,

v.

MARVIN M. BRANDT, Trustee of the Marvin M. Brandt Revocable Trust, et al.,

Defendant-Counter-Claimants-Appellants,

and

DANIEL K. MCNIERNEY, et al.,

Defendant-Counter-Claimants,

and

WYOMING AND COLORADO RAILROAD COMPANY, INC., et al.,

Defendants.

RAILS TO TRAILS CONSERVANCY,

Amicus Curiae.

No. 09-8047

ORDER

(Filed Dec. 26, 2012)

Before **KELLY**, **O'BRIEN**, and **HOLMES**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

The General Railroad Right of Way Act of 1875, 18 Stat. 482-83 (1875), 43 U.S.C. §§ 934-939

"An act granting to railroads the right of way through the public lands of the United States."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States is granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Sec. 2. That any 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, or the crossing of other railroads at grade. And the location of such right of way through

any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided,* That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

Sec. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

Sec. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve

months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided,* That 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.

Sec. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by act of Congress heretofore passed.

Sec. 6. That Congress reserves the right at any time to alter, amend, or this act, or any part thereof.

Approved, March 3, 1875.

43 U.S.C. § 912

Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: *Provided*, That this Act shall not affect conveyances made by any railroad company of portions of its right of way if such conveyance be among those which have been or may hereafter and before such forfeiture or abandonment be

validated and confirmed by any Act of Congress; nor shall this Act affect any public highway now on said right of way: *Provided further*, 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 so transferred and conveyed, with the right to prospect for, mine, and remove same.

16 U.S.C. § 1248

* * *

(c) Abandoned railroad grants; retention of rights

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 section 912 of Title 43, 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.

(d) Location, incorporation, and management

(1) All rights-of-way, or portions thereof, retained by the United States pursuant to subsection (c) of this section which are located within the boundaries of a conservation system unit or a National Forest shall be added to and incorporated within such unit or National Forest and managed in accordance with applicable provisions of law, including this chapter.

* * *

43 C.F.R. § 2842.1 (1976)

§ 2842.1. Nature of grant.

(a) *Generally.* 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 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. If a settler has a valid claim to land existing at the date of the filing of the map of definite location, his right is superior, and he is entitled to such reasonable measure of damages for right-of-way as may be determined upon by agreement or in the courts, the question being one that does not fall within the jurisdiction of the Department of the Interior.

The United State of America
To all to whom these presents shall come, Greeting:

WHEREAS

Melvin M. Brandt and Lula M. Brandt in exchange for certain other lands conveyed to the United States, has selected and is entitled to a Land Patent pursuant to the Act of March 20, 1922, as amended, 16 U.S.C. 485 (1970), for the following described land:

Sixth Principal Meridian, Wyoming

T. 13 N., R. 78 W.,

Tract 37.

Containing 83.32 acres;

NOW KNOW YE, that there is, therefore, granted by the UNITED STATES unto the above named claimants the land above described; TO HAVE AND TO HOLD the said land with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimants, their successors and assigns, forever;

EXCEPTING AND RESERVING TO THE UNITED STATES from the land granted a right-of-way thereon for ditches or canals constructed by the authority of the United States; and

RESERVING TO the United States, and its assigns, a right-of-way for the existing Platte Access Road No. 512 over and across Tract No. 37, in Sections 21 and 22, T. 13 N., R. 78 W., 6th P.M.; beginning at a point from which Corner No. 7 of Tract 37,

T. 13 N., R. 78 W., 6th P.M. bears N. 13° 40' E., approximately 420 feet, thence, with a right-of-way width 10 feet to left of the centerline and 20 feet to the right of the centerline, traversing in a southwesterly direction approximately 105 feet to a point from which Corner No. 5 of said Tract No. 37 bears N. 73° 29' W., approximately 20 feet; and at which the right-of-way changes to 80 feet in width lying equally on either side of a centerline and continues traversing in a southwesterly direction approximately 1,720 feet to a point on the south boundary of the said Tract No. 37 from which Corner No. 3 of said Tract 37 bears N. 70° 03' W., approximately 825 feet and extending or shortening the side lines so as to terminate at the property line of said Tract 37, having a total length of approximately 1,825 feet and containing 3.30 acres, more or less; and

RESERVING TO the United States, and its assigns, a right-of-way for the existing Dry Park Road No. 517, over and across Tract 37 in Sections 21 and 22, T. 13 N., R. 78 W., 6th P.M. being approximately 80 feet in width, 40 feet to the left of the centerline, and to the extent the right-of-way delineated by the following described centerline lies within the foregoing described Tract 37 approximately 40 feet to the right of that centerline, and extending and shortening the sidelines so as to terminate at the property line. The centerline begins at a point on the north boundary of Tract 37, T. 13 N., R. 78 W., 6th P.M. between Corner No. 7 and Corner No. 8 of said Tract 37 from which said Corner No. 7 bears N. 73° 35' W.,

approximately 100 feet and traversing in a southwesterly direction approximately 440 feet to a point representing the terminus of road No. 517 and its junction with road No. 512, from which the Corner No. 7 of said Tract 37 bears N. 13° 40' E., approximately 420 feet containing 0.71 acres, more or less.

Provided, that if for a period of five years, the United States, or its assigns, shall cease to use the above roads, or any segment thereof, for the purposes reserved, or if at any time the Regional Forester determines that the roads, or any segment thereof, is no longer needed for the purposes reserved, the easement traversed thereby shall terminate. In the event of such nonuse or such determination by the Regional Forester, the Regional Forester shall furnish to the patentees or, their heirs or assigns, a statement in recordable form evidencing termination.

SUBJECT TO those rights for railroad purposes as have been granted to the Laramie Hahn's Peak & Pacific Railway Company, its successors or assigns by permit Cheyenne 04128 under the Act of March 3, 1875, 43 U.S.C. 934-939.

IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat. 476), has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.

[SEAL]

GIVEN under my hand, in Cheyenne, Wyoming the EIGHTEENTH day of FEBRUARY in the year of our Lord one thousand nine hundred and SEVENTY-SIX and of the Independence of the United States the two hundredth, and

By /s/ Harold G. Stinchcomb
Acting Chief, Branch of Lands
and Minerals Operations

Patent Number 49-76-0031

QUESTIONS AND ANSWERS ABOUT THE 1875 ACT AND OPINION M-37025.

ON NOVEMBER 4, 2011, THE SOLICITOR OF THE UNITED STATES DEPARTMENT OF THE INTERIOR ISSUED OPINION M-37025 WHICH PARTIALLY WITHDREW THE SOLICITOR'S 1989 OPINION M-36964 AND CLARIFIED THE SCOPE OF A RIGHT OF WAY ESTABLISHED UNDER THE GENERAL RAILROAD RIGHT OF WAY ACT OF MARCH 3, 1875 (1875 ACT). HERE ARE SOME QUESTIONS AND ANSWERS ABOUT THE 1875 ACT AND OPINION M-37025.

1. What is the General Railroad Right of Way Act of March 3, 1875?

The General Railroad Right of Way Act of March 3, 1875 (1875 Act) granted railroad companies a 100 foot right-of-way (ROW) on public land on either side of a railroad line subject to certain terms and conditions. Thousands of miles of 1875 Act ROWs are estimated to exist on public land in the western United States.

2. Were there other statutes that authorize the granting of ROWs on public land to railroad companies?

Yes. There were a number of acts pre-1871 that granted railroad companies ROWs. These pre-1871 acts were generally for specific companies or routes, and provided fee title to the lands over which the railroad was constructed, including to certain public

land on either side of a railroad line subject to certain terms and conditions.

3. Are the pre-1871 acts and the 1875 Act still in effect?

No. In 1976, Congress enacted the Federal Land Policy and Management Act (FLPMA). Title VII of FLPMA repealed the various railroad ROW statutes but recognized existing ROWs established under those statutes as valid existing rights.

4. What is an "M Opinion"?

An "M Opinion," which is short for "Memorandum Opinion," is a formal written opinion by the Solicitor that presents the official legal interpretation of the Department of the Interior on matters within the Department's jurisdiction. M Opinions are binding on all Department offices and officials and may be withdrawn, overruled, or modified only by the Solicitor, the Deputy Secretary, or the Secretary.

5. What did Opinion M-36964 do?

Opinion M-36964 was issued by the Solicitor in 1989 and arose in the context of MCI Communication's request to install a fiber optic line within three different railroad ROWs across BLM land held by the Southern Pacific Railroad Company pursuant to (i) the Act of July 27, 1866; (ii) the Act of March 3, 1871; and (iii) the 1875 Act. With respect to the pre-1871

ROWs, Opinion M-36964 concluded that a Southern Pacific held a fee interest and therefore could authorize any activity within those ROWs (including the installation of fiber optic line) so long as it did not interfere with railroad operations. With respect to the 1875 Act ROW, Opinion M-36964 concluded that Southern Pacific held an interest that was "tantamount" to a fee and thus could similarly undertake or authorize any activity within these ROWs (including the installation of fiber optic line) so long as it did not interfere with railroad operations.

6. What does Opinion M-37025 do relative to the 1875 Act?

Opinion M-37025 was issued by the Solicitor on November 4, 2011. It withdraws those portions of Opinion M-36964 regarding the 1875 Act based on the fact that those portions are inconsistent with a longstanding Supreme Court precedent – *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942) – and two recent federal court decisions – *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) and *Home on the Range v. AT&T Corporation*, 386 F. Supp. 2d 999 (D. Ind. 2005) (the latter questioned the legal basis for Opinion M-36964's conclusion). Specifically, Opinion M-37025 rejects Opinion M-36964's conclusion that the 1875 Act is "tantamount" to a fee. Rather, Opinion M-37025 states that the scope of an 1875 Act ROW is limited to those activities that derive from or further a railroad purpose. As result, Opinion M-37025 activities that are not

related to railroad purposes are outside the scope of the ROW grant and that such activities require BLM authorization pursuant to applicable law. Approval of any such uses by the BLM will require coordination with the railroad to ensure such uses do not interfere with railroad operations within the ROW.

7. What does Opinion M-37025 do relative to the pre-1871 Acts?

Nothing. Opinion M-37025 specifically states that it does not alter the conclusions of Opinion M-36964 with respect to the pre-1871 Acts. Therefore, the conclusion of Opinion M-36964 that railroad companies possess a fee interest in these pre-1871 ROWs is unchanged.

8. What are examples of activities within a railroad ROW that derive from or further a railroad purpose?

Although each situation must be evaluated on a case by case basis, examples of activities within an 1875 Act ROW that may serve a railroad purpose include: telegraph, telephone and fiber optic lines that provide for both railroad and commercial communications; warehouses that provide for receipt of freight by the railroad while also providing other retail services; transmission lines that provide power to the rail line and commercially; and station grounds, maintenance yards, and related improvements.

9. What should the proponents of a new use within an 1875 Act ROW on BLM land do?

Proponents of new uses within an 1875 Act ROW should contact BLM for a determination of whether the proposed use serves a railroad purpose. As explained above, if BLM determines that a proposed use *does* serve a railroad purpose, BLM authorization is not required and the railroad company may undertake or authorize the use at its discretion, subject to any other applicable legal requirements. If, however, BLM determines that the proposed use *does not* serve a railroad purpose, BLM authorization is required and the proponent must submit an application to the agency for processing in accordance with applicable law, regulation and policy.

10. What actions, if any, will BLM undertake regarding uses that already exist within 1875 Act ROWs based on Opinion M-37025?

The BLM is currently developing guidance that addresses the relationship of Opinion M-37025 to existing uses within 1875 Act ROWs on BLM land and the actions, if any, that the agency should take to ensure compliance with the new Opinion.

11. Who should I contact for further information?

You may contact the BLM's Washington Office, Branch of Rights of Way at 202-912-7342 if you have further questions concerning the applicability of Opinion M-37025 to 1875 Act ROWs on BLM land.