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IN THE SUPREME COURT OF THE UNITED STATES

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 MARVIN M. BRANDT REVOCABLE :
 TRUST, ET AL., :
 Petitioners : No. 12-1173
 v. :
 UNITED STATES :
 - - - - - x

Washington, D.C.
 Tuesday, January 14, 2014

The above-entitled matter came on for oral
 argument before the Supreme Court of the United States
 at 11:14 a.m.

APPEARANCES:

STEVEN J. LECHNER, ESQ., Lakewood, Colorado; on behalf
 of Petitioners.

ANTHONY A. YANG, ESQ., Assistant to the Solicitor
 General, Department of Justice, Washington, D.C.; on
 behalf of Respondent.

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P R O C E E D I N G S

(11:14 a.m.)

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

Mr. Lechner.

ORAL ARGUMENT OF STEVEN J. LECHNER

ON BEHALF OF THE PETITIONERS

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

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

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

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

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: But 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. And at the time,

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

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

11 MR. LECHNER: Well --

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

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

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

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

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

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

3 JUSTICE BREYER: Yes.

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

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

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

19 MR. LECHNER: Exactly.

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

24 MR. LECHNER: Correct.

25 JUSTICE SCALIA: And that case has been

1 around for how long?

2 MR. LECHNER: Seventy-two years.

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

10 MR. LECHNER: No, but I think it's important
11 that -- the argument that the government is making today
12 is similar to their alternative argument that they made
13 there in Great Northern, saying, okay, well, if it's not
14 an easement, then it's a limited fee in a surface. This
15 Court in Great Northern did not even address that
16 alternative argument, which shows how strongly this
17 Court in Great Northern believed it was just an
18 easement. And this --

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

1 MR. LECHNER: Yes. They are mutually
2 exclusive.

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

13 So what's your response to that?

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

16 JUSTICE BREYER: Why -- why?

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

25 JUSTICE SCALIA: I assume your answer would

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

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

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

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

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

1 said, well, let's put these as a public highway.

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

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

9 MR. LECHNER: Correct.

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

16 MR. LECHNER: As the government argued in
17 Great Northern and as this Court adopted that argument,
18 the key provision in the 1875 Act is Section 4, which
19 reserved the right to Congress to dispose of the lands
20 underlying 1875 rights-of-way to settlers. And this was
21 a reflection of the change of policy in 1871 because
22 that's where the Congress changed its policy to -- in an
23 effort to secure homesteads to actual settlers as
24 opposed to benefiting the railroads.

25 In Section 4, as this Court said in Great

1 Northern, after language to demonstrate a conveyance of
2 an easement would be hard to find.

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

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

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

24 How did they get those additional lands?

25 MR. LECHNER: The station --

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

4 MR. LECHNER: Well, under -- under the 1875
5 Act, yes, Congress did provide for station grounds. The
6 railroad could secure station grounds by filing a map of
7 the station grounds with the local land office, and once
8 the secretary approved, then they would acquire the
9 station grounds. But the nature of the grant that they
10 required on the station grounds is the same as for the
11 right-of-way, and that's merely an easement.

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

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

22 JUSTICE KENNEDY: Are there any instances in
23 which the railroad can keep its station even if it
24 abandons the right-of-way? Or does the station fall
25 with the -- when the right-of-way is abandoned?

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

5 JUSTICE ALITO: Could I ask you again about
6 Section 912? Your patent says that it is subject to
7 those rights for railroad purposes as have been granted
8 to the railway company in particular, and its successors
9 and assigns. Now, that was -- that patent came after
10 the enactment of 912, and 912 clarifies the rights of --
11 or changes the rights of railroad companies and says
12 that if they abandon property, within one year after
13 that, they -- there can be a public highway established
14 on that -- on that property. So why wasn't your patent
15 subject to that?

16 MR. LECHNER: Well -- well, first, I
17 don't -- 912 did not change the grant to the railroad.
18 912 applies if the government has any remaining interest
19 in the right-of-way.

20 JUSTICE ALITO: Well, you didn't get your
21 property from the railroad. You got it from the
22 government.

23 MR. LECHNER: Correct.

24 JUSTICE ALITO: You got a patent from the
25 government. So the question is: What were they

1 conveying to you? And if you read the patent in
2 connection with 912, isn't it clear they're conveying to
3 you every -- arguably everything other than this right
4 to have a public highway established on that land when
5 it was abandoned by the railroad?

6 MR. LECHNER: They were conveying it subject
7 to those rights for railroad purposes is the specific
8 language. And the 912 does not create a reservation; it
9 doesn't create a right of reverter. It was simply to
10 deal with what they were going to do with these strips
11 of land upon abandonment. Because at the time, that's
12 when abandonment of the railroads first began, Congress
13 was worried we were going to have these isolated strips.
14 It didn't change the 1875 Act, it didn't change the
15 previously granted rights-of-way to expand the scope of
16 them.

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

23 But it didn't change the nature of the
24 grant. It didn't change the 1875 Act. It didn't create
25 it. It did not create an interest that wasn't there

1 before. It was just how to deal with the interest that
2 the -- that Congress thought it had after this Court's
3 decision in Townsend and Stringham.

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

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

16 JUSTICE ALITO: That's your argument, isn't
17 it?

18 MR. LECHNER: Well, I think that's the
19 argument under -- under the common law, too, is -- is
20 what --

21 JUSTICE ALITO: Yeah. Okay. And may be --

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

23 JUSTICE ALITO: It may be a good argument.

24 MR. LECHNER: They merge.

25 JUSTICE ALITO: But that's your argument.

1 JUSTICE BREYER: Now, what about when 912
2 says when the railroad abandons a piece of the
3 right-of-way, okay, it then says that the interest of
4 the United States, with all right, title, and interest
5 in the state of the United States shall be vested in the
6 town that builds the highway. But your point is, that's
7 true, but where they previously -- where they have
8 previous -- where they have given -- where they conveyed
9 it to a private person, they didn't have any right,
10 title, and interest, because on abandonment it was
11 simply an easement. And on abandonment, that goes to
12 the property owner who owns the -- the land on either
13 side.

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

18 MR. LECHNER: Correct.

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

21 MR. LECHNER: Correct.

22 JUSTICE BREYER: Okay.

23 MR. LECHNER: And there's --

24 JUSTICE SOTOMAYOR: Let's take this in a
25 normal easement situation. I have an easement to go

1 through your backyard to get to the street. Can I
2 assign that easement to another person so that the
3 person who buys my home can now walk through your
4 backyard?

5 MR. LECHNER: In certain circumstances, yes.

6 JUSTICE SOTOMAYOR: So what's wrong with the
7 concept that when this land was given to you as a
8 railroad right-of-way, when it's abandoned, that the
9 railroad, in essence, under 1912, and under the 1922
10 Act, that you are giving that easement to the U.S. to
11 use as a right-of-way? And so, whether it's a trail or
12 a highway or any of the other items that are specified
13 in the statute that that easement is continuing to be
14 used by the person who gave it, which was originally the
15 U.S. Your patent was given subject to that easement, so
16 that right-of-way.

17 MR. LECHNER: It was subject to those rights
18 for railroad purposes, correct.

19 JUSTICE SOTOMAYOR: Well, what was the
20 language of the patent?

21 MR. LECHNER: Subject to those rights for
22 railroad purposes, that conveys --

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

25 MR. LECHNER: Exact language on page 78,

1 Petitioner's Appendix.

2 JUSTICE SOTOMAYOR: The Joint Appendix?

3 MR. LECHNER: Petitioner's Appendix, 78,
4 sorry.

5 JUSTICE SOTOMAYOR: Too many briefs. Sorry.

6 MR. LECHNER: 78.

7 JUSTICE KENNEDY: And what do you want us to
8 read there?

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

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

16 MR. LECHNER: A right to lay their tracks
17 and a right of passage.

18 JUSTICE SOTOMAYOR: Just as I'm seeing the
19 1875 grant, it was the right-of-way through public
20 lands.

21 MR. LECHNER: Well, yes, and as the
22 government argued in Great Northern that that was --
23 that right in the 1875 Act was a right to lay tracks and
24 it was a right of passage and easement.

25 JUSTICE KAGAN: Mr. Lechner, I know a great

1 more than -- and that is very strong support for your
2 view. But why did Great Northern think that there was a
3 difference between pre-1871 grants and post?

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

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

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

23 MR. LECHNER: Well, Section 4 has a lot to
24 do with that, and that is where Congress reserved the
25 right to dispose of the underlying lands to the

1 settlers. That provision is not found in the pre-1871
2 railroad grants, and this Court in Great Northern looked
3 at that and you say, You got to look at Section 4, that
4 provides light on how to interpret the right-of-way
5 grant in Section 1. And because of Congress's intent
6 and the legislative history surrounding similar language
7 when Congress passed it in 1872, they called it the
8 right-of-way is going to be an encumbrance.

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

18 MR. LECHNER: But as the government argued
19 in Great Northern, it would be silly to patent the
20 underlying lands subject to a fee. I mean, there would
21 be no reason for that language at all if the railroad
22 got a fee. And then you patented the -- in effect it
23 would be the adjacent land, not the underlying land.
24 There would be no reason to say that the adjacent land
25 is subject to a fee because with the limited fees, they

1 were envisioning those things going to the center of the
2 earth. So you would be patenting the adjacent land.
3 But under Section 4 and as Great Northern interpreted,
4 the patents go to the underlying land and that's what
5 happened in this case, because Brandt owns the
6 underlying land and minerals.

7 JUSTICE KENNEDY: Well, in your answer it
8 seemed to me, and maybe you have to proffer, that you
9 confused limited fee with fee simple or absolute fee.
10 Now, obviously that's true if it's the same owner, they
11 merge.

12 MR. LECHNER: Well, I was using limited fee
13 in the context as this Court used it in Townsend,
14 limited fee with the implied condition of reverter. I
15 mean, even in Townsend 1903, the railroad got it all,
16 but it was subject to implied condition of reverter if
17 they stopped using it for railroad purpose. But they
18 did give fee simple absolute to the center of the earth
19 is how it was construed at that time. So that sheds
20 light on the fact that Section 4 reflects that only an
21 easement was granted because you would not need to have
22 Subject 2 language at all if you were just patenting the
23 adjacent lands.

24 It is also well established that the
25 interpretation of the land laws such as the 1875 Act is

1 entitled to great deference. This is because public
2 land laws provide for the acquisition of the title,
3 which must be secure. Beginning from 1988 and
4 continuing through today, the Department of Interior
5 still construes the 1875 Act as easements and they can
6 still construe 1875 Act rights of way as different from
7 pre-1871.

8 JUSTICE SCALIA: I don't understand how that
9 can be, and yet, the government can argue contrary to
10 what the government says. I mean, is that what you are
11 telling us?

12 MR. LECHNER: I'm saying --

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

17 MR. LECHNER: Well, I think, under this
18 Court's precedent, you defer to the agency in charge of
19 administering the 1875 Act, and that is the Department
20 of Interior. And the Department of Interior has
21 consistently interpreted these as -- these rights of way
22 as easements and that interpretation is entitled to
23 substantial deference.

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

1 MR. LECHNER: If it pleases the Court, I
2 would like to reserve the remainder of my time for
3 rebuttal.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Yang.

6 ORAL ARGUMENT OF ANTHONY A. YANG

7 ON BEHALF OF THE RESPONDENT

8 MR. YANG: Mr. Chief Justice and may it
9 please the Court:

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

17 JUSTICE ALITO: Mr. Yang, I have to say I
18 think the government gets the prize for understatement
19 with its brief in this case. You have a sentence in
20 your brief that says, "We acknowledge that there is
21 language in this Court's opinion in Great Northern and
22 in the government's brief in that case that lends some
23 support to petitioner's contrary argument."

24 Here are the subject headings of the
25 government's brief in Great Northern. "The right-of-way

1 granted by the Act of March 3, 1875, is in the nature of
2 an easement. The language of the 1875 Act shows that
3 only an easement was granted. The legislative
4 background and history of the 1875 Act show that the
5 grant was of an easement rather than a fee. Subsequent
6 administrative and congressional construction confirm
7 that only an easement was granted." Under the first
8 sentence of the summary of the argument --

9 MR. YANG: There is also other portions of
10 the brief. I would refer the Court, for instance, to
11 Footnote 4 where the government said there would be a
12 separate question raised about whether a patent holder
13 subsequently who obtains the patent after the grant of
14 right-of-way would take this government interest. And
15 the Court -- the government said in fact that would
16 raise different questions. The Court recognized that on
17 pages -- the last two pages of its opinion, it
18 specifically limited its judgment to situations where
19 the government retained interest in the entire
20 surrounding parcel and, in fact, modified the judgment
21 below which enjoined the railroad from oil drilling
22 simply to apply to that.

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

25 JUSTICE SCALIA: Wait, wait. Before you go,

1 you really think the Court was saying, It will be an
2 easement when that suits the government, but it will be
3 something else when that suits the government?

4 MR. YANG: No, I think --

5 JUSTICE SCALIA: I mean, it's either an
6 easement or it's not an easement. You really think
7 the -- the opinion meant to reserve the question whether
8 it was an easement.

9 MR. YANG: I do with respect to the issue
10 that we have here. The question before the Court was
11 whether the right-of-way, which is a statutory term,
12 Congress could have used "easement"; it could have used
13 "fee." It did not. It uses a special statutory term
14 which has accumulated meaning over time, particularly,
15 in the railroad context.

16 And in that context, the Court was deciding
17 whether it was in the nature of an easement, which as
18 our subject heading said, it's in the nature of an
19 easement. But that's vis-à-vis the United States --

20 JUSTICE BREYER: I got that point.

21 MR. YANG: -- with respect to the mineral
22 lands. And, in fact, the shift that, Justice Kagan, you
23 were talking about is a shift about subsidies. It was a
24 shift of subsidy away from these lavish land grants.
25 And when Congress was stopping that -- that lavish grant

1 to railroads, it made no sense to construe the act with
2 respect to the mineral rights, which the Court said
3 were -- were mineral riches. Why would Congress do that
4 when it was cutting back on --

5 JUSTICE ALITO: That may be.

6 JUSTICE BREYER: All right.

7 JUSTICE ALITO: But the term "easement" is a
8 well-known term with an established meaning. And you're
9 saying that -- you said it was an easement. The Court
10 said it was an easement. You -- you persuaded the Court
11 to say it was an easement. And now you're saying this
12 is some kind of property right that has no name,
13 previously unknown to the law.

14 MR. YANG: It's a right-of-way. And, in
15 fact, the government's brief also said that with
16 respect -- and I'm quoting from page 9 -- with respect
17 to the surface -- the control -- under any of the
18 theories, even under the easement theory, which I don't
19 believe is a true common law easement, the railroad's
20 control of the surface was complete. And then we went
21 on further -- and this is on pages 36 to 37 -- that said
22 it was a fact that the right-of-way has some of the
23 attributes of a fee, and those included exclusive and
24 perpetual occupation and remedies --

25 JUSTICE BREYER: All right. Let me put it

1 this way.

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

11 And -- and that's particularly true because
12 this Court had already construed Section 4 of the 1875
13 Act before Great Northern in Stalker and in Steinke.
14 And in Stalker, the Court held that the subject to --
15 this is on page 154 -- a patent was subject to the
16 railroad rights acquired by approval. That's the
17 approval in Section 4, in the subject to language in
18 Section 4. "Upon approval, the grounds so selected were
19 segregated from the public lands and the required
20 material to withdraw the land granted from the market."
21 And then the Court goes on, and this is on page 154
22 again, "The later patent," the patent issued to a
23 settler. Even though the local land office forgot to or
24 omitted to mark the right-of-way on the land plats, the
25 subsequent patent was inoperative to pass title to those

1 later patentholders.

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

7 And I think it's important, in both of those
8 cases, the Court cited to Interior's regulations. In
9 Stalker, the Court quoted at length the regulations from
10 1888, which, although the Court suggested that in Great
11 Northern those were the first regulations, they actually
12 weren't. There were prior regulations in 1878 which
13 discuss nothing about the nature of the fee. And those,
14 unfortunately, are hard to find. They are in Senate
15 Executive Document 30, 45th Congress, Third Session,
16 1879.

17 So -- but the regs that the Petitioners now
18 rely on were specifically referenced by the Court,
19 including the regs that say the disposition of the land
20 surrounding the right-of-way is subject to the
21 right-of-way.

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

25 MR. YANG: We don't have good numbers,

1 actually, on that.

2 JUSTICE BREYER: But what are the numbers?

3 I mean, look, this is what I'm thinking. This is
4 property law. It's not just a question of trying to
5 work out what the case could or couldn't have stood for.
6 If I try to remember my property class, it vaguely
7 was -- which was a great class, A. James Casner, real
8 expert. And he -- he, I think, said that when you
9 convey subject to divestment, the -- something called
10 season under the common law went to the recipient of the
11 conveyance.

12 But if you conveyed an easement, season did
13 not pass. So in holding that it is an easement, you're
14 holding there was no season, and therefore, it couldn't
15 be a divestiture.

16 Now, whether that's true or not or I've
17 misremembered it, I'd go back to Justice Scalia's
18 question. Is there a single example since the Doomsday
19 Book, since Dadonis, since the Bracton on little to
20 whatever it was. I mean, in the history of the common
21 law up to the present where a court has interpreted an
22 ambiguous phrase, which doesn't say to grant an easement
23 for one purpose, but not for the other. There may be
24 some, but I didn't notice any cited in the government's
25 brief.

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

3 JUSTICE BREYER: No, I said in any case at
4 all.

5 MR. YANG: But in this context --

6 JUSTICE BREYER: Yes, yes. What is the
7 case?

8 MR. YANG: In this context --

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

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

13 JUSTICE BREYER: Oh, but they had -- they
14 had a different view.

15 MR. YANG: No, no, no.

16 JUSTICE BREYER: They didn't say it was an
17 easement.

18 MR. YANG: It -- they did.

19 JUSTICE BREYER: I didn't read what -- it
20 did?

21 MR. YANG: They sometimes referred to them
22 as easements.

23 JUSTICE BREYER: Which case?

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

1 JUSTICE BREYER: Where do I -- where is it
2 roughly in your brief?

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

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

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

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

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

16 JUSTICE BREYER: Can you imagine or explain
17 to me why a property lawyer worth his salt since
18 70 years ago or more, 1942, wouldn't have read that case
19 and advised his client, who was buying the land, if the
20 railroad abandons it, it's yours.

21 MR. YANG: Yes. There are --

22 JUSTICE BREYER: Where is some evidence of
23 that?

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

25 JUSTICE BREYER: No, not reasons. I want to

1 know if there's any authority, and then you can give me
2 the reasons.

3 MR. YANG: Oh, yes. There's statutory and
4 case law authority. I would start with Stalker and
5 Steinke, which specifically say that when you have
6 approved the map, it's equivalent to a patent, and then
7 therefore, any parcel subject -- is -- conveyed subject
8 to the patent or the right-of-way, which means you don't
9 get any interest at least in the surface of the
10 right-of-way.

11 So this -- those cases have never been
12 overruled, one. Two, Congress in 1906, and this is --
13 this isn't significant. This is at page -- Section 940
14 at page 7 -- 6A and 7A of our brief. Congress said that
15 each and every grant of right-of-way under this 1875
16 Act -- each and every one -- "shall be declared
17 forfeited if they haven't been constructed," and -- this
18 is important -- "the United States resumes the full
19 title to the lands covered thereby, free and discharged
20 from such easement" --

21 JUSTICE SCALIA: Did they give compensation
22 to the people --

23 MR. YANG: No.

24 JUSTICE SCALIA: -- to whom they pronounced
25 that?

1 MR. YANG: No.

2 JUSTICE SCALIA: That can't change the
3 meaning of the 1875 Act.

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

6 JUSTICE SCALIA: It reflects a later
7 Congress's understanding of what an earlier Congress
8 did. We don't --

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

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

12 MR. YANG: This Court did in Great Northern.
13 In fact, this Court --

14 JUSTICE SCALIA: People have done it.

15 MR. YANG: Okay. That's possible, but what
16 we're talking about is Great Northern. And, in fact,
17 Great Northern quotes this language of Section 940. The
18 very next section goes on to say that the government's
19 interests shall inure to the benefit of the land
20 conveyed by the United States previously, which was
21 subject to the right-of-way.

22 So that section itself shows that starting
23 in 1906, and that's both 1906 and 1909, Congress
24 understood that the government had a reversionary
25 interest.

1 JUSTICE KAGAN: Mr. Yang, could I take you
2 back to my question?

3 MR. YANG: Sure.

4 JUSTICE KAGAN: Thousands, tens of
5 thousands? How many people are involved here and how
6 many acres of land?

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

12 It's hard to know about mileage because the
13 specific land grants were often quite long, but in
14 terms -- there were at least a significant number of
15 1875 Act rights of ways.

16 And so going back to Justice Breyer's
17 question about why a good lawyer would not have great
18 pause about saying that you got the surface interests.
19 You have Stalker and Steinke. You have the Section 940,
20 which was enacted in 1906 and 1909. You have Section
21 922 -- Section 912, which was enacted in 1922, which the
22 Court has already discussed, which shows that whenever
23 there is a forfeit, the United States' interest reverts
24 first to roads and then to municipalities, and if there
25 was anything left it would go to a land owner. That,

1 you know, was unquestioned it appears until -- at least
2 with the surface interests until the mid-1980s, for
3 60 years. The municipalities and roads were --

4 JUSTICE BREYER: Well, I see that they do
5 and I certainly think bicycle paths are a good idea, but
6 the problem that I see here is just what Justice Kagan
7 is bringing up; that is, as I read this, I think there
8 might be millions of acres in the last 70 years that
9 have been conveyed. For all I know, there is some right
10 of way that goes through people's houses, you know, and
11 all of a sudden, they are going to be living in their
12 house and suddenly a bicycle will run through it, which
13 isn't so bad, but I'm concerned about that, and your
14 answer makes me more concerned --

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

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

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

24 JUSTICE BREYER: Exactly, because the lawyer
25 would think -- when he reads the case of Great Northern,

1 you think it's an easement.

2 MR. YANG: And then when the city takes the
3 road and when the municipality -- excuse me -- when the
4 municipality takes the right of way no one complained
5 for 60 years? I mean, this is the background of the
6 law. This is going to be --

7 JUSTICE BREYER: So how much is that? How
8 much roughly is that? How often has it turned out that
9 there was a conveyance -- after 1942 there was a
10 conveyance of an abandoned right of way by the United
11 States to land that had been previously been granted to
12 a private owner?

13 MR. YANG: The amicus brief of --

14 JUSTICE BREYER: How often?

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

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

19 MR. YANG: I think a significant amount of
20 time, because the -- if you look at the amicus brief of
21 the National Council on State Legislatures, they explain
22 this. This is --

23 JUSTICE BREYER: I will say ten times as
24 much reliance on the one side than the other side, is
25 that totally wrong?

1 MR. YANG: Your Honor, I can't speculate on
2 numbers. I just don't have -- it would be not
3 appropriate for me for the United States to speculate on
4 numbers.

5 JUSTICE GINSBURG: Mr. Yang, would you
6 clarify what you're -- what Mr. Lechner told us. He
7 said that to this very day the Department of Interior
8 has taken the position that these railroad rights of way
9 are easements.

10 MR. YANG: That's not correct because it
11 needs to be qualified. After Great Northern, Interior
12 has concluded in *Amerada Hess*, which we cite in our
13 brief, that the subsurface interests would go to the
14 patentee, but with respect to the surface interests,
15 that has not been the case. In fact, until 1984 is the
16 first case that I have seen in a case that let -- that
17 was the counterpart to the Oregon Short Line case that
18 we cite that led to the decision here. It just wasn't
19 disputed about the surface interest.

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

22 MR. YANG: They agree with our brief. We
23 don't always --

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

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

6 JUSTICE SCALIA: But both of them want more
7 federal lands, that's surprising, right, both
8 agriculture and --

9 MR. YANG: I think that's maybe a little
10 unfair, Justice Scalia. I think government is giving
11 the Court its view of the law here. We are interpreting
12 it. Multiple agencies have been consulted and we've
13 been trying to come to grips with the Court's
14 conflicting, you know, language. If you take language
15 in the abstract and you divorce it from the context of
16 the case, the Court's decisions are conflicting, but
17 when you look at the context of the case, you look at
18 Great Northern with respect to saying that the
19 subsurface interests, the mineral interests are like an
20 easement with respect to the United States vis-à-vis the
21 railroad, but then you have Stalker and Steinke saying
22 that when under Section 4 of the Act -- it's an
23 authoritative construction of Section 4 of the Act.
24 When you approve a map of a railroad under Section 4, it
25 is tantamount to a patent and thereafter a subsequent

1 patent does not confer an interest on a patentee?

2 Those cases are reconciled, we think, by
3 acknowledging that Stalker and Steinke control at least
4 with respect to the surface interests, and then with
5 respect to the subsurface interests, Great Northern
6 clearly says that, at least vis-à-vis the United States
7 and the railroad where there is no third-parties
8 involved that is deemed to be like an easement that
9 would not give a subsurface interest. And there is real
10 important reasons to distinguish between the subsurface
11 and the surface with respect to rights of way.

12 Surface for the right of way is what's
13 important. It's critical. You need to have an artery
14 that connects various parcels of land. That was true
15 back when 1875 was enacted and it's true now with
16 respect to highways and other uses that the government
17 might put its land to.

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

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

24 JUSTICE KAGAN: Well, I'm just suggesting
25 that after Great Northern and then you're given this

1 patent, which is unequivocal and does not reserve
2 anything, why anybody would think that they haven't
3 gotten the whole ball of wax is a mystery.

4 MR. YANG: Well, I think you would have to
5 -- I think if you had a good lawyer, the good lawyer
6 would say, Look, we've got -- there is uncertainty here.
7 You've got Stalker and Steinke, which says you get no
8 interest. You have Great Northern, which doesn't
9 address interest that pass to third parties. It only
10 addresses the interest that the railroad has, and it
11 says there is no mineral rights. And then you have
12 Congress in 1906, 1909, 1922, and more recently in 1988,
13 doubling down and saying, you know, the United States'
14 interest goes to roads first.

15 JUSTICE KAGAN: It seems to me a fair
16 reading of the history here, Mr. Yang, is that it really
17 didn't occur to the government until very recently that
18 these rights of way had value as anything other than
19 railroad tracks, and indeed that the government was
20 anxiously trying to give these things away because it
21 thought that these spaghetti strips of land, it's of no
22 use to the government, here, take them, get them off our
23 hands. And having done that for many, many, many
24 decades, the government faces a problem when it turns
25 around and says, you know what, we forgot, there are

1 bike paths.

2 MR. YANG: I don't think that's quite
3 accurate. At least since 1922, the government has
4 disposed of -- or Congress, I should say, has directed
5 the government to dispose of its reversionary interests
6 first to roads, and that remains true today. And then
7 also from 1922 until 1988, it was supposed to go to any
8 municipality, any land within a municipality goes to the
9 municipality; and then third, it would go to any land
10 owner of the surrounding parcel that was paying the
11 interest subject to the right of way.

12 Now, of course, you know, Congress is free
13 to choose to change its decision about how to dispose of
14 U.S. Government interests to any government property.
15 There is no vested interest in that. And I think what
16 we are trying to say in our brief is that petitioner
17 asks the Court essentially to nullify a significant --
18 significant enactments by Congress. It would nullify --

19 JUSTICE BREYER: That's true, but when you
20 talk about -- I mean, I went and read -- when I read --
21 I thought your brief was very persuasive and then I read
22 Great Northern and I thought they have -- they are
23 really quoting it correctly. Here's what they said
24 about the cases that you refer to like Stringer, The
25 conclusion of the railroad was the owner of a limited

1 fee -- which was the conclusion of those earlier
2 cases -- was based on cases arising out of the 1871
3 Act, not the 1875 Act, and the change of policy in 1875
4 was brought -- was not brought to the Court's attention.
5 And then they say that conclusion is inconsistent with
6 the language of the 1875 Act. It's history. And it's
7 early administrative interpretation. We therefore do
8 not regard this earlier case as controlling.

9 MR. YANG: That was Townsend, which was
10 dictum. We told the Court that Townsend was dictum. In
11 Townsend, the dispute was by a railroad who got a decree
12 from a state court saying it had the right of way.

13 JUSTICE BREYER: Well, I thought they said
14 in the Stringer case. Is that same as --

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

16 JUSTICE BREYER: Yeah, that's the one you
17 were --

18 MR. YANG: No, no, we are not relying on --
19 we are relying on Stalker and Steinke, which are 1875
20 Act holdings. It's this Court construing the very
21 statute that we're talking about, Section 4, which is
22 the very section that the petitioner -- now, it would be
23 kind of remarkable to read language in Great Northern
24 which addressed a different question in which the
25 government specifically reserved the question of what

1 interest would transfer to a patentee. The Court
2 specifically limited its decision so it wouldn't reach
3 that issue. And then it sub silentio overruled two
4 decisions by this Court on the very statute decided
5 30 years earlier when the Court was closer to the 1875
6 Act? That would be a pretty remarkable thing, I think.
7 And what we're saying is that, no, Stalker and Steinke
8 remain good law, even if you characterize the right of
9 way as having attributes of an easement because it's
10 clear it can't be a common law easement.

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

21 We said as an easement, you know, the fact
22 that it has some of the attributes of a fee, including
23 exclusive or perpetual occupation and the remedies of a
24 fee and not an easement, doesn't take it out of the box
25 of what we were talking about in that case.

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

6 JUSTICE BREYER: That's -- that's basically
7 my problem. I guess you just don't have any specific
8 things of what property lawyers were saying. But those
9 two cases are from the era of Stringer, and at that
10 point, apparently, the Court thought it was a limited
11 fee.

12 MR. YANG: One was before --

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

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

16 JUSTICE BREYER: So -- so then in Great
17 Northern it comes along?

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

1 And the Court is doing exactly what we're
2 saying should be done here, which is you understand the
3 right-of-way in the context of the statutory text, in
4 the context of the environment, the surrounding
5 statutory environment in the context of this Court's
6 decisions, and it's not a binary black-or-white choice
7 between, you know, common law terms.

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

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

21 MR. YANG: On bike trails, this is -- this
22 is not a Rails-to-Trails Act case. There are different
23 issues there. On the Rails-to-Trails Act case, you
24 know, it's -- I don't have in mileage, but this is a
25 trail that in this case the government used its property

1 interest through the national forests as well as through
2 this parcel for like a 22-mile trail. There are
3 probably 1,000 miles of trail that are -- that would be
4 affected. And importantly, there's a lot of interest
5 going forward that would be affected.

6 When the law again -- the law of -- in 1922
7 was that the Congress would reserve the United States'
8 interests for roads and municipalities and that was a
9 significant --

10 JUSTICE KAGAN: Are there highways that
11 would be affected? I mean, if we rule for the Brandts,
12 are there suddenly going to be highways that can no
13 longer be highways anymore?

14 MR. YANG: It certainly would call into
15 question the legality of the land transfers. And I'm
16 sure that could be something that could be litigated.
17 There would be issues -- I'm sure defenses raised by the
18 States and municipalities. But what the Court would be
19 saying is that for -- since 1922, and this policy
20 continues now, that the highways that have been created
21 under 1875 Act would be invalid.

22 JUSTICE BREYER: Can you think of anything I
23 can do about this? It's a case, in my mind at least,
24 where reliance interests on -- on a previous case in the
25 property law area are important, and yet none of the

1 briefs here really gives me a -- a reasonably concrete
2 idea of how much reliance there has been. And -- and --

3 JUSTICE SOTOMAYOR: On easements.

4 JUSTICE BREYER: So I'm somewhat in the
5 dark.

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

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

21 In 1931, the -- a case called *Otis Birch*
22 where Interior basically followed *Stalker* and recognized
23 that you could not pass title. Now, that was a Mineral
24 Act case, and the Court also -- Interior also said that
25 because you can't separate the estates, or there's no

1 reason to separate the surface from the subsurface, the
2 mineral couldn't be transferred, either. That's been
3 overtaken by events.

4 It's important to recognize in '31, and when
5 the regs were codified in the CFR in '38, which are the
6 1909 regs, which had never been changed or revisited on
7 the nature of the interests, they simply just carried
8 forward, even though Interior recognized that the --
9 there would be no interest given to patentees of the
10 land after a right-of-way is granted under Section 4 of
11 the Act.

12 CHIEF JUSTICE ROBERTS: Maybe the reason you
13 don't have records on this, which strikes me as pretty
14 unusual that the government doesn't know what it owns,
15 is that for decades, you didn't think that you owned a
16 reversionary interest.

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

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

21 MR. YANG: Well, but Congress told us --
22 told everyone how to dispose of it. It went to streets,
23 roads, highways, then to municipalities, and if then not
24 municipalities, it would go to the landowner. So the
25 United States, you know, disposed of its reversionary

1 interests through statute. It wasn't until 1988 that
2 the policy changed to -- to prioritize highways and then
3 the U.S.'s interests after that.

4 So it's understandable why we haven't been
5 intimately involved with all these forfeitures that have
6 occurred over time. Congress directed how the United
7 States interests should be disposed of.

8 JUSTICE GINSBURG: What would -- what would
9 be the exposure of the United States if we -- if you --
10 are there takings claims now?

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

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

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

25 JUSTICE SCALIA: What about adverse

1 possession? Can't the -- can't the --

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

4 JUSTICE SCALIA: I would think if there's
5 been no objection to these spaghetti strips of land, I
6 don't think condemnation would cost the government a
7 whole lot for that matter. What, you know --

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

9 JUSTICE SCALIA: -- what a spaghetti strip
10 of land through --

11 MR. YANG: We faced a very considerable
12 amount of litigation in recent years.

13 JUSTICE BREYER: Doesn't Interior or some --
14 I mean, doesn't the highway -- aren't there people in
15 the government who keep track of where the highways are
16 built?

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

21 JUSTICE SCALIA: Yes, but you should --
22 should know how much land the United States owns. It's
23 -- it's incredible that -- that there's no record in the
24 Interior Department or anywhere else of what land the
25 United States own. You claim you own these thousands of

1 acres, and you say we've not kept track of it. We just
2 know where it's going to go, but we don't know what we
3 own.

4 MR. YANG: There are some records that you
5 can get from archives with respect to specific things,
6 but it's not centralized. We don't have a way of
7 aggregating what has happened over the last 90 years.
8 That's the difficulty that we have here.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 MR. YANG: Thank you.

11 CHIEF JUSTICE ROBERTS: Mr. Lechner, you
12 have 4 minutes remaining.

13 REBUTTAL ARGUMENT OF STEVEN J. LECHNER

14 ON BEHALF OF THE PETITIONERS

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

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

24 Steinke was written by Justice Van Devanter
25 who also wrote Stringham, which Great Northern

1 overturned. And that's why Stalker and Steinke fell out
2 of use over the years. And if Stalker and Steinke were
3 so important, the government should have brought those
4 cases to the Court's attention in Great Northern, but it
5 didn't.

6 With respect to the 1931 land decision the
7 government just brought up, I -- I refer the Court to
8 solicitor's opinion --

9 JUSTICE BREYER: Yes, it would be the
10 private parties that would have brought it up in Great
11 Northern, wouldn't it?

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

19 But, you know, I'm not a property lawyer,
20 and so what actually happened matters. And the amounts
21 matter, at least to me. And do you have any light to
22 shed?

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

1 JUSTICE BREYER: What about on your side?
2 What about the possibility that millions of acres has
3 been conveyed and there are tens of thousands or
4 hundreds of thousands of abandoned railroads that
5 property lawyers thought went to the person who bought
6 them, and run through somebody's house? I mean, is that
7 a figment of my imagination?

8 MR. LECHNER: No.

9 JUSTICE BREYER: And you would say no, it
10 isn't, and therefore I'm asking you is there any
11 empirical support anywhere for how property lawyers have
12 treated Great Northern, how much was conveyed,
13 et cetera? Anything you can say on that would be
14 helpful.

15 MR. LECHNER: I have nothing to say about
16 the quantity, but I know that with S.C. -- the Seventh
17 Circuit ruled in S.C. Johnson that the title insurance
18 thought that was a landmark decision because it resolved
19 a lot of problems with the title insurance industry.

20 Each mile of the right-of-way takes up
21 24 acres. At one point there were 270,000, as this
22 Court noted in Preseault, there was 270,000 miles of
23 roads at the peak in the early 1920s and about 130 of
24 those had been abandoned by the time of the Preseault
25 decision.

1 I want to also address the forfeiture
2 provision that they mention and Great Northern relied on
3 Section 43, 940, to confirm its conclusion that the S
4 and D, these are easements because 43 U.S.C. 940 calls
5 them an easement. And with respect to land that the
6 government still owned at the time of abandonment, they
7 said that the government's land would be discharged of
8 the easements.

9 JUSTICE KENNEDY: Is there any doctrine in
10 property law that if a right of access is granted and
11 its to the exclusion of all other uses, it's -- it looks
12 for all purposes like absolute control, that it ceases
13 to be an easement and becomes a limited fee? I mean is
14 there some magic that takes place in property law so
15 that if there's a grant that conveys such total control,
16 is it construed not to be an easement?

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

18 JUSTICE KENNEDY: I've never seen it.

19 MR. LECHNER: Roads, highways are
20 conveyed --

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

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

24 JUSTICE SCALIA: James Casner didn't talk to
25 me about limited fee.

1 MR. LECHNER: I read these cases in law
2 school so I was aware of the term.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 The case is submitted.

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

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