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1 P R O C E E D I N G S

2 (11:14 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 12-1173, Marvin Brandt Revocable  
5 Trust v. United States.

6 Mr. Lechner.

7 ORAL ARGUMENT OF STEVEN J. LECHNER

8 ON BEHALF OF THE PETITIONERS

9 MR. LECHNER: Mr. Chief Justice, and may it  
10 please the Court:

11 If upheld, the decision below will upset  
12 100 years of property law and title to perhaps a million  
13 acres of land, based upon an implied reversionary  
14 interest that the government recently created.

15 I would like to make three points: First,  
16 the decision below violates Leo Sheep, where this Court  
17 rejected the government's attempt to create a property  
18 interest through implication and reaffirmed that the  
19 government does not retain any interest not expressly  
20 reserved in the patent or the granting statute.

21 Two, the decision below is contrary to both  
22 the government's argument and this Court's ruling in  
23 Great Northern that 1875 Act rights-of-way are easements  
24 and are not fees.

25 And finally, the decision below is

1 inconsistent with the Department of Interior's  
2 longstanding interpretation that the 1875 Act granted  
3 only an easement.

4 It is axiomatic that the highest evidence of  
5 title in this country is a patent from the government.  
6 When the government issues a patent, it divests itself  
7 of title except for those interests expressly reserved.  
8 Here, the patent did not reserve any interest in the  
9 1875 Act --

10 JUSTICE SCALIA: Counsel, you are not  
11 reading this, are you?

12 JUSTICE BREYER: It's all right.

13 MR. LECHNER: Here the patent did not  
14 reserve any interest in 1875 Act right-of-way. Yet the  
15 government knew how to reserve interests at that time  
16 because it reserved the interest for ditches and canal,  
17 and reserved the right to two Forest Service roads when  
18 it issued the patent.

19 That some interests were reserved by the  
20 government in 1976 shows that other interests were not.

21 JUSTICE ALITO: Well, under Section 1912,  
22 the government could -- did reserve an interest for a  
23 public highway; is that correct?

24 MR. LECHNER: No.

25 JUSTICE ALITO: No?

1           MR. LECHNER:           1912, Section 1912 has to be  
2 read in conjunction with this Court's decision in  
3 Northern Pacific v. Townsend, and Stringham. And in  
4 those decisions, this Court held that railroad  
5 rights-of-way were limited fees with implied  
6 reversionary interests.

7           CHIEF JUSTICE ROBERTS:           The patent you talk  
8 about, I am not recalling it exactly. It had some -- it  
9 mentioned the railroad interest, right?

10          MR. LECHNER:           Yes, it mentioned it in the  
11 context of, that Brandt's title is subject to those  
12 rights for railroad purposes as had been granted to the  
13 railroad under the 1875 Act.

14          CHIEF JUSTICE ROBERTS:           So it didn't  
15 characterize it as either an easement or a fee with an  
16 implied reverter?

17          MR. LECHNER:           That it was subject to those  
18 rights for railroad purposes as had been granted to the  
19 railroad sounds like it was granted subject to a  
20 servitude. "Rights for railroad purpose" sounds like a  
21 servitude. And of course that's how the Department of  
22 Interior interpreted it at the time, that these 1875  
23 rights-of-way were easements, following its longstanding  
24 interpretation plus this Court's ruling in Great  
25 Northern that these were easements.

1           And at the time, that regulation was the law  
2 of the land. And that's -- that controlled the title  
3 that Brandt got.

4           JUSTICE BREYER:           What they are saying, I  
5 think the government's point is -- the other side is  
6 saying, and I don't remember the term of my property  
7 law. What's the right term? It's -- you grant to A,  
8 black acre to A and his heirs; it's a fee simple. But  
9 it's subject to a shifting; it's subject to divestiture,  
10 subject to a condition subsequent. What's the right  
11 term?

12          MR. LECHNER:           Well --

13          JUSTICE BREYER:           It shifts the -- it shifts  
14 it back.

15          MR. LECHNER:           A defeasible fee? Or implied  
16 conditional --

17          JUSTICE BREYER:           It could be. There was a  
18 technical term they used to have. But anyway, that's  
19 what they're saying.

20          MR. LECHNER:           That's what they're saying.

21          JUSTICE BREYER:           And they are saying that  
22 that's, for purposes of who owns the land, the mineral  
23 rights, it's treated as an easement. But for purposes  
24 of deciding who it reverts to, it's treated as a fee  
25 subject to a shifting use or whatever you call it.

1 Subject to -- what did you say? Subject to --

2 MR. LECHNER: Subject to a right of  
3 reverter.

4 JUSTICE BREYER: Yes.

5 MR. LECHNER: Yes. But that's similar to  
6 the argument that the government made in 1942 in Great  
7 Northern. The limited fee --

8 JUSTICE BREYER: Well, it's different in  
9 this respect. It's different that there they were  
10 talking about who owns the mineral rights. So for those  
11 purposes they say it's treated like an easement. But  
12 for who gets the reverter, it's treated like a shift of  
13 the fee.

14 JUSTICE SCALIA: Oh, that's nice. Do you  
15 know of any other real estate thing which says it's an  
16 easement for one purpose and the fee for another? The  
17 government absolutely denied in Great Northern, didn't  
18 it? It was -- that was the government's case; this was  
19 not a fee.

20 MR. LECHNER: Exactly.

21 JUSTICE SCALIA: They didn't say it's a --  
22 you know, for some purposes it is. They said it was not  
23 a fee. And that's what the Court held, contrary -- in  
24 accordance with what the government wanted, right?

25 MR. LECHNER: Correct.

1 JUSTICE SCALIA: And that case has been  
2 around for how long?

3 MR. LECHNER: 72 years.

4 JUSTICE SCALIA: Okay. And the case  
5 explicitly says it's an easement. And people have been  
6 buying and selling real estate I assume in reliance on  
7 that case for -- for that entire period of time. And  
8 now the government has this new theory that for some  
9 purposes it's a fee; for some purposes it's an easement.  
10 That's not what Great Northern said.

11 MR. LECHNER: No, but I think it's important  
12 that -- the argument that the government is making today  
13 is similar to their alternative argument that they made  
14 there in Great Northern, saying, okay, well, if it's not  
15 an easement, then it's a limited fee in the surface.

16 This Court in Great Northern did not even  
17 address that alternative argument, which shows how  
18 strongly this Court in Great Northern believed it was  
19 just an easement. And this --

20 CHIEF JUSTICE ROBERTS: But they are not  
21 really not alternative -- well, maybe it's all right to  
22 say they are alternative arguments, but they are  
23 mutually exclusive arguments. I mean they are  
24 alternative in the sense that they led to the same  
25 result, but the one argument is that this is A, and the

1 other argument is this is not A.

2 MR. LECHNER: Yes. They'd be mutually  
3 exclusive.

4 JUSTICE BREYER: All right. We have a  
5 brief here from the cities, and they point out that --  
6 that, of course, there is reliance on your side;  
7 you're -- I believe you are absolutely right. But they  
8 say there is also a lot of reliance on the other side,  
9 because cities have built highways, and they've -- or  
10 states have, and they've converted it to use under  
11 patents or under statutes that the United States gave  
12 them that right. And all those are going to be invalid  
13 if you win.

14 So what's your response to that?

15 MR. LECHNER: They would all -- I'm not sure  
16 that they would be invalid, necessarily.

17 JUSTICE BREYER: Why -- why?

18 MR. LECHNER: Well, I'm not -- I don't know  
19 where all the city public highways' interests are,  
20 vis-à-vis how the land was originally patented. It  
21 could have been originally patented in a town site plat  
22 or something like that, that -- as opposed to here,  
23 where it was originally patented to one -- under one  
24 patent, and I'm not sure how all the cities' property  
25 was acquired.

1 JUSTICE SCALIA: I assume your answer would  
2 be that if it's a choice between disappointing people  
3 who properly relied on the law, and disappointing people  
4 who were -- were not following the law, it's clear who  
5 should -- who should take it in the neck. It's the  
6 latter, isn't it?

7 MR. LECHNER: Absolutely, plus the cities  
8 also have the -- the power of the eminent -- the power  
9 of eminent domain. And if they would want a public  
10 highway, they certainly could condemn one.

11 JUSTICE GINSBURG: I thought this -- the  
12 cities were relying on Section 912, as applied to the  
13 1875 Act.

14 MR. LECHNER: That's what -- that's what  
15 they -- that's what the cities were relying on. But you  
16 must keep in mind that Section 912 did not alter or  
17 amend the 1875 Act, so the nature of the grant in the  
18 1875 Act must be looked through the eyes of Congress in  
19 1875.

20 In 1922, when Congress passed Section 912,  
21 Congress was grappling with what to do with these  
22 isolated strips of land that would be administratively  
23 burdensome to manage. And they said -- well,  
24 originally, they said, well, let's give them to the  
25 settlers because they are the ones entitled to it in the

1 first place, and then -- and then as an afterthought  
2 said, well, let's put these as a public highway.

3 But they did not amend the grant under the  
4 1875 Act or alter the amended grant.

5 JUSTICE GINSBURG: Well, can you explain to  
6 me something to me about that 1875 Act a little bit? We  
7 know that until 1871, these railroad rights-of-way were  
8 considered to leave the government in the position of  
9 having a reversionary interest.

10 MR. LECHNER: Correct.

11 JUSTICE GINSBURG: And I don't see anything  
12 in the 1875 Act statute. There was an end to the giving  
13 away of large -- large quantities of land to the  
14 railroad, and so that was out. But what is there in  
15 the 1875 Act that changes the right-of-way from what it  
16 had been up until 1871?

17 MR. LECHNER: As the government argued in  
18 Great Northern and as this Court adopted that argument,  
19 the key provision in the 1875 Act is Section 4, which  
20 reserved the right to Congress to dispose of the lands  
21 underlying 1875 rights-of-way to settlers.

22 And this was a reflection of the change of  
23 policy in 1871 because that's where the Congress changed  
24 its policy to -- in an effort to secure homesteads to  
25 actual settlers as opposed to benefiting the railroads.

1           In Section 4, as this Court said in Great  
2 Northern, after language to demonstrate a conveyance of  
3 an easement would be hard to find.

4           JUSTICE GINSBURG:           But the railroad wasn't  
5 benefited by the end of the 1871 understanding of the  
6 right-of-way. The one that was benefited was the  
7 government. The government got -- got back the land, so  
8 it's not -- we're not -- was going to stop giving land  
9 to the railroad, yes, but the beneficiary that is losing  
10 out under your interpretation is the government.

11          MR. LECHNER:           But it's -- it's not only my  
12 interpretation, it's the interpretation of the Court in  
13 Great Northern that it was an easement. And this Court  
14 was not -- this Court in Great Northern knew the  
15 difference of the word "easement" and knew what the  
16 significance of using that term would mean. So did the  
17 government at the time.

18          JUSTICE KENNEDY:        There were -- there were  
19 points along the right-of-way where the railroad needed  
20 a station or a wider area for water towers and so forth.  
21 And it -- it usually could receive those by simply  
22 filing a patent if it was within a permitted zone, if it  
23 was within -- if they were 20 miles equidistant or  
24 something like that.

25           How did they get those additional lands?

1 MR. LECHNER: The station --

2 JUSTICE KENNEDY: One way they could do them  
3 was to condemn them, but absent condemnation, could they  
4 just receive them from the government?

5 MR. LECHNER: Well, under -- under the 1875  
6 Act, yes, Congress did provide for station grounds. The  
7 railroad could secure station grounds by filing a map of  
8 the station grounds with the local land office, and once  
9 the secretary approved, then they would acquire the  
10 station grounds.

11 But the nature of the grant that they  
12 required on the station grounds is the same as for the  
13 right-of-way, and that's merely an easement.

14 JUSTICE KENNEDY: Oh. So it's -- so it was  
15 clear at the time of the grant that it was on the --  
16 that what was granted was co-extensive with what the  
17 right-of-way was, with the railroad right-of-way.

18 MR. LECHNER: Yes. And that was how the  
19 Department of Interior originally interpreted it in  
20 1888, as the -- the railroad didn't get a fee in  
21 anything, it got a right-of-way -- it got an easement in  
22 the railroad -- in the right-of-way and in the station  
23 grounds.

24 JUSTICE KENNEDY: Are there any instances in  
25 which the railroad can keep its station even if it

1 abandons the right-of-way? Or does the station fall  
2 with the -- when the right-of-way is abandoned?

3 MR. LECHNER: I think the right -- the  
4 station grounds are tied to the right-of-way. So if you  
5 abandon the right-of-way, the station grounds would also  
6 be extinguished and unburden the underlying fee.

7 JUSTICE ALITO: Could I ask you again about  
8 Section 912? Your patent says that it is subject to  
9 those rights for railroad purposes as have been granted  
10 to the railway company in particular, and its successors  
11 and assigns.

12 Now, that was -- that patent came after the  
13 enactment of 912, and 912 clarifies the rights of -- or  
14 changes the rights of railroad companies and says that  
15 if they abandon property, within one year after that,  
16 they -- there can be a public highway established on  
17 that -- on that property. So why wasn't your patent  
18 subject to that?

19 MR. LECHNER: Well -- well, first, I  
20 don't -- 912 did not change the grant to the railroad.  
21 912 applies if the government has any remaining interest  
22 in the right-of-way.

23 JUSTICE ALITO: Well, you didn't get your  
24 property from the railroad. You got it from the  
25 government.

1 MR. LECHNER: Correct.

2 JUSTICE ALITO: You got a patent from the  
3 government. So the question is: What were they  
4 conveying to you? And if you read the patent in  
5 connection with 912, isn't it clear they're conveying to  
6 you every -- arguably everything other than this right  
7 to have a public highway established on that land when  
8 it was abandoned by the railroad?

9 MR. LECHNER: They were conveying it subject  
10 to those rights for railroad purposes is the specific  
11 language. And but 912 does not create a reservation; it  
12 doesn't create a right of reverter. It was simply to  
13 deal with what they were going to do with these strips  
14 of land upon abandonment.

15 Because at the time, that's when abandonment  
16 of the railroads first began, Congress was worried we  
17 were going to have these isolated strips. It didn't  
18 change the 1875 Act, it didn't change the previously  
19 granted rights-of-way to expand the scope of them.

20 But when they were abandoned and they came  
21 back under the law at the time that the government had  
22 the implied condition of reverter, they came back. The  
23 government said, okay, well, if you want to establish a  
24 public highway, that's fine, otherwise, it's going to  
25 go -- it's going to inure to the benefit of the settler.

1           But it didn't change the nature of the  
2 grant. It didn't change the 1875 Act. It didn't create  
3 it. It did not create an interest that wasn't there  
4 before. It was just how to deal with the interest that  
5 the -- that Congress thought it had after this Court's  
6 decision in Townsend and Stringham.

7           JUSTICE ALITO:           I still don't understand it.  
8 You say this was purely an easement. All right. So  
9 that means that when there's an abandonment, the  
10 government has complete title to the property, right?  
11 They convey that property to you, but before they do  
12 that, they say that there's this reservation of rights  
13 with respect to the establishment of a highway.

14          MR. LECHNER:           I'm -- I'm -- one -- well,  
15 I'm -- I'm troubled. Under -- under your hypothetical,  
16 the government still owns the underlying land when the  
17 railroad's abandoned? So when the railroad is  
18 abandoned, the two estates merge. There was one.

19          JUSTICE ALITO:           That's your argument, isn't  
20 it?

21          MR. LECHNER:           Well, I think that's the  
22 argument under -- under the common law, too, is -- is  
23 what --

24          JUSTICE ALITO:           Yes. Okay. And may be --

25          MR. LECHNER:           So they -- they merge.

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1 JUSTICE ALITO: It may be a good argument.

2 MR. LECHNER: They merge.

3 JUSTICE ALITO: But that's your argument.

4 JUSTICE BREYER: Now, what about when 912  
5 says that when the railroad abandons a piece of the  
6 right-of-way, okay, it then says that the interest of  
7 the United States, with all right, title, and interest  
8 in the state of the United States shall be vested in the  
9 town that builds the highway.

10 But your point is, that's true, but where  
11 they previously -- where they have previous -- where  
12 they have given -- where they conveyed it to a private  
13 person, they didn't have any right, title, and interest,  
14 because on abandonment it was simply an easement. And  
15 on abandonment, that goes to the property owner who owns  
16 the -- the land on either side.

17 Is that -- I mean, your point is that the  
18 United States didn't have any right, title, and interest  
19 on the abandonment unless the United States continued to  
20 own the property.

21 MR. LECHNER: Correct.

22 JUSTICE BREYER: All right. So that is your  
23 point. They can't convey what they don't have.

24 MR. LECHNER: Correct.

25 JUSTICE BREYER: Okay.

1 MR. LECHNER: And there's --

2 JUSTICE SOTOMAYOR: Let's take this in a  
3 normal easement situation. I have an easement to go  
4 through your backyard to get to the street. Can I  
5 assign that easement to another person so that the  
6 person who buys my home can now walk through your  
7 backyard?

8 MR. LECHNER: In certain circumstances, yes.

9 JUSTICE SOTOMAYOR: So what's wrong with the  
10 concept that when this land was given to you as a  
11 railroad right-of-way, when it's abandoned, that the  
12 railroad, in essence, under 1912, and under the 1922  
13 Act, that you are giving that easement to the U.S. to  
14 use as a right-of-way?

15 And so, whether it's a trail or a highway or  
16 any of the other items that are specified in the statute  
17 that that easement is continuing to be used by the  
18 person who gave it, which was originally the U.S. Your  
19 patent was given subject to that easement, to that  
20 right-of-way.

21 MR. LECHNER: It was subject to those rights  
22 for railroad purposes, correct.

23 JUSTICE SOTOMAYOR: Well, what was the  
24 language of the patent?

25 MR. LECHNER: Subject to those rights for

1 railroad purposes, that conveys --

2 JUSTICE SOTOMAYOR: Was that the exact  
3 language? I thought it was for right-of-way.

4 MR. LECHNER: Exact language on page 78,  
5 Petitioner's Appendix.

6 JUSTICE SOTOMAYOR: The Joint Appendix?

7 MR. LECHNER: Petitioner's Appendix, 78,  
8 sorry.

9 JUSTICE SOTOMAYOR: Too many briefs. Sorry.

10 MR. LECHNER: 78.

11 JUSTICE KENNEDY: And what do you want us to  
12 read there?

13 MR. LECHNER: Well, there was a question  
14 about whether that was actually the language, was it  
15 subject to those rights. The last full paragraph,  
16 "subject to those rights for railroad purposes have been  
17 granted to the railroad under the 1875 Act."

18 JUSTICE SOTOMAYOR: The 1875 Act, what was  
19 given to the railroad was a right-of-way.

20 MR. LECHNER: A right to lay their tracks  
21 and a right of passage.

22 JUSTICE SOTOMAYOR: Just as I'm seeing the  
23 1875 grant, it was the right-of-way through public  
24 lands.

25 MR. LECHNER: Well, yes, and as the

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1 government argued in Great Northern that that was --  
2 that right in the 1875 Act was a right to lay tracks and  
3 it was a right of passage, an easement.

4 JUSTICE KAGAN: Mr. Lechner, I know Great Northern said so  
5 and that is surely very strong support for your  
6 view. But why did Great Northern think that there was a  
7 difference between pre-1871 grants and post?

8 MR. LECHNER: First, the shift in Congress's  
9 policy. And the railroads fell out of disfavor and  
10 Congress passed resolution saying -- you know, we want  
11 to hold on to these lands to secure homesteads for  
12 actual settlers.

13 JUSTICE KAGAN: I mean, I guess I had thought if you  
14 were just dealing with this as a matter of first  
15 impression that the shift in Congress's policy was a  
16 shift about whether to give away -- you know, huge  
17 swaths of land to the railroads, and that Congress  
18 indeed decided, enough of this, we are not going to give  
19 these checkerboard grants of land to the railroad,  
20 because they are making a mint from this, and we would  
21 rather give it to homesteaders.

22 But there was -- I don't see any evidence  
23 that there was any shift in policy or any reason why  
24 there would be a shift in policy, as to what the rights  
25 of way were. Whether they were easements or whether

1 they were limited fees.

2 MR. LECHNER: Well, Section 4 has a lot to  
3 do with that, and that is where Congress reserved the  
4 right to dispose of the underlying lands to the  
5 settlers. That provision is not found in the pre-1871  
6 railroad grants, and this Court in Great Northern looked  
7 at that and you say, you got to look at Section 4, that  
8 provides light on how to interpret the right-of-way  
9 grant in Section 1.

10 And because of Congress's intent and the  
11 legislative history surrounding similar language when  
12 Congress passed it in 1872, they called it the  
13 right-of-way is merely going to be an encumbrance.

14 JUSTICE KAGAN: I guess -- you know, again,  
15 if you were just looking at this as a matter of first  
16 impression, the language of Section 4 does not seem to  
17 me to be very indicative of anything. You know, it says  
18 "subject to the right-of-way." Subject to the  
19 right-of-way. Whatever the right-of-way is. Subject to  
20 the right-of-way if it's an easement. Subject to the  
21 right-of-way if it's a limited fee. Doesn't seem to  
22 pick one or the other.

23 MR. LECHNER: But as the government argued  
24 in Great Northern, it would be silly to patent the  
25 underlying lands subject to a fee. I mean, there would

1 be no reason for that language at all if the railroad  
2 got a fee. And then you patented the -- in effect it  
3 would be the adjacent land, not the underlying land.  
4 There would be no reason to say that the adjacent land  
5 is subject to a fee because with the limited fees, they  
6 were envisioning those things going to the center of the  
7 earth.

8 So you would be patenting the adjacent land.  
9 But under Section 4 and as Great Northern interpreted,  
10 the patents go to the underlying land and that's what  
11 happened in this case, because Brandt owns the  
12 underlying land and minerals.

13 JUSTICE KENNEDY: Well, in your answer it  
14 seemed to me, and maybe you have to do this to proffer, that you  
15 confused limited fee with fee simple ,with absolute fee.  
16 Now, obviously that's true if it's the same owner, they  
17 merge.

18 MR. LECHNER: Well, I was using limited fee  
19 in the context as this Court used it in Townsend,  
20 limited fee with the implied condition of reverter. I  
21 mean, even in Townsend 1903, the railroad got it all,  
22 but it was subject to implied condition of reverter if  
23 they stopped using it for railroad purpose. But they  
24 did give fee simple absolute to the center of the earth  
25 is how it was construed at that time.

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1           So that sheds light on the fact that Section  
2           4 reflects that only an easement was granted because you  
3           would not need to have Subject 2 language at all if you  
4           were just patenting the adjacent lands.

5           It is also well established that the Department of Interior's  
6           interpretation of public land laws such as the 1875 Act is  
7           entitled to great deference. This is because public  
8           land laws provide for the acquisition of the title,  
9           which must be secure. Beginning in 1888 and  
10          continuing through today, the Department of Interior  
11          still construes the 1875 Act as easements and they can  
12          still construe 1875 Act rights of way as different from  
13          pre-1871.

14          JUSTICE SCALIA:           I don't understand how that  
15          can be, and yet, the government can argue contrary to  
16          what the government says. I mean, is that what you are  
17          telling us?

18          MR. LECHNER:               I'm saying --

19          JUSTICE SCALIA:           The Interior says one thing  
20          and the Justice Department here says something else? I  
21          mean, we have a president who reconciles these two  
22          things. He must agree with one or the other.

23          MR. LECHNER:               Well, I think, under this  
24          Court's precedent, you defer to the agency in charge of  
25          administering the 1875 Act, and that is the Department

1 of Interior. And the Department of Interior has  
2 consistently interpreted these as -- these rights of way  
3 as easements and that interpretation is entitled to  
4 substantial deference.

5 JUSTICE SCALIA: I'm sure the government  
6 will have an explanation as to why we shouldn't.

7 MR. LECHNER: If it pleases the Court, I  
8 would like to reserve the remainder of my time for  
9 rebuttal.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
11 Mr. Yang.

12 ORAL ARGUMENT OF ANTHONY A. YANG  
13 ON BEHALF OF THE RESPONDENT

14 MR. YANG: Mr. Chief Justice, and may it  
15 please the Court:

16 The statute, its legislative history, the  
17 surrounding statutory context which includes Section 912  
18 as well as 1906 and 1909 Acts and this Court's decisions  
19 construing the 1875 Act including Section 4 which  
20 predated Great Northern show that the United States  
21 retains the reversionary interest in the surface of the  
22 land of right-of-ways granted to railroads --

23 JUSTICE ALITO: Mr. Yang, I have to say I  
24 think the government gets a prize for understatement  
25 with its brief in this case. You have a sentence in

1 your brief that says, "We acknowledge that there is  
2 language in this Court's opinion in Great Northern and  
3 in the government's brief in that case that lends some  
4 support to petitioner's contrary argument."

5 Here are the subject headings of the  
6 government's brief in Great Northern. "The right-of-way  
7 granted by the Act of March 3, 1875, is in the nature of  
8 an easement. The language of the 1875 Act shows that  
9 only an easement was granted. The legislative  
10 background and history of the 1875 Act show that the  
11 grant was of an easement rather than a fee.

12 Subsequent administrative and congressional  
13 construction confirm that only an easement was granted."  
14 And the first sentence of the summary of the  
15 argument --

16 MR. YANG: There is also other portions of  
17 the brief. I would refer the Court, for instance, to  
18 Footnote 4 where the government said there would be a  
19 separate question raised about whether a patent holder  
20 subsequently who obtains the patent after the grant of  
21 right-of-way would take this government interest. And  
22 the Court -- the government said in fact that would  
23 raise different questions.

24 The Court recognized that on pages -- the  
25 last two pages of its opinion, it specifically limited

1 its judgment to situations where the government retained  
2 interest in the entire surrounding parcel and, in fact,  
3 modified the judgment below which enjoined the railroad  
4 from oil drilling simply to apply to that.

5 Not only that, the Court was writing on --  
6 the government didn't cite, for instance --

7 JUSTICE SCALIA: Wait, wait. Before you go,  
8 you really think the Court was saying, It will be an  
9 easement when that suits the government, but it will be  
10 something else when that suits the government?

11 MR. YANG: No, I think what the Court was --

12 JUSTICE SCALIA: I mean, it's either an  
13 easement or it's not an easement. You really think  
14 the -- the opinion meant to reserve the question whether  
15 it was an easement.

16 MR. YANG: I do with respect to the issue  
17 that we have here. The question before the Court was  
18 whether the right-of-way, which is a statutory term,  
19 Congress could have used "easement"; it could have used  
20 "fee." It did not. It uses a special statutory term  
21 which has accumulated meaning over time, particularly,  
22 in the railroad context.

23 And in that context, the Court was deciding  
24 whether it was in the nature of an easement, which as  
25 our subject heading said, it's in the nature of an

1 easement. But that's vis-à-vis the United States --

2 JUSTICE BREYER: I got that point.

3 MR. YANG: -- with respect to the mineral  
4 lands. And, in fact, the shift that, Justice Kagan, you  
5 were talking about is a shift about subsidies. It was a  
6 shift of subsidy away from these lavish land grants.  
7 And when Congress was stopping that -- that lavish grant  
8 to railroads, it made no sense to construe the act with  
9 respect to the mineral rights, which the Court said  
10 were -- were mineral riches. Why would Congress do that  
11 when it was cutting back on --

12 JUSTICE ALITO: That may be.

13 JUSTICE BREYER: All right.

14 JUSTICE ALITO: But the term "easement" is a  
15 well-known term with an established meaning. And you're  
16 saying that -- you said it was an easement. The Court  
17 said it was an easement. You -- you persuaded the Court  
18 to say it was an easement. And now you're saying this  
19 is some kind of property right that has no name,  
20 previously unknown to the law.

21 MR. YANG: It's a right-of-way. And, in  
22 fact, the government's brief also said that with  
23 respect -- and I'm quoting from page 9 -- with respect  
24 to the surface -- the control -- under any of the  
25 theories, even under the easement theory, which I don't

1 believe is a true common law easement, the railroad's  
2 control of the surface was complete. And then we went  
3 on further -- and this is on pages 36 to 37 -- that said  
4 it was a fact that the right-of-way has some of the  
5 attributes of a fee, and those included exclusive and  
6 perpetual occupation and remedies --

7 JUSTICE BREYER: All right. Let me put it  
8 this way.

9 MR. YANG: And so, again, if we were to  
10 rewrite our brief, we would certainly do so much more  
11 carefully now. But I think that the way that you read  
12 the brief is the way that you read opinions, which is in  
13 the context in which it was decided, particularly  
14 because Footnote 4, and this Court's opinion responding  
15 to Footnote 4, made clear that they were only addressing  
16 mineral rights where the United States held the  
17 surrounding parcel.

18 And -- and that's particularly true because  
19 this Court had already construed Section 4 of the 1875  
20 Act before Great Northern in Stalker and in Steinke.  
21 And in Stalker, the Court held that the subject to --  
22 this is on page 154 -- a patent was subject to the  
23 railroad rights acquired by approval. That's the  
24 approval in Section 4, in the subject to language in  
25 Section 4.

1           "Upon approval, the grounds so selected were  
2 segregated from the public lands and the required  
3 material to withdraw the land granted from the market."  
4 And then the Court goes on, and this is on page 154  
5 again, "The later patent," the patent issued to a  
6 settler. Even though the local land office forgot to or  
7 omitted to mark the right-of-way on the land plats, the  
8 subsequent patent was inoperative to pass title to those  
9 later patentholders.

10           And then in Steinke -- this is 1922 -- the  
11 Court followed Stalker and said, "The approved map under  
12 Section 4 is the equivalent of a patent." And then they  
13 go on to say, citing Stalker, that the later patent was  
14 inoperative to pass title.

15           And I think it's important, in both of those  
16 cases, the Court cited to Interior's regulations. In  
17 Stalker, the Court quoted at length the regulations from  
18 1888, which, although the Court suggested that in Great  
19 Northern those were the first regulations, they actually  
20 weren't.

21           There were prior regulations in 1878 which  
22 discuss nothing about the nature of the fee. And those,  
23 unfortunately, are hard to find. They are in Senate  
24 Executive Document 30, 45th Congress, Third Session,  
25 1879.

1           So -- but the regs that the Petitioners now  
2           rely on were specifically referenced by the Court,  
3           including the regs that say the disposition of the land  
4           surrounding the right-of-way is subject to the  
5           right-of-way.

6           JUSTICE KAGAN:                Mr. Yang, the Petitioners  
7           say that there are thousands or even tens of thousands  
8           of people in their position.   Do you dispute that?

9           MR. YANG:                    We don't have good numbers,  
10          actually, on that.

11          JUSTICE BREYER:             But what are the numbers?  
12          I mean, look, this is what I'm thinking.   This is  
13          property law.   It's not just a question of trying to  
14          work out what the case could or couldn't have stood for.  
15          If I try to remember my property class, it vaguely  
16          was -- which was a great class, A. James Casner, real  
17          expert.

18          And he -- he, I think, said that when you  
19          convey subject of divestment, the -- something called  
20          season under the common law went to the recipient of the  
21          conveyance.

22          But if you conveyed an easement, season did  
23          not pass.   So in holding that it is an easement, you're  
24          holding there was no season, and therefore, it couldn't  
25          be a divestiture.

1           Now, whether that's true or not or I've  
2           misremembered it, I'd go back to Justice Scalia's  
3           question. Is there a single example since the Domesday  
4           Book, since Dadonis, since the Bracton, on little to  
5           whatever it was, I mean, in the history of the common  
6           law up to the present, where a court has interpreted an  
7           ambiguous phrase, which doesn't say to grant an easement  
8           for one purpose, but not for the other. There may be  
9           some, but I didn't notice any cited in the government's  
10          brief.

11          MR. YANG:                Well, I'm not sure that there  
12          would be any common law cases.

13          JUSTICE BREYER:         No, I said in any case at  
14          all.

15          MR. YANG:                But in this context --

16          JUSTICE BREYER:         Yes, yes. What is the  
17          case?

18          MR. YANG:                In this context --

19          JUSTICE BREYER:         What is the case? I'd like  
20          to read it.

21          MR. YANG:                -- even with respect to the  
22          pre-1871 statutes, the Court would sometimes --

23          JUSTICE BREYER:         Oh, but they had -- they  
24          had a different view.

25          MR. YANG:                No, no, no.

1 JUSTICE BREYER: They didn't say it was an  
2 easement.

3 MR. YANG: It -- they did.

4 JUSTICE BREYER: I didn't read what -- it  
5 did?

6 MR. YANG: They sometimes referred to them  
7 as easements.

8 JUSTICE BREYER: Which case?

9 MR. YANG: I don't have it in front of me.  
10 I know that --

11 JUSTICE BREYER: Where do I -- where is it  
12 roughly in your brief?

13 MR. YANG: We didn't refer to those cases.

14 JUSTICE BREYER: Oh, all right. Well --

15 MR. YANG: We might have cited the cases in  
16 our brief. We didn't refer to that part of the case.

17 JUSTICE BREYER: I'm surprised that -- but  
18 the -- if you think there are some, I'll get my law  
19 clerks to look --

20 MR. YANG: But there are some, but the point  
21 was they were trying to discuss the nature of a  
22 statutory right-of-way. Congress did not use the term  
23 "easement," it did not use the term "fee." And so the  
24 Court has been using common law terms which don't fit  
25 perfectly to describe certain kinds of --

1 JUSTICE BREYER: Can you imagine or explain  
2 to me why a property lawyer worth his salt since  
3 70 years ago or more, 1942, wouldn't have read that case  
4 and advised his client, who was buying the land, if the  
5 railroad abandons it, it's yours.

6 MR. YANG: Yes. There are --

7 JUSTICE BREYER: Where is some evidence of  
8 that?

9 MR. YANG: There are at least four reasons.

10 JUSTICE BREYER: No, not reasons. I want to  
11 know if there's any authority, and then you get to the  
12 the reasons.

13 MR. YANG: Oh, yes. There's both statutory and  
14 case law authority. I would start with Stalker and  
15 Steinke, which specifically say that when you have  
16 approved the map, it's equivalent to a patent, and then  
17 therefore, any parcel subject -- is -- conveyed subject  
18 to the patent or the right-of-way, which means you don't  
19 get any interest at least in the surface of the  
20 right-of-way.

21 So this -- those cases have never been  
22 overruled, one. Two, Congress in 1906, and this is --  
23 this isn't significant. This is at page -- Section 940  
24 at page 7 -- 6A and 7A of our brief. Congress said that  
25 each and every grant of right-of-way under this 1875

1 Act -- each and every one -- "shall be declared  
2 forfeited if they haven't been constructed," and -- this  
3 is important -- "the United States resumes the full  
4 title to the lands covered thereby, free and discharged  
5 from such easement" --

6 JUSTICE SCALIA: Did they give compensation  
7 to the people --

8 MR. YANG: No.

9 JUSTICE SCALIA: -- to whom they pronounced  
10 that?

11 MR. YANG: No.

12 JUSTICE SCALIA: That can't change the  
13 meaning of the 1875 Act.

14 MR. YANG: But it reflects Congress's  
15 understanding of what the 1875 Act --

16 JUSTICE SCALIA: It reflects a later  
17 Congress's understanding of what an earlier Congress  
18 did. We don't --

19 MR. YANG: Well, when we're --

20 JUSTICE SCALIA: -- interpret statutes on  
21 the basis of what later Congresses think they meant.

22 MR. YANG: This Court did in Great Northern.  
23 In fact, this Court --

24 JUSTICE SCALIA: People have done it.

25 MR. YANG: Okay. That's possible, but what

1 we're talking about is Great Northern. And, in fact,  
2 Great Northern quotes this language of Section 940. The  
3 very next section goes on to say that the government's  
4 interests shall inure to the benefit of the land  
5 conveyed by the United States previously, which was  
6 subject to the right-of-way.

7 So that section itself shows that starting  
8 in 1906, and that's both 1906 and 1909, Congress  
9 understood that the government had a reversionary  
10 interest.

11 JUSTICE KAGAN: Mr. Yang, can I take you  
12 back to my question?

13 MR. YANG: Sure.

14 JUSTICE KAGAN: Thousands, tens of  
15 thousands? How many people are involved here and how  
16 many acres of land?

17 MR. YANG: Again, we don't know because the  
18 way that these things are disposed of, there has not  
19 been a centralized way of tracking it. It could be a  
20 significant amount, because the 1875 Act rights-of-ways  
21 were at least in number the most numerous.

22 It's hard to know about mileage because the  
23 specific land grants were often quite long, but in  
24 terms -- there were at least a significant number of  
25 1875 Act rights of ways.

1           And so going back to Justice Breyer's  
2 question about why a good lawyer would not have great  
3 pause about saying that you got the surface interests.  
4 You have Stalker and Steinke. You have the Section 940,  
5 which was enacted in 1906 and 1909.

6           You have Section 922 -- Section 912, which  
7 was enacted in 1922, which the Court has already  
8 discussed, which shows that whenever there is a forfeiture,  
9 the United States' interest reverts to first for roads and  
10 then to municipalities, and if there was anything left  
11 it would go to a land owner.

12           That -- you know, was unquestioned it  
13 appears until -- at least with the surface interests  
14 until the mid-1980s, for 60 years. The municipalities  
15 and roads were --

16           JUSTICE BREYER:           Well, I see that they do  
17 and I certainly think bicycle paths are a good idea, but  
18 the problem that I see here is just what Justice Kagan  
19 is bringing up; that is, as I read this, I think there  
20 might be millions of acres in the last 70 years that  
21 have been conveyed. For all I know, there is some right  
22 of way that goes through people's houses -- you know,  
23 and all of a sudden, they are going to be living in  
24 their house and suddenly a bicycle will run through it,  
25 which isn't so bad, but I'm concerned about that, and

1 your answer makes me more concerned --

2 MR. YANG: Well, I think it's telling --

3 JUSTICE BREYER: -- because you haven't  
4 suggested anything that makes me think there aren't  
5 millions and millions of acres involved. Now, what are  
6 you going to say that disabuses me of that?

7 MR. YANG: Well, I think it's telling that  
8 between 1922 and the mid-1980s this issue does not  
9 appear to have arisen. It has arisen only with respect  
10 to --

11 JUSTICE BREYER: Exactly, because the lawyer  
12 would think -- when he reads the case of Great Northern,  
13 you think it's an easement.

14 MR. YANG: And then when the city takes the  
15 road and when the municipality -- excuse me -- when the  
16 municipality takes the right of way no one complained  
17 for 60 years? I mean, this is the background of the  
18 law. This is going to be --

19 JUSTICE BREYER: So how much is that? How  
20 much roughly is that? How often has it turned out that  
21 there was a conveyance -- after 1942 there was a  
22 conveyance of an abandoned right of way by the United  
23 States to land that had been previously been granted to  
24 a private owner?

25 MR. YANG: The amicus brief of --

1 JUSTICE BREYER: How often?

2 MR. YANG: Again, we don't have good numbers  
3 on how often.

4 JUSTICE BREYER: I know you don't have good  
5 numbers, but can you give me a rough estimate?

6 MR. YANG: I think a significant amount of  
7 time, because the -- if you look at the amicus brief of  
8 the National Council on State Legislatures, they explain  
9 this. This is --

10 JUSTICE BREYER: I will say ten times as  
11 much reliance on the one side than the other side, is  
12 that totally wrong?

13 MR. YANG: Your Honor, I can't speculate on  
14 numbers. I just don't have -- it would be not  
15 appropriate for me for the United States to speculate on  
16 numbers.

17 JUSTICE GINSBURG: Mr. Yang, would you  
18 clarify what you're -- what Mr. Lechner told us. He  
19 said that to this very day the Department of Interior  
20 has taken the position that these railroad rights of way  
21 are easements.

22 MR. YANG: That's not correct because it  
23 needs to be qualified. After Great Northern, Interior  
24 has concluded in *Amerada Hess*, which we cite in our  
25 brief, that the subsurface interests would go to the

1 patentee, but with respect to the surface interests,  
2 that has not been the case.

3 In fact, until 1984 is the first case that I  
4 have seen in a case that let -- that was the counterpart  
5 to the Oregon Short Line case that we cite that led to  
6 the decision here. It just wasn't disputed about the  
7 surface interest.

8 CHIEF JUSTICE ROBERTS: Why then did no one  
9 from the Department of Interior join your brief?

10 MR. YANG: They agree with our brief. We  
11 don't always --

12 CHIEF JUSTICE ROBERTS: They don't have a  
13 choice, do they? I mean, it's --

14 MR. YANG: No, we have been in close  
15 consultation with the Department of Interior and they have  
16 signed off on this brief. The agency that is at issue  
17 here is actually agriculture because agriculture is the  
18 forest service which has the lands. I think --

19 JUSTICE SCALIA: But both of them want more  
20 Federal lands, that's surprising, right, both  
21 agriculture and --

22 MR. YANG: I think that's maybe a little  
23 unfair, Justice Scalia. I think government is giving  
24 the Court its view of the law here. We are interpreting  
25 it. Multiple agencies have been consulted and we've

1       been trying to come to grips with the Court's  
2       conflicting -- you know, language.

3               If you take language in the abstract and you  
4       divorce it from the context of the case, the Court's  
5       decisions are conflicting, but when you look at the  
6       context of the case, you look at Great Northern with  
7       respect to saying that the subsurface interests, the  
8       mineral interests are like an easement with respect to  
9       the United States vis-à-vis the railroad, but then you  
10      have Stalker and Steinke saying that when under Section  
11      4 of the Act -- it's an authoritative construction of  
12      Section 4 of the Act.   When you approve a map of a  
13      railroad under Section 4, it is tantamount to a patent  
14      and thereafter a subsequent patent does not confer an  
15      interest on the patentee.

16              Those cases are reconciled, we think, by  
17      acknowledging that Stalker and Steinke control at least  
18      with respect to the surface interests, and then with  
19      respect to the subsurface interests, Great Northern  
20      clearly says that, at least vis-à-vis the United States  
21      and the railroad where there is no third-parties  
22      involved that is deemed to be like an easement that  
23      would not give a subsurface interest.   And there is real  
24      important reasons to distinguish between the subsurface  
25      and the surface with respect to rights of way.

1           Surface for the right of way is what's  
2           important.  It's critical.  You need to have an artery  
3           that connects various parcels of land.  That was true  
4           back when 1875 was enacted and it's true now with  
5           respect to highways and other uses that the government  
6           might put its land to.

7           JUSTICE KAGAN:           The patent here, Mr. Yang,  
8           which was, what, in the mid-1970s did not reserve  
9           anything.  The government just made an uncritical grant  
10          to the grant family?

11          MR. YANG:                And that was true both in Stalker  
12          and in Steinke with respect to the subsequent patents.

13          JUSTICE KAGAN:           Well, I'm just suggesting  
14          that after Great Northern and then you're given this  
15          patent, which is unequivocal and does not reserve  
16          anything, why anybody would think that they hadn't  
17          gotten the whole ball of wax is a mystery.

18          MR. YANG:                Well, I think you would have  
19          to -- I think if you had a good lawyer, the good lawyer  
20          would say, Look, we've got -- there is uncertainty here.  
21          You've got Stalker and Steinke, which says you get no  
22          interest.  You have Great Northern, which doesn't  
23          address interest that pass to third parties.

24                It only addresses the interest that the  
25          railroad has, and it says there is no mineral rights.

1 And then you have Congress in 1906, 1909, 1922, and more  
2 recently in 1988, doubling down and saying -- you know,  
3 the United States' interest goes to roads first.

4 JUSTICE KAGAN: It seems to me a fair  
5 reading of the history here, Mr. Yang, is that it really  
6 didn't occur to the government until very recently that  
7 these rights of way had value as anything other than  
8 railroad tracks, and indeed that the government was  
9 anxiously trying to give these things away because it  
10 thought that these spaghetti strips of land, it's of no  
11 use to the government, here, take them, get them off our  
12 hands.

13 And having done that for many, many, many  
14 decades, the government faces a problem when it turns  
15 around and says, you know what, we forgot, there are  
16 bike paths.

17 MR. YANG: I don't think that's quite  
18 accurate. At least since 1922, the government has  
19 disposed of -- or Congress, I should say, has directed  
20 the government to dispose of its reversionary interests  
21 first to roads, and that remains true today. And then  
22 also from 1922 until 1988, it was supposed to go to any  
23 municipality, any land within a municipality goes to the  
24 municipality; and then third, it would go to any land  
25 owner of the surrounding parcel that was paying the

1 interest subject to the right of way.

2 Now, of course -- you know, Congress is free  
3 to choose to change its decision about how to dispose of  
4 U.S. Government interests to any government property.  
5 There is no vested interest in that. And I think what  
6 we are trying to say in our brief is that petitioner  
7 asks the Court essentially to nullify a significant --  
8 significant enactments by Congress. It would nullify --

9 JUSTICE BREYER: That's true, but when you  
10 talk about -- I mean, I went and read -- when I read --  
11 I thought your brief was very persuasive but then I read  
12 Great Northern and I thought they have -- they are  
13 really quoting it correctly.

14 Here's what they said about the cases that  
15 you refer to like Stringer, The conclusion that the  
16 railroad was the owner of a limited fee -- which was the  
17 conclusion of those earlier cases -- was based on cases  
18 arising out of the 1871 Act, not the 1875 Act, and the  
19 change of policy in 1875 was brought -- was not brought  
20 to the Court's attention.

21 And then they say that conclusion is  
22 inconsistent with the language of the 1875 Act. It's  
23 history. And it's early administrative interpretation.  
24 We therefore do not regard this earlier case as  
25 controlling.

1           MR. YANG:           That was Townsend, which was  
2 dictum. We told the Court that Townsend was dictum. In  
3 Townsend, the dispute was by a railroad who got a decree  
4 from a State court saying it had the right of way.

5           JUSTICE BREYER:       Well, I thought they say  
6 in the Stringer case. Is that same as --

7           MR. YANG:           Oh, I'm sorry, Stringer.

8           JUSTICE BREYER:       Yes, that's the one you  
9 were --

10          MR. YANG:           No, no, we are not relying on --  
11 we are relying on Stalker and Steinke, which are 1875  
12 Act holdings. It's this Court construing the very  
13 statute that we're talking about, Section 4, which is  
14 the very section that the petitioner -- now, it would be  
15 kind of remarkable to read language in Great Northern  
16 which addressed a different question in which the  
17 government specifically reserved the question of what  
18 interest would transfer to a patentee.

19          The Court specifically limited its decision  
20 so it wouldn't reach that issue. And then it sub  
21 silentio overruled two decisions by this Court on the  
22 very statute decided 30 years earlier when the Court was  
23 closer to the 1875 Act? That would be a pretty  
24 remarkable thing, I think. And what we're saying is  
25 that, no, Stalker and Steinke remain good law, even if

1 you characterize the right of way as having attributes  
2 of an easement because it's clear it can't be a common  
3 law easement.

4 I don't think that even -- petitioner may be  
5 able to dispute this -- but a common law easement, as  
6 this Court has explained, would not give as  
7 traditionally framed exclusive and perpetual occupation  
8 to the railroad. It would not give the remedy of the  
9 fee. All those are very practical, real rights that  
10 would have to be conferred that would be greater than a  
11 mere common law easement. And that's true back in 1871,  
12 and it's true in 1875, and we said it was true in our  
13 brief to this Court.

14 We said as an easement -- you know, the fact  
15 that it has some of the attributes of a fee, including  
16 exclusive or perpetual occupation and the remedies of a  
17 fee and not an easement, doesn't take it out of the box  
18 of what we were talking about in that case.

19 And so, again, I think you need to read it  
20 in context. I agree that if you just take Great  
21 Northern and look at it without peeling back the hood a  
22 little bit, there's language that -- you know, would  
23 lead --

24 JUSTICE BREYER: That's -- that's basically  
25 my problem. I guess you just don't have any specific

1 things of what property lawyers were saying. But those  
2 two cases are from the era of Stringer, and at that  
3 point, apparently, the Court thought it was a limited  
4 fee.

5 MR. YANG: One was before --

6 JUSTICE BREYER: And then you get -- they  
7 were all -- was any of them after Great Northern?

8 MR. YANG: No, not after Great Northern.

9 JUSTICE BREYER: So -- so then in Great  
10 Northern it comes along?

11 MR. YANG: But Justice Breyer, I think it's  
12 a mistake to rely on these labels of limited fee and  
13 easement too strongly. That's what this Court's  
14 basically said in Union Pacific in 1957. In Union  
15 Pacific, the Court said look, these pre-1871 cases use  
16 the term "limited fee," but really, we're not going to  
17 deem that to be controlling with respect to the mineral  
18 rights.

19 And the Court is doing exactly what we're  
20 saying should be done here, which is you understand the  
21 right-of-way in the context of the statutory text, in  
22 the context of the environment, the surrounding  
23 statutory environment in the context of this Court's  
24 decisions, and it's not a binary black-or-white choice  
25 between -- you know, common law terms.

1 Congress didn't use those common law terms.  
2 Congress used the term "right-of-way." It used the same  
3 text that it did in prior grants of rights-of-way. And  
4 all we're trying to say is that there are real important  
5 interests here. It's not practically feasible to ever  
6 reconstruct these arteries through the lands. And they  
7 were important when Congress granted them to develop the  
8 lands in 1875, and they remain important today, as  
9 Congress has now repeatedly recognized in terms of  
10 granting public roads. So --

11 JUSTICE ALITO: Do we know how many miles of  
12 public roads and how many miles of bike trails have  
13 been -- you don't know that either?

14 MR. YANG: On bike trails, this is -- this  
15 is not a Rails-to-Trails Act case. There are different  
16 issues there. On the Rails-to-Trails Act case -- you  
17 know, it's -- I don't have in mileage, but this is a  
18 trail that in this case the government used its property  
19 interest through the national forests as well as through  
20 this parcel for like a 22-mile trail. There are  
21 probably 1,000 miles of trail that are -- that would be  
22 affected. And importantly, there's a lot of interest  
23 going forward that would be affected.

24 When the law again -- the law of -- in 1922  
25 was that the Congress would reserve the United States'

1 interests for roads and municipalities and that was a  
2 significant --

3 JUSTICE KAGAN: Are there highways that  
4 would be affected? I mean, if we rule for the Brandts,  
5 are there suddenly going to be highways that can no  
6 longer be highways anymore?

7 MR. YANG: It certainly would call into  
8 question the legality of the land transfers. And I'm  
9 sure that could be something that could be litigated.  
10 There would be issues -- I'm sure defenses raised by the  
11 States and municipalities.

12 But what the Court would be saying is that  
13 for -- since 1922, and this policy continues now, that  
14 the highways that have been created under 1875 Act would  
15 be invalid.

16 JUSTICE BREYER: Can you think of anything I  
17 can do about this? It's a case, in my mind at least,  
18 where reliance interests on -- on a previous case in the  
19 property law area are important, and yet none of the  
20 briefs here really gives me a -- a reasonably concrete  
21 idea of how much reliance there has been. And -- and --

22 JUSTICE SOTOMAYOR: On easements.

23 JUSTICE BREYER: So I'm somewhat in the  
24 dark.

25 MR. YANG: Yes. It's difficult to know,

1 because again, these are kind of ad hoc things. When  
2 there's an abandonment, there might be proceedings, but  
3 there's been -- we've not been able to obtain  
4 centralized, reliable information on the total number,  
5 because this goes back a pretty long way. We're talking  
6 about, again, starting in 1922, you know. This has been  
7 unchallenged until we got two district court decisions  
8 in '80 -- in the mid '80s with respect to the surface.

9 Now, on -- on the subsurface, Great Northern  
10 has -- you know, continued to be applied by Interior and  
11 that's been treated differently. And I think it's  
12 important also to remember that the regulations, not  
13 only were they cited by this Court in *Stalker* and  
14 *Steinke*, the Court was clearly aware of the regulations.

15 In 1931, the -- a case called *Otis Birch*  
16 where Interior basically followed *Stalker* and recognized  
17 that you could not pass title. Now, that was a Mineral  
18 Act case, and the Court also -- Interior also said that  
19 because you can't separate the estates, or there's no  
20 reason to separate the surface from the subsurface, the  
21 mineral couldn't be transferred, either. That's been  
22 overtaken by events.

23 It's important to recognize in '31, and when  
24 the regs were codified in the CFR in '38, which are the  
25 1909 regs, which had never been changed or revisited on

1 the nature of the interests, they simply just carried  
2 forward, even though Interior recognized that the --  
3 there would be no interest given to patentees of the  
4 land after a right-of-way is granted under Section 4 of  
5 the Act.

6 CHIEF JUSTICE ROBERTS: Maybe the reason you  
7 don't have records on this, which strikes me as pretty  
8 unusual that the government doesn't know what it owns,  
9 is that for decades, you didn't think that you owned a  
10 reversionary interest.

11 MR. YANG: Well, for decades, we thought we  
12 owned a reversionary interest. It's just that --

13 CHIEF JUSTICE ROBERTS: But you don't have  
14 any records on where these things are.

15 MR. YANG: Well, but Congress told us --  
16 told everyone how to dispose of it. It went to streets,  
17 roads, highways, then to municipalities, and if then not  
18 municipalities, it would go to the landowner. So the  
19 United States -- you know, disposed of its reversionary  
20 interests through statute. It wasn't until 1988 that  
21 the policy changed to -- to prioritize highways and then  
22 the U.S.'s interests after that.

23 So it's understandable why we haven't been  
24 intimately involved with all these forfeitures that have  
25 occurred over time. Congress directed how the United

1 States interests should be disposed of.

2 JUSTICE GINSBURG: What would -- what would  
3 be the exposure of the United States if we -- if you lose--  
4 are there takings claims now?

5 MR. YANG: There are takings claims also  
6 that would -- any 1875 Act case or right-of-way which  
7 has been abandoned, which has then put to another use,  
8 whether it be a highway under the current Section 912,  
9 or whether it reverts to the United States, or even if,  
10 for instance, it doesn't revert to the United States --

11 JUSTICE SOTOMAYOR: Are there any statute of  
12 limitations? Would all of this be subject to the APA,  
13 or -- or a claim for damages against the U.S.?

14 MR. YANG: I -- I don't believe the APA  
15 would govern a claim of damages against the U.S. There  
16 are takings claims which -- which proceed under the  
17 Tucker Act against the U.S. Or the Little Tucker Act,  
18 depending on the amount. That wouldn't be an APA issue.

19 JUSTICE SCALIA: What about adverse  
20 possession? Can't the -- can't the --

21 MR. YANG: Adverse possession is certainly  
22 an issue that might -- would come up.

23 JUSTICE SCALIA: I would think if there's  
24 been no objection to these spaghetti strips of land, I  
25 don't think condemnation would cost the government a

1 whole lot for that matter. What, you know --

2 MR. YANG: Well, we've faced --

3 JUSTICE SCALIA: -- what a spaghetti strip  
4 of land through --

5 MR. YANG: We faced a very considerable  
6 amount of litigation in recent years.

7 JUSTICE BREYER: Doesn't Interior or some --  
8 I mean, doesn't the highway -- aren't there people in  
9 the government who keep track of where the highways are  
10 built?

11 MR. YANG: Well, for local roads? This  
12 is -- the idea that these -- these rights-of-ways would  
13 go to States and localities, not Federal highways.  
14 That's -- that's Section 912.

15 JUSTICE SCALIA: Yes, but you should --  
16 should know how much land the United States owns. It's  
17 -- it's incredible that -- that there's no record in the  
18 Interior Department or anywhere else of what land the  
19 United States own. You claim you own these thousands of  
20 acres, and you say we've not kept track of it. We just  
21 know where it's going to go, but we don't know what we  
22 own.

23 MR. YANG: There are some records that you  
24 can get from archives with respect to specific things,  
25 but it's not centralized. We don't have a way of

1 aggregating what has happened over the last 90 years.  
2 That's the difficulty that we have here.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MR. YANG: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Lechner, you  
6 have 4 minutes remaining.

7 REBUTTAL ARGUMENT OF STEVEN J. LECHNER

8 ON BEHALF OF THE PETITIONERS

9 MR. LECHNER: We do know how many acres are  
10 involved in this case, and the government is claiming 10  
11 of the 83 acres that it patented to Marvin Brandt's  
12 parents.

13 As this Court has noted, stare decisis  
14 concerns are -- in many cases involving property rights.  
15 With respect to Stalker and Steinke, those were  
16 pre-Great Northern; those were limited fee cases. At  
17 most, they stand for first in time, first in right.

18 Steinke was written by Justice Van Devanter  
19 who also wrote Stringham, which Great Northern  
20 overturned. And that's why Stalker and Steinke fell out  
21 of use over the years. And if Stalker and Steinke were  
22 so important, the government should have brought those  
23 cases to the Court's attention in Great Northern, but it  
24 didn't.

25 With respect to the 1931 land decision the

1 government just brought up, I -- I refer the Court to  
2 solicitor's opinion --

3 JUSTICE BREYER: I guess it would be the  
4 private parties that would have brought it up in Great  
5 Northern, wouldn't it?

6 And do you have any light to shed on the  
7 comparative amounts? I mean, they're saying -- for all  
8 we know there are billions of dollars worth of takings  
9 claims that will come out where the highways run, and  
10 you're arguing, of course, any reasonable property  
11 lawyer would have relied on Great Northern to think it  
12 was just conveying an easement.

13 But -- you know, I'm not a property lawyer,  
14 and so what actually happened matters. And the amounts  
15 matter, at least to me. And do you have any light to  
16 shed?

17 MR. LECHNER: I don't have any light to shed  
18 on the actual mileage. We know it's thousands. We know  
19 that --

20 JUSTICE BREYER: What about on your side?  
21 What about the possibility that millions of acres has  
22 been conveyed and there are tens of thousands or  
23 hundreds of thousands of abandoned railroads that  
24 property lawyers thought went to the person who bought  
25 them, and run through somebody's house? I mean, is that

1 a figment of my imagination?

2 MR. LECHNER: No.

3 JUSTICE BREYER: And you would say no, it  
4 isn't, and therefore I'm asking you is there any  
5 empirical support anywhere for how property lawyers have  
6 treated Great Northern, how much was conveyed,  
7 et cetera? Anything you can say on that would be  
8 helpful.

9 MR. LECHNER: I have nothing to say about  
10 the quantity, but I know that with S.C. -- the Seventh  
11 Circuit ruled in S.C. Johnson that the title insurance  
12 thought that was a landmark decision because it resolved  
13 a lot of problems with the title insurance industry.

14 Each mile of the right-of-way takes up  
15 24 acres. At one point there were 270,000, as this  
16 Court noted in Preseault, there was 270,000 miles of  
17 roads at the peak in the early 1920s and about 130 of  
18 those had been abandoned by the time of the Preseault  
19 decision.

20 I want to also address the forfeiture  
21 provision that they mention and Great Northern relied on  
22 Section 43, 940, to confirm its conclusion that the S  
23 and D, these are easements because 43 U.S.C. 940 calls  
24 them an easement. And with respect to land that the  
25 government still owned at the time of abandonment, they

1 said that the government's land would be discharged of  
2 the easements.

3 JUSTICE KENNEDY: Is there any doctrine in  
4 property law that if a right of access is granted and  
5 its to the exclusion of all other uses, it's -- it looks  
6 for all purposes like absolute control, that it ceases  
7 to be an easement and becomes a limited fee?

8 I mean, is there some magic that takes place  
9 in property law so that if there's a grant that conveys  
10 such total control, that it construed not to be an  
11 easement?

12 MR. LECHNER: I don't know of any.

13 JUSTICE KENNEDY: I've never seen it.

14 MR. LECHNER: Roads, highways are  
15 conveyed --

16 JUSTICE SCALIA: Have you even heard of the  
17 term "limited fee" until this case? I never heard it.

18 MR. LECHNER: Well, I read these --

19 JUSTICE SCALIA: A. James Casner didn't talk to  
20 me about limited fee.

21 MR. LECHNER: Well, I read these cases in law  
22 school so I was aware of the term.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 The case is submitted.

1           (Whereupon, at 12:16 p.m., the case in the  
2 above-entitled matter was submitted.)  
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