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In the

Supreme Court of the United States

LEO SHEEP COMPANY AND
PALM LIVESTOCK COMPANY,

PETITIONERS

V.

UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR AND
DIRECTOR, BUREAU OF LAND MANAGEMENT

RESPONDENTS

No. 77-1686

Washington, D. C.
January 15, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

LEO SHEEP COMPANY AND PALM LIVESTOCK COMPANY, Petitioners	:	
v.	:	No. 77-1686
UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR AND DIRECTOR, BUREAU OF LAND MANAGEMENT Respondents	:	

Monday, January 15, 1979
Washington, D. C.

The above-entitled matter came on for argument at 2:35 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

CLYDE O. MARTZ, ESQ., Davis, Graham and Stubbs, 2600 Colorado National Building, 950 Seventeenth Street, Denver, Colorado 80202 For Petitioners

MRS. SARA S. BEALE, Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530 For Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 77-1686, Leo Sheep Company et al against the United States et al.

Mr. Martz, you may proceed.

ORAL ARGUMENT OF CLYDE O. MARTZ, ESQ.,

ON BEHALF OF PETITIONERS

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

The issue in this case is whether Congress reserved rights of way across some 34 million acres of land that were patented in the support of the Transcontinental Railroad construction under the Union Pacific Act of 1862.

The Act is very straightforward. Section III makes a grant of every alternate section of public land designated by odd numbers in the amount of five alternate sections per mile on each side of the railroad. This number was amended two years later to increase it to ten.

The purpose is stated in Section III as aiding in the construction of said railroad and telegraph line and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores thereon.

Congress made three categories of exceptions. First, it provided for an exception for land sold, reserved or otherwise disposed of by the United States prior to the fixing of the

road.

Secondly, it excepted or exempted mineral lands and third it excluded or required the reversion of lands not sold or disposed of within three years after the completion of the road.

It contained no exceptions or reservations of any kind of rights of way across the land, rather, this is not in issue or in dispute in the case.

Section IV then directed that after acceptance of each 40 miles of line constructed, patents shall issue containing the right and title of said land to the company and it provides no qualification with respect to the right or title of lands that are conveyed.

Petitioners in this case are successors in interest to the railroad grants of Section III lands on the east side of Seminoe Reservoir in the State of Wyoming and have grants under Section IV without reservation of any kind in the patents for crossings.

Petitioners also hold the alternate, even-numbered sections under grazing license pursuant to the Taylor Grazing Act of 1934.

The controversy in this case arose in December of 1973 when officers and agents of the Department of Interior commenced constructing a road from a public highway westerly to the eastern shore of Seminoe Reservoir across public domain

sections and the alternating checkerboard lands that Petitioners patented under the 1862 Act.

They did this without consent of the landowners and without payment of any compensation or fencing of the road for the protection of the lands crossed.

Petitioners filed an action to quiet title against this claim. The parties stipulated as to the facts and submitted the matters to the Federal District Court in Wyoming for -- on cross motions of summary judgment, on the title issue.

The District Court quieted title in Plaintiffs, concluding that there were no rights-of-way reserved either expressly or by implication; secondly, that no rights-of-way by necessity could be implied in favor of the sovereign since the sovereign has the power of eminent domain to take such ways as it needs at all times and the Court further found that for 110 years after the grant of the fee lands to the Union Pacific Railroad Company, neither the Department of the Interior nor any other agency or agency of the United States construed the grant or the patents issue pursuant thereto as conferring any right upon the United States, its agents or the public, to traverse the lands granted to the railroad.

On appeal to the Tenth Circuit court, that decision was reversed, the Court of Appeals finding that there was a right of way reserved by implication, saying to hold to the

contrary would be to ascribe to Congress a degree of carelessness or lack of foresight which in our view would be unwarranted.

Petitioner submits that the decision of the Court of Appeals should be reversed, the decision of the trial court affirmed, for several reasons, the first and foremost being that the Court of Appeals presumed an intent that was not expressed anywhere by Congress in the legislative history or in the debates or in the language of the Act.

The Court of Appeals considered no administrative experience under the Act in 110 years of patenting of land.

QUESTION: Incidentally, what has been happening about this for 110 years, Mr. Martz?

MR. MARTZ: Mr. Justice Brennan, absolutely nothing. The United States in its brief acknowledges that it has acquired rights-of-way by purchase when it has needed them. So far as the record shows, there has never been a condemnation action to acquire a right-of-way. It would appear, Your Honor, that this is a new idea that was --

QUESTION: But there must have been rights of way all this time.

MR. MARTZ: Yes, Your Honor. I think if we look at the history of the Union Pacific Act and the way in which this alternate section concept was used by Congress to encourage settlement and development of the lands and support the

railroad, this becomes understandable.

Congress started back in 1827 according to the legislative history in providing support for public improvement by contributing the proceeds from the sale of public lands. It did this for canals. It did it for highways and it did it starting in 1850 for railroads.

The idea was that it would give the proceeds of sale to an enterprise that was providing a public improvement.

QUESTION: That got to be a very politically hot potato after awhile, did it not?

MR. MARTZ: That is right, Your Honor and one response to the political hot potato was the checkerboard pattern.

QUESTION: Right.

MR. MARTZ: Congress was criticized for giving away lands so it theorized --

QUESTION: Internal improvements, that was called.

MR. MARTZ: Internal improvements, yes, but if we were to --

QUESTION: And everybody in Congress shied away from that phrase.

MR. MARTZ: Right. And it provided that what we will do is subsidize the project with alternate sections and we retain the intervening section for sale for the public treasury and if settlement occurs and the country grows, the land retained can be sold for double value and we recover the price of

the subsidy.

QUESTION: That is right.

MR. MARTZ: Now, it looked at the enterprise as promoting settlement through sale of lands concurrently with entries under the preemption act of the alternate sections and in the experience for 35 years, from 1927 to 1862, the lands were settled along the canals and the highways without reservation of rights-of-way, without rights-of-way problems and without creating a checkerboard pattern of land ownership.

It is a case where a person settling on an odd section of land pays one seller. He settles on an even section of land, he pays another.

Now, this was the picture in 1862 --

QUESTION: And, of course, many roads were built across both kinds of land by state and local government.

MR. MARTZ: Precisely. Land was not --

QUESTION: And by condemnation.

MR. MARTZ: And simply by the cooperative efforts of the settlers. As we know, when people moved west to settle, they followed trails of convenience; whether it went across public or private land was of no concern to either. There was a -- as this Court has developed in the Buford case, in the Canfield case that has come up under the Inclosures Act questions, it has recognized a law of the open range where people had a right to push livestock, graze livestock on unfenced land

without regard to land ownerships.

This was the climate. But there was another facet of it. Congress wanted this Transcontinental Railroad. It had been trying to get it from the mid-1850's. It was a big gamble because there was nothing west of the Missouri but Indians and sagebrush.

The railroad was created by the Act, the Union Pacific Road but it could not get private capital to support this gamble. This Court reviewed the pressures on Congress in the Platt case in 1879 and said strikingly enough, "We do not now attempt to portray the earnestness, the all-absorbing earnestness with which Congress sought to secure the construction of the road by private enterprise."

In 1862 it gave five sections of land on either side of the road; in 1864 it increased it to ten sections. This Court said in Platt that was necessary to push the project.

The Court said, "Suffice it to say, the purpose of Congress above all others was to obtain the construction of the railroad by the corporation it created to undertake the work. For that alone the subsidy bonds were given and only for that the grants of land were made."

QUESTION: Well, it was British capital that finally built the Union Pacific, was it not?

MR. MARTZ: I am not aware of that, Your Honor.

QUESTION: Well, Grenville Dodge was behind it, was

it not?

MR. MARTZ: Was what, sir?

QUESTION: Was it not Grenville Dodge who was behind it, from Omaha?

MR. MARTZ: I do not have that in my writ.

QUESTION: From London.

QUESTION: Does this record show, Mr. Martz, to what extent the rights of way were taken by condemnation, either federal or state, over this whole history? That is, I do not mean precisely. Was that a lot of right-of-way and a lot of money or a small amount?

MR. MARTZ: No, as far as I know -- you are speaking of the private condemnation, of government condemnation to get the rights of way across these tracks? As far as the record shows, Your Honor, in all three levels of court there has not been a condemnation proceeding initiated by the United States.

At least, none has been brought to the attention of any court by the Government.

QUESTION: It is a little puzzling why this has taken so long to mature into this situation.

MR. MARTZ: Well, may I suggest that as the lands were, in fact, settled in the west, if we leave out the checker-board pattern for a moment, you do have, as Mr. Justice Stewart suggested, have a day-to-day, week-to-week evolution of road or trail construction which trails became roads by proscriptive

easement. The land was not of great value and access was obtained.

QUESTION: Some of it became very valuable timberland and is today. Is that not so?

MR. MARTZ: Well, this happened yes, through the years when rights-of-way might be purchased. I recall, as this Court said in the Canfield case, "Every landowner has a right to enclose his own land," and obviously, if he does this, this may interfere with access to other lands but the Court said, "This cannot really be a practical problem until such time as the west is fully settled and at that point there will be roads to the area."

QUESTION: Mr. Martz?

MR. MARTZ: Yes, Mr. Justice.

QUESTION: As a practical matter, how much are we really talking about in this case, with Leo Sheep Company -- apart from your parade of horribles in your brief. But all we are talking about is an easement across the corners, is it not?

MR. MARTZ: That is right, Your Honor.

We are talking of very few dollars. We are talking, though, about a principle that if these checkerboard lands were patented without reservation, the issue today is not really whether the United States or any other private party has a right of access to cross a section of land to reach an adjoining section of land. The kind of case in which this

question is being raised is precisely the kind that gave rise to this controversy, the construction of a roadway across a ranch area for access not of a few people but of the public to a recreational area without fencing the road for the protection of the integrity of the ranching area.

Now, these are the kinds of questions in which this issue may be raised and it is on these kinds of questions that we need clarification of these rights.

QUESTION: Following up on Justice Blackmun's question, is it not true, if you look at the checkerboard that it would always be possible to stay on government land except where you have to cross at corners?

MR. MARTZ: That is right.

QUESTION: So is it not possible that Congress -- you mentioned the widespread understanding that people could go anyplace they wanted to in those days without worrying about having somebody build a fence in front of them. Is it not likely that Congress did not dream that there would be any problem about cutting across a corner every mile or so?

MR. MARTZ: Your Honor, I would submit that Congress did not dream that there would be checkerboard ownership of the land through the support program.

QUESTION: At least to start with.

MR. MARTZ: No, YOur Honor, it had already had 35 years experience in entering lands in the alternate section

basis. Had the railroads, in moving west, followed the provisions of the Act and obtained patents of the completed -- each 40-mile piece of land and sold those lands off to settlers to raise money to continue to build the road as it happened with the canal program in the east, you would have scattered settlements on odd and even-numbered sections, the same as you would have under the Homestead process.

What happened that Congress could not have anticipated in 1862 when it enacted the Homestead Act opening the west and the Railroad Grant Act for the Union Pacific Road was that for the first time the public enterprise would not sell the land to settlers but would mortgage it in its entirety. It was the mortgaging process that created a pattern of checkerboard ownership that became a matter of concern ten years after the grants were first made.

QUESTION: Mr. Martz, am I wrong in thinking the Homestead Act of 1862 authorized only 160-acre homesteads?

MR. MARTZ: That is right, Your Honor.

QUESTION: I am correct?

MR. MARTZ: That is correct, Your Honor.

QUESTION: And was it the Desert Land Act in 1877 or the Farmers and Stock Raisers Act in 1960 that finally went to 640?

MR. MARTZ: Well, there was an Enlarged Homestead Act first in -- I cannot give you the date, 1890 or 1900 -- and

then the Stockraising Homestead Act went to 640.

QUESTION: But at any rate, at the time of these railroad grants, the homestead was 160 and not 640.

MR. MARTZ: Well, Your Honor, it was really contemporaneous. Congress had had no experience under the Homestead Act.

QUESTION: They passed at the same time.

MR. MARTZ: They passed in the same Congress and the Homestead Act says, we are opening the west. You can settle on 160 acre-family units.

They said to the railroads, we are granting alternate sections to you for you to dispose of. They did not, to be sure, limit the size of the disposition.

But it did say, any lands which have not been disposed of in three years after completion of the road will then be opened to entry only under the Homestead and preemption laws.

So Congress was looking at the sale of lands while the railroad was being constructed and the residual lands would become part of the public domain package and --

QUESTION: Yes, but they were selling to their own facilities -- did they not?

MR. MARTZ: The railroads were engaged in a great deal of fraud -- at least they were charged with a great deal of fraud.

QUESTION: Yes but there were a lot of sales.

MR. MARTZ: To a point where Congress -- and this is most significant, too, that after the problem of the checkerboard grants became very real during the range wars of the 1880's and the 1890's where, as you say, these packages, lands were transferred to subsidiaries or to private companies who tried to utilize the checkerboard pattern of ownership to seize control of great amounts of the public lands and led to the enactment of the Unlawful Inclosures Act of 1885 and it led Congress in 1887 to affirm the titles of bona fide purchasers from the railroads.

Had Congress had any reservation at all as to whether it had or had not made a reservation of rights-of-way in 1862, it certainly had the right when it affirmed the patents of bona fide purchasers in 1887 to clear it up.

QUESTION: Now, how does an individual apply all of that which came about at a time, to quote you, there was nothing beyond Reserve but sagebrush and Indians at the time when California was the largest state in the Union. Well, I mean, to bring it down to the --

MR. MARTZ: Well, I am sure, Mr. Justice Marshall, they would not have built the railroad if they --

QUESTION: I am not asking for myself but I mean, I just --

MR. MARTZ: But it was the area between. What the period was that the grants of these lands --

QUESTION: I have great difficulty with the United States Government giving away my land without retaining an easement.

MR. MARTZ: Well, it did not retain easements in homestead grants. As a matter of fact, the United States has not retained an easement of this kind in any grant.

As this Court said in Platt, the purpose of the grants was to support the road. It was to enable the railroad to sell these lands to settlers moving along the road west and using the money for the construction of roads.

Now, if Congress allowed homesteads on even-numbered sections without any reservation of right and said on the odd-numbered sections, Mr. Railroad, you have got to give us an easement -- undefined across that land, how successful would the railroad have been in competing with the Homestead Act in selling any lands -- assuming the lands were of equal quality.

The purpose, this Court said in Platt, was to support the railroad and to settle the west. The three-judge dissenting opinion in Platt is, I think, very helpful in getting this whole matter in focus.

This was the Court speaking at the time when Congressional intent was still fresh in everybody's mind. The majority in Platt allowed the railroad to hold this acreage on the theory that the mortgaging was the disposition so that within the three years after completion of the road the railroad did

not have to either settle it or give it back for entry under the Homestead or Preemption Laws. It could hold it.

The dissent in Platt said, this is not what Congress ever intended. Congress intended these lands to be settled and that the railroads would not be able to hold them by mortgage. It could not hold this landlocked checkerboard pattern and had the will of Congress been carried out without the mortgaging process we would not have this problem today.

But the fact remains the lands were patented. There was no reservation. The legislative history would affirm the fact that there was no intent on the part of Congress to make such reservation.

Now, I want to save five minutes for rebuttal but I want to make one comment about the two cases that the Court of Appeals used not as precedent but as comfort in support of its decision, these being the Buford case and the Canfield case that came up with respect to the practices that were then in existence at getting monopolies on the public lands by use of this checkerboard acreage.

Buford said, no private landowner can enjoin or recover trespass damage for the crossing of unfenced open lands associated with the public domain. Canfield sai , it is a public nuisance of the holder of checkerboarded lands to fence it and thereby, even though the fences are on private lands, enclose blocks of the public domain.

QUESTION: Canfield was based on a Act of Congress so specified, was it not?

MR. MARTZ: The Act of Congress saying there shall not be an inclosure.

QUESTION: Yes.

MR. MARTZ: The point, gentlemen, I want to make is that in both of the Acts and in both of the cases, looking first at Buford, this Court made it clear that what it was speaking of is the custom of the open range that had lasted for 100 years, that you cross land, whether in public or in private ownership, in cattle drives or with grazing, without liability in trespass or without hindrance.

If the private landowner wanted to protect his land, he had to fence it and this Court said in Canfield, if he fences it, he is entitled to exclusive possession.

Now, the Court below and the Government have argued that these cases suggest the existence of rights-of-way across the odd-numbered sections because --

MR. CHIEF JUSTICE BURGER: We resume there at 10:00 o'clock in the morning.

[Whereupon, at 3:00 o'clock p.m., the Court was adjourned, to reconvene at 10:00 o'clock a.m., Tuesday, January 16, 1979.]