

1-1-2015

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Recommended Citation

Shelley Ross Saxer, *"Rails-to-Trails" Potential Impact of Marvin M. Brandt Revocable Trust v. United States*, 48 Loy. L.A. L. Rev. 345 (2015).

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“RAILS-TO-TRAILS”

POTENTIAL IMPACT OF *MARVIN M. BRANDT REVOCABLE TRUST v. UNITED STATES*

*Shelley Ross Saxer**

Across the United States, over 20,000 miles of land that formerly housed railroad corridors has been converted and reappropriated into public-use trails through a federal program aptly dubbed, “Rails-to-Trails.” The viability of the “Rails-to-Trails” program has been threatened by the Supreme Court’s decision in Martin M. Brandt Revocable Trust v. United States. In Brandt, the Court held that the underlying land in the “Rails-to-Trails” program constitutes an easement granted from the original private landowners to the railroad companies. Accordingly, once the railroad companies abandon the easement, the land reverts back to the original landowners, not the government. This Article analyzes the Brandt opinion and discusses the wide-ranging consequences of the Court’s holding. It begins by providing background on the original land conveyances in the eighteenth century that eventually gave rise to the current litigation in Brandt. It then proceeds to explain the Brandt decision and provide scholarly criticism of the Court’s opinion and reasoning. Finally, the Article concludes by discussing the practical implications of the decision: by holding that the underlying rail corridors are easements that revert to private landowners, the Court opens the door for these private landowners to bring Fifth Amendment Takings claims against the government for converting the rail corridors into public-use trails. Ultimately, this may require the taxpaying public to compensate the private landowners impacted by the “Rails-to-Trails” program.

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I. INTRODUCTION

Congress amended the National Trails System Act (NTSA) in 1983, and it is now also known as the “Rails-to-Trails Act” because it authorizes “railbanking.”¹ Railbanking permits recreational trail use of railroad corridors that are in the process of abandonment in order to preserve the railroad right-of-way for future railroad use.² Nationwide, there has been litigation over this process as thousands of miles of railroad corridors have been, or are in the process of being, converted to hiking and biking trails.³ Adjoining landowners have claimed that they are entitled to the corridors when the railroad has abandoned its use of the easements.⁴ These litigants have argued that the government should use eminent domain to obtain these trail rights or be forced to pay damages for a Fifth Amendment taking based upon the NTSA,⁵ which provides that this temporary use “shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.”⁶ Although it is a federal statute that precludes treating the recreational uses as abandonment of the railroad right-of-way,⁷ the

1. National Trails System Act, 16 U.S.C. § 1241 (2012).

2. *Id.* § 1247(d); *see also* Caldwell v. United States, 57 Fed. Cl. 193, 194 (2003) (explaining that railbanking is the process whereby “[t]he right-of-way is ‘banked’ until such future time as railroad service is restored”).

3. *See* Thor Hearne, *DOJ's Rails-to-Trails Strategy Fails*, INVERSECONDEMNATION.COM (Feb. 17, 2012), <http://www.inversecondemnation.com/inversecondemnation/2012/02/guest-post-doj-rails-to-trails-strategy-fails.html>.

4. *See, e.g.*, Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1263 (2014).

5. *See* Brian T. Hodges, When the Common Law Runs Into the Constitution: The Train Wreck Avoided in *Marvin M. Brandt Revocable Trust v. United States* 8–9 (Sept. 19, 2014) (on file with author), presented at the 17th Annual Conference on Litigating Takings Challenges to Land Use and Environmental Regulations (citing Hash v. United States, 403 F.3d 1308, 1318 (Fed. Cir. 2005); Beres v. United States, 64 Fed. Cl. 403, 407 (2005)) (noting that *Brandt* did not follow the typical path for a rails-to-trails case, which would require the federal government to compensate a landowner if it “wants to convert an abandoned right-of-way into a recreational trail”); *see also* Danaya C. Wright, *Reliance Interests and Takings Liability for Rail-Trail Conversions: Marvin M. Brandt Revocable Trust v. United States*, 44 ENVTL. L. REP. 10173, 10179 (2014) [hereinafter Wright, *Reliance Interests and Takings Liability*] (noting that the “same lawyers that had been arguing that the railbanking statute worked a taking because it intercepted state-law property rights that would have vested but for the NTSA began arguing that interim trail use of preserved FGRWO [federally granted right-of-way] also worked a taking because it interfered with federal property rights that would otherwise pass to adjacent landowners”).

6. 16 U.S.C. § 1247(d) (2012).

7. *Id.* (providing that using rail-banking “shall not be treated, for the purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes”).

actual possession and conversion to recreational uses is performed by third parties, such as non-profit organizations and state or local government agencies.⁸ However, it has been the U.S. federal government (the “Government”) that is required to pay just compensation when any taking is found.

Under the Transportation Act of 1920, the Surface Transportation Board (STB) is responsible for “regulating the construction, operation, and abandonment of railroad lines in the United States” so that railroads wishing to discontinue or abandon a railroad line must seek approval from the STB.⁹ To terminate use of a railroad corridor, the railroad has three choices.¹⁰ It may apply to the STB to discontinue service, it may seek approval from the STB to abandon its right-of-way, or it can “railbank”¹¹ by applying to the STB and allowing a third party to accept responsibility for the corridor and use it temporarily for a trail until the railroad is reestablished.¹² If the STB approves a trail-use agreement between the railroad and the third party, it issues a Notice of Interim Trail Use (NITU), which expires after 180 days if the agreement is not consummated.¹³ It is at this point that adjacent landowners typically object to the government action of railbanking as a Fifth Amendment taking.¹⁴ The NITU stays the abandonment of the railroad easement, which prevents any landowners claiming to own a fee interest underlying the right-of-way from obtaining full interest in their land, unencumbered by the easement.¹⁵

8. See KATHERINE J. BARTON, OVERVIEW OF TAKINGS CLAIMS IN THE CONTEXT OF THE RAILS-TO-TRAILS PROGRAM 2 (2014) (noting that after a railroad files for abandonment, a state, municipality, or non-profit group may agree to acquire the right-of-way for recreational use subject to the railroad’s right “to reassert control of the property for restoration of rail service”); see also Jenna Greene, *Rail-to-Trails Program Costly to Taxpayers*, NAT’L L.J. (2013), <http://www.nationallawjournal.com/id=1202617646798/RailtoTrails-Program-Costly-to-Taxpayers?slreturn=20141112193840> (quoting Mark “Thor” Hearne II asking, “Why should U.S. taxpayers have to fund the acquisition of property the federal government doesn’t even own?”).

9. *Buford v. United States*, 103 Fed. Cl. 522, 525 (2012).

10. *Id.* at 525.

11. See 11-78A POWELL ON REAL PROPERTY § 78A.11[2] (Michael Allan Wolf ed., 2014), which states, “Because abandonment was not consummated, federal regulatory jurisdiction remains and the rail corridor continues as part of the national rail network. The corridor is merely noted as an inactive line with interim trail use being made while it is preserved for future reactivation.”

12. *Buford*, 103 Fed. Cl. at 525.

13. *Id.* at 525–26.

14. See Hearne, *supra* note 3 (citing *Ladd v. United States*, 630 F.3d 1015 (Fed. Cir. 2010)).

15. *Buford*, 103 Fed. Cl. at 526.

The first challenge to the Rails-to-Trails Act to reach the U.S. Supreme Court, *Preseault v. Interstate Commerce Commission (Preseault I)*,¹⁶ alleged that the act was unconstitutional on its face as a taking and as outside the Government's authority under the Commerce Clause.¹⁷ The Court affirmed the Second Circuit's holding that rejected the facial takings challenge and found authority for the act under the Commerce Clause.¹⁸ However, the Court specifically held that "even if the rails-to-trails statute gives rise to a taking, compensation is available to petitioners under the Tucker Act, 28 U.S.C. § 1491(a)(1) (1982 ed.)," thus satisfying the Fifth Amendment's just compensation requirement, and "that the statute is a valid exercise of congressional power under the Commerce Clause."¹⁹ Subsequent litigation in *Preseault v. United States (Preseault II)*²⁰ resulted in an award of just compensation to the landowners, who established that the railroad's interest was a common law easement under Vermont law²¹ and that the scope of the original railroad use was exceeded when used for a recreational trail under the Rails-to-Trails Act.²²

Takings claims brought by landowners adjoining a railroad corridor will be analyzed under state law if the "landowners are successors to the individuals who initially conveyed a property interest to the railroad" or under federal law if the "landowners are generally successors to individuals who obtained the land, after the railroad grant took effect, under the homesteading laws or other statutes providing for the conveyance of federal patent deeds to non-federal parties."²³ There are three main steps involved in analyzing the Rails-to-Trails litigation.²⁴ First, it must be determined what *type*

16. 494 U.S. 1 (1990).

17. *Id.* at 4.

18. *Id.* at 10, 19.

19. *Id.* at 4–5.

20. 100 F.3d 1525 (Fed. Cir. 1996) (en banc).

21. *Id.* at 1537, 1552.

22. *See id.* at 1544.

23. *See* Katherine J. Barton, Attorney, Appellate Section, Env't & Natural Res. Div., U.S. Dep't of Justice, Overview of Takings Claims in the Context of the Rails-To-Trails Program, Presentation at 17th Annual Conference on Litigating Takings Challenges to Land Use and Environmental Regulations 3 (Sept. 19, 2014).

24. *See Preseault II*, 100 F.3d at 1533, which established a three-part inquiry to determine takings liability for converting railroad rights of way into trails for recreation as follows:

(1) who owned the strips of land involved, specifically did the Railroad . . . acquire only easements, or did it obtain fee simple estates; (2) if the Railroad acquired only

of interest was originally acquired by the railroad.²⁵ If the railroad owned the right-of-way as a fee simple, the adjoining landowners cannot claim ownership based upon abandonment.²⁶ The railroad would be allowed to grant the fee simple interest to the Government or to a trail group, so long as the corridor is kept available for future reactivation and other statutory requirements are met.²⁷ If the railroad's right-of-way is an easement, the railroad would likely be able to assign the commercial interest to the Government.²⁸ However, further analysis is required based on how the Government uses the easement and whether the easement was terminated at any point.²⁹ Second, assuming the interest is an easement, the court will need to determine whether railbanking is within the *scope of the original easement* granted or whether the scope can be expanded under law to include trails and hiking as a valid easement use to preserve the railroad corridor for future use.³⁰ Third, the court will need to determine whether the *easement has been terminated* by some act of the easement-holding railroad, such as exceeding the scope, misusing the easement, or abandoning it.³¹

easements, were the terms of the easements limited to use for railroad purposes, or did they include future use as public recreational trails; and (3) even if the grants of the Railroad's easements were broad enough to encompass recreational trails, had these easements terminated prior to the alleged taking so that the property owners at that time held fee simples unencumbered by the easements.

Id.

25. *See id.*

26. *See* 28 AM. JUR. 2d ESTATES § 13 (2011) ("Fee simple absolute and fee simple represent the entire and absolute interest and property in the land. No one can have a greater interest. The holder of a fee simple holds property clear of any condition, limitation, or restriction." (internal quotation marks omitted)).

27. *See id.*

28. RESTATEMENT (THIRD) OF PROPERTY SERVITUDES § 1.2 (1998) ("An easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.").

29. *See id.* § 1.2 cmt. d ("Unlike most possessory estates, easements . . . may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude.").

30. *See* Preseault v. United States (*Preseault II*), 100 F.3d 1525, 1533 (Fed. Cir. 1996) (en banc).

31. *See id.*

II. RAILS-TO-TRAILS ACT LITIGATION

A. Type of Interest Granted

Determining the type of interest granted to the railroad is the first step, and this is the focus of the *Brandt* decision, which is discussed below.³² However, this may be a complex determination because it is based upon the language of the original grant, potentially conflicting federal and state laws, and evidence surrounding the conveyance of rights.³³ Railroad rights-of-way based upon common law will need to be either a fee interest or an easement. Under common law, if the railroad's interest is determined to be an easement, it will be classified as a commercial easement in gross. The easement cannot be appurtenant because while the adjacent landowners have the servient parcels, there is no dominant parcel. Railroad rights-of-way granted by statute need not necessarily follow common law property rules and the nature of the interest may instead be governed by the statute.³⁴

The Federal Claims Court has stated that in order for a landowner to establish a takings claim under the NTSA, the railroad's interest must be an easement, not a fee, since

any particular landowner must establish that full use of the fee underlying the railroad's easement would have been unimpaired but for the operation of the Trails Act. If the railroad held a fee interest in the right-of-way, or if the abutting landowner held less than the fee, no such right of control would arise, and consequently, no claim will lie.³⁵

If there is a deed involved in determining the interest conveyed, it must be interpreted based upon the law in effect when the interest was acquired.³⁶

Since the Rails-to-Trails litigation has begun, a majority of courts have found, either through analysis of conveyances or through

32. See *infra* Part III.

33. See *infra* notes 48–53 and accompanying text for a particularly complicated example.

34. See Barton, *supra* note 23, at 3–4 (citing *Marshall v. Chi. & Nw. Transp. Co.*, 31 F.3d 1029, 1032 (10th Cir. 1994)).

35. *Hubbert v. United States*, 58 Fed. Cl. 613, 614–15 (2003) (citation omitted); see also *Macy Elevator, Inc. v. United States*, 97 Fed. Cl. 708, 713–14 (2011) (determining after reviewing seventy-four deeds that the railroad held a fee simple interest in fourteen of the parcels and easements in the remaining parcels; the easements' scope would be the focus of the litigation).

36. *Hash v. United States*, 403 F.3d 1308, 1315 (Fed. Cir. 2005).

agreement or concession of the parties, that the type of interests originally acquired by the railroads were easements.³⁷ However, these results may be misleading considering that the attorneys for plaintiff landowners may have preselected the parcels most likely to be interpreted as easements. In some cases, however, courts have found the railroad's interest to be a fee simple interest, not subject to abandonment.³⁸ In *Miller v. United States*,³⁹ for example, the Federal Claims Court determined that the railroad held a fee interest, not an easement.⁴⁰ Under Missouri state law in effect at the time the railroad received ownership, any interest obtained by the railroad via condemnation was deemed to be an easement.⁴¹ However, the railroad received a deed to the railroad corridor parcels at issue instead of obtaining ownership using eminent domain.⁴² Although

37. See, e.g., *Preseault II*, 100 F.3d 1525, 1530 (Fed. Cir. 1996) (en banc) (concluding that 1899 transfers to the railroad were easements for railroad purposes); see also Samuel C. Johnson 1988 Trust v. Bayfield Cnty., Wis., 649 F.3d 799, 807–08 (7th Cir. 2011) (holding that a county could not build snowmobile trails across former railroad easements, unless it acquired the right through condemnation, since abandonment by railroad gave private landowners of underlying parcels full ownership and there was no reversion to the U.S. government after abandonment); *Buford v. United States*, 103 Fed. Cl. 522, 531 (2012) (finding that while the habendum clause in the two deeds at issue purported to convey a strip of land in fee simple, the first two granting clauses conveyed an easement, and, according to the Mississippi rules of construction, “where there are two repugnant clauses, the first must prevail” so that the railroad owned only an easement); *Longnecker Prop. v. United States*, 105 Fed. Cl. 393, 396 (2012) (parties stipulated that deeds at issue conveyed only easements to railroads); *Biery v. United States*, 99 Fed. Cl. 565, 572 (2011) (holding that it is “not disputed that the railroads in these cases did not acquire fee interests in the property that is the subject of these cases . . . [t]hus, these cases turn on the scope of the railroad easements acquired by the railroad in each of the relevant conveyance instruments and whether the Trails Act has prevented the reversion of the plaintiffs’ property rights under Kansas law”); *Ybanez v. United States*, 98 Fed. Cl. 659, 671 (2011) (concluding that railroad interests were easements and not fees simple); *Farmers Coop. Co. v. United States*, 98 Fed. Cl. 797, 802 (2011) (“The parties agree that, as a result of state legislation enacted in 1868, the property interest in land acquired by railroads via condemnation amounts to an easement.”); *Jenkins v. United States*, 102 Fed. Cl. 598, 602 (2011) (“The government concedes that the Des Moines Valley right-of-way deeds granted the railroad an easement rather than a fee under Iowa law.”); *Midland Valley R. Co. v. Corn*, 21 F.2d 96, 98–99 (D. Kan. 1927) (finding that both Kansas and Oklahoma consider a railroad’s right-of-way to be an easement, not a fee simple interest, so that the owner of a servient estate may drill for oil if it does not interfere with railroad purposes or if the right-of-way has been abandoned).

38. See, e.g., *Hochstetler Living Trust v. Friends of the Pumpkinvine Nature Trail, Inc.*, 947 N.E.2d 928, 934 (Ind. App. 2011) (agreeing with the trial court that the deed to the railroad conveyed fee simple title because while the consideration paid was nominal, the deed “contains no limiting language, does not refer to any specific use, nor does it transfer a ‘right of way,’” and instead conveyed a “strip of land”).

39. 67 Fed. Cl. 542 (2005).

40. *Id.* at 548.

41. See *id.* at 546.

42. *Id.*

the court recognized a preference in Missouri law that an ambiguous conveyance to a railroad should be construed as an easement, it interpreted the language of the deed and found that it was “consistent with the intent to convey the full fee.”⁴³ Similarly, in *Rasmuson v. United States*,⁴⁴ the Federal Claims Court, interpreting Iowa state law, held that the eight deeds at issue conveyed a fee simple interest to the railroad.⁴⁵ In refusing to apply the “compulsory consent” theory under Vermont law that was applied in the *Preseault II* case,⁴⁶ the *Rasmuson* court stated, “It is clear that the Iowa Supreme Court has recognized that railroads may acquire fee deeds to narrow strips of land notwithstanding their right to acquire strips of land through condemnation.”⁴⁷

An example of the complexity of these determinations can be found in *Burgess v. United States*,⁴⁸ where the court interpreted ten different categories of deeds to determine whether the railroad acquired an easement or a fee simple interest in the parcels at issue in a “rails to trails” conversion in Iowa and whether any issues of material fact existed to preclude a summary judgment for these takings claims.⁴⁹ Starting with the first step of the inquiry, both parties agreed to focus on the legal interpretation of the deeds conveying a property interest from the landowners’ predecessors to the railroad for a vast majority of the parcels at issue.⁵⁰ These deeds were interpreted based on contract construction rules, as required by Iowa law.⁵¹ The court made a variety of determinations as follows: ten of the parcels were subject to easements by condemnation, making the United States liable for a taking after abandonment; nineteen of the parcels had deeds that plaintiffs conceded reflected no takings liability; sixty-eight of the parcels with a “Right-of-Way Deed” were deemed to be subject to an easement for railroad purposes only; thirteen of the parcels were found to be originally

43. *Id.* at 547–48.

44. 109 Fed. Cl. 267 (2013).

45. *Id.* at 275.

46. *Preseault II*, 100 F.3d 1525, 1535–37 (1996) (en banc) (holding that the railroad acquired an easement, not a fee simple interest, based on the “eminent domain flavor” of the proceeding, notwithstanding the existence of a deed).

47. *Rasmuson v. United States*, 109 Fed. Cl. 267, 275 (2013).

48. 109 Fed. Cl. 223 (2013).

49. *Id.* at 228.

50. *Id.*

51. *Id.*

subject to an easement for railroad purposes, but later conveyances from plaintiffs' predecessors to the railroad were determined to grant a fee simple interest and extinguish the easements based on unity of ownership; eight parcels were deemed to be subject to reversionary interests when the easement was no longer used for railroad purposes, but under Iowa Code section 614.24, the Stale Uses and Reversions Act, these reversionary interests were extinguished after failure to refile within the statutory period of time; some of the claims were dismissed; and some of the claims involved disputed issues of material fact.⁵² The *Burgess* court briefly addressed step two and concluded that under Iowa law, railbanking and trail use were not within the scope of the easements for railroad purposes and were therefore subject to takings liability, so long as the landowners had a sufficient property interest in the underlying corridor land.⁵³

The *Haggart v. United States*⁵⁴ litigation was also a complex class action of approximately 522 property owners of land adjacent to railroad rights-of-way.⁵⁵ The court divided the class into six subclasses in order to determine the nature of the property interests held.⁵⁶ In Subclass Two, both parties agreed that the railroad held an easement right only in the 134 parcels in this category.⁵⁷ In the remaining five categories of the fifty-three deeds conveying 214 parcels in Subclass Four,⁵⁸ the court found only one of the five categories granted the railroad a fee simple interest.⁵⁹ The court applied Washington state law, which started with the presumption that railroads would hold only easement interests unless a multi-factor test indicated the existence of a fee simple conveyance.⁶⁰ In

52. *Id.* at 228–37.

53. *Id.* at 238–40.

54. 108 Fed. Cl. 70 (2012).

55. *Id.* at 74.

56. *Id.*

57. *Id.* at 77–78.

58. *Id.* at 86.

59. *Id.* at 94 (holding that only Subclass Four, Category E, conveyed a fee simple as the analysis of the other four categories only revealed one factor that weighed in favor of a fee simple conveyance).

60. *Id.* at 87 (citing *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n*, 126 P.3d 16, 24–25 (Wash. 2006)) (“*Kershaw* instructs other courts to begin their analysis of railroad conveyance deeds by looking first for language in the granting clause that conveys the land for right-of-way or railroad purposes, and further instructs that courts should presume that an easement was granted if this language is present. Then, using the *Brown* factors, courts should examine the remainder of the deed to see if the presumption of an easement is rebutted by other language. *Kershaw* is the most recent decision of the Washington Supreme Court to address

Subclass Four, an analysis of the documents in four of the five categories revealed only one factor in favor of finding a fee simple interest, which was outweighed by the presumption in support of an easement right.⁶¹

In addition to arguing that the railroad's underlying interest is in fee simple, rather than an easement, the United States has argued that it, rather than the underlying landowner, retains a reversionary interest in the land subject to railway easements granted under the General Railroad Right-of-Way Act of 1875.⁶² This argument, unsuccessfully asserted in *Brandt*, uses federal law under the 1875 Act instead of common law. The Tenth Circuit, which was reversed by the Court in *Brandt*, had long held that the common law of easements did not apply to rights of way created pursuant to the 1875 Act. In *Marshall v. Chicago & Northwestern Transportation Co.*,⁶³ the Tenth Circuit relied on the Idaho district court in *Idaho v. Oregon Short Line Railroad*,⁶⁴ and concluded that the United States retained a reversionary interest in the railroad right-of-way.⁶⁵ The Tenth Circuit applied this precedent in ruling for the United States in *Brandt*, but also recognized that other circuits, including the Seventh Circuit, the Federal Circuit, and the Court of Federal Claims, "have concluded that the United States did not retain any reversionary interest in these railroad rights-of-way."⁶⁶ This split of authority was resolved by the U.S. Supreme Court in *Brandt*, which found that "the right-of-way granted under the 1875 Act was an easement" and that railroads were not granted "something more than an easement, reserving an implied reversionary interest in that something more to the United States."⁶⁷ Without explicit language to the contrary and

whether right-of-way deeds convey an easement or fee, and it must serve as the touchstone of this court's analysis of the deeds related to the Subclass Four categories.").

61. *Id.* at 86–94.

62. 43 U.S.C. §§ 934–39, amended by Title VII, Pub. L. No. 94-579, § 706(a), 90 Stat. 2793 (1976).

63. 31 F.3d 1028 (10th Cir. 1994).

64. 617 F. Supp. 207 (D. Idaho 1985).

65. *Marshall v. Chi. & Nw. Transp. Co.*, 31 F.3d 1028, 1032 (10th Cir. 1994).

66. *United States v. Brandt*, 496 F. App'x 822, 825 (10th Cir. 2012), *rev'd sub nom.* *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257 (2014).

67. *Brandt*, 134 S. Ct. at 1264; *see also* *Samuel C. Johnson 1988 Trust v. Bayfield Cnty., Wis.*, 649 F.3d 799, 806 (7th Cir. 2011) ("[T]he 1856 and 1864 statutes, which provided for the relinquishment of federal ownership, created or retained no rights of way."); *Hash v. United States*, 403 F.3d 1308, 1318 (Fed. Cir. 2005) (concluding that one category of land at issue is owned in fee by landowners, subject to the railway easement, and upon abandonment by the

applying the common law of easements, a land grant conveys fee simple ownership to the landowner, subject to any railroad easements identified.⁶⁸

Historically, the interests of railroads, the Government, and adjacent landowners in railway corridors have generally been described using five property classifications.⁶⁹ First, the railroad may own a fee simple absolute interest in the corridor, free of the interests of either the Government or the landowners.⁷⁰ Second, the railroad may own a fee simple defeasible interest in the corridor, which will revert to the Government as a fee simple absolute upon abandonment of the railway.⁷¹ Third, the railroad may own an easement defeasible, which will revert to the Government as an easement upon railway abandonment.⁷² Fourth, the railroad may own an easement, such that upon railway abandonment, the servient parcel, owned either by the Government or the adjacent landowners, will become unburdened by the railroad's easement.⁷³ Fifth, the interest granted to railroads is described as a hybrid property interest created by federal statute and subject to the continuing interests of the Government to use the corridors for other public uses, including

railroad and conversion to recreational trails, the government is liable for a taking without just compensation); *Beres v. United States*, 64 Fed. Cl. 403, 425–28 (2005) (finding that United States does not hold a reversionary interest in lands originally subject to railroad easement).

68. See *Brandt*, 134 S. Ct. at 1266–68.

69. For excellent research and explanation of the history of railroad grants, federal legislation, and railroad decisions, see generally Danaya C. Wright, *Reliance Interests and Takings Liability*, *supra* note 5; Danaya C. Wright, *The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History: Hash v. United States and the Threat to Rail-Trail Conversions*, 38 ENVTL. L. 711 (2008) [hereinafter Wright, *Shifting Sands*]; Darwin P. Roberts, Note, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's "1871 Shift"* 82 U. COLO. L. REV. 85 (2011) [hereinafter Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way*].

70. See, e.g., *Rasmuson v. United States*, 109 Fed. Cl. 267 (2013).

71. See, e.g., *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267 (1903).

72. See, e.g., *Marshall v. Chi. & Nw. Transp. Co.*, 31 F.3d 1028 (10th Cir. 1994); see also *Brandt*, 134 S. Ct. at 1272 (Sotomayor, J., dissenting) (noting that Government's brief in *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942), "expressly reserved the possibility that it retained a reversionary interest in the right-of-way, even if the surrounding land was patented to others").

73. See, e.g., *Hash v. United States*, 403 F.3d 1308, 1318 (Fed. Cir. 2005) (concluding that one category of land at issue is owned in fee by landowners, subject to the railway easement, and upon abandonment by the railroad and conversion to recreational trails, the government is liable for a taking without just compensation); see also Samuel C. Johnson 1988 Trust v. Bayfield Cnty., Wis., 649 F.3d 799, 806 (7th Cir. 2011) ("[T]he 1856 and 1864 statutes, which provided for the relinquishment of federal ownership, created or retained no rights of way."); *Beres v. United States*, 64 Fed. Cl. 403, 425–28 (2005) (finding that United States does not hold a reversionary interest in lands originally subject to railroad easement).

transportation, telecommunications, and recreational trails.⁷⁴ The rights of the public to these rights-of-way, which were initially conveyed by the Government to railroads from public land, have been greatly compromised by the Court's 1942 decision, *Great Northern Railway Co. v. United States*,⁷⁵ and its most recent 2014 decision, *Brandt*, which classify the railroad's interest as a common law easement. These decisions will allow adjacent landowners, who were granted a Government patent under the 1875 Act, to establish an unencumbered right to property underlying the railroad corridor once the railroad has abandoned its rights-of-way.

B. Scope of the Easement

Once it has been determined that the railroad's interest is an easement, the court must decide the scope of easement and whether the intended use is within the scope.⁷⁶ Just as with determining the type of interest conveyed under the first step, courts look to the original language of the grant to determine the scope of the easement.⁷⁷ If the easement grants "a right-of-way for railroad purposes," many courts will find that removing tracks and replacing them with a recreational trail is not considered a railroad purpose.⁷⁸ Thus, neither trail use nor railbanking has been found to be within the scope of the original easement in most courts.⁷⁹

The U.S. Department of Justice has continued to argue that the conversion of public recreational trails from railroad corridors does

74. See Wright, *Shifting Sands*, *supra* note 69, at 714; Wright, *Reliance Interests and Takings Liability*, *supra* note 5, at 10175–76.

75. 315 U.S. 262 (1942).

76. *Preseault II*, 100 F.3d 1525, 1533 (Fed. Cir. 1996) (en banc).

77. See *id.*

78. See *Haggart v. United States*, 108 Fed. Cl. 70, 78 (2012) (citing *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010) ("It is settled law that a Fifth Amendment taking occurs in Rails-to-Trails cases when government action destroys state-defined property rights by converting a railway easement to a recreational trail, *if trail use is outside the scope of the original railway easement.*" (emphasis added by *Haggart* court))); *Roeder Co. v. Burlington N., Inc.*, 716 P.2d 855, 859 (Wash. 1986) (en banc) ("Where only an easement for a right of way is concerned, and its use for such purpose ceases, the land is discharged of the burden of the easement and the right to possession reverts to the original landowner or to that landowner's successors in interest.") ("If the easement granted to the railroad by plaintiffs' predecessors was limited to railroad purposes and its scope does not include recreational trail use upon issuance of a NITU, then a taking will be established.")

79. See, e.g., *infra* cases cited in note 83. *But see* *Wash. Wildlife Pres. Inc. v. State*, 329 N.W.2d 543, 547 (Minn. 1983) (finding that "[r]ecreational trail use of the land is compatible and consistent with its prior use as a rail line, and imposes no greater burden on the servient estates").

not constitute a taking because such use can be considered within the scope of a railroad purpose. In *Buford v. United States*,⁸⁰ the Government argued that the issue of whether railbanking and temporary trail use was within the scope of the railroad's easement was a matter of first impression under Mississippi law.⁸¹ However, the court concluded that based on previous Mississippi cases, "Mississippi courts would not find that railbanking and interim trail use are within the scope of the Railroad's easement."⁸² The Government's argument regarding scope has been successful in some state cases where the interest granted to the railroad is deemed to be broader than "an easement for railroad purposes."⁸³ However, federal courts have generally held that public recreational trails and railbanking are not within the scope of an easement that has been granted for railroad purposes.⁸⁴

80. 103 Fed. Cl. 522 (2012).

81. *Id.* at 531–32.

82. *Id.* at 532.

83. *See Jenkins v. United States*, 102 Fed. Cl. 598, 606 (2011) (citing *Moody v. Allegheny Valley Land Trust*, 601 Pa. 655, 666 (2009) (finding that easement is for a right-of-way, which does not specify that easement terminates when no longer used for rail service, and is still a right-of-way when used as a trail for interim railbanking purposes)) (explaining that "[i]n several other states, courts have found that the STB's authorization of railbanking and recreational trail use does not give rise to a taking based on the terms of the railroad's easements in those cases and the applicable state law"); *Chevy Chase Land Co. v. United States*, 733 A.2d 1055, 1094–95 (Md. 1999) (determining that deed conveyed a general right-of-way and use as a trail was consistent with the prior railway use and within the scope of the original easement); *Wash. Wildlife Pres., Inc.*, 329 N.W.2d at 547 (finding that "[r]ecreational trail use of the land is compatible and consistent with its prior use as a rail line, and imposes no greater burden on the servient estates").

84. *See, e.g., Preseault II*, 100 F.3d 1525, 1542–43 (Fed. Cir. 1996) (en banc) (easement granted for railroad transportation and recreational trail use is "clearly different" in the degree and nature of burden imposed on servient estate and is not within the scope of the original easement); *Toews v. United States*, 376 F.3d 1371, 1379 (D.C. Cir. 2004) ("[I]t is clear that under the rule as it is applied in California a public transportation easement defined as one for railroad purposes is not stretchable into an easement for a recreational trail and linear park for skateboarders and picnickers, however desirable such uses may be for these linear strips of land."); *Longnecker Prop. v. United States*, 105 Fed. Cl. 393, 418 (2012) (finding that "plain language of the Right of Way Deeds makes it clear that uses other than for railroad purposes, including as a recreational trail, exceed the scope of easements of the Right of Way Deeds under consideration"); *Anna F. Nordhus Family Trust v. United States*, 98 Fed. Cl. 331, 338–39 (2011) (finding that "removing tracks to establish recreational trails is not consistent with a railroad purpose, and cannot be regarded as incidental to the operation of trains" and that railbanking is not within the scope of the easement); *Macy Elevator, Inc. v. United States*, 97 Fed. Cl. 708, 730 (2011) ("[R]ecreational trail use does not fall within the scope of the original railroad easement."); *Jenkins*, 102 Fed. Cl. at 612 ("[A]pplying Iowa law to the language and circumstances surrounding the Des Moines Valley right-of-way deeds reveals that the grantors of the easements intended that those easements would be used for railroad purposes only. . . . [I]f the Des Moines Valley right-of-way easement deeds were limited to railroad purposes only, recreational trail use would fall outside of these deeded easements under Iowa law."); *Capreal, Inc. v. United States*, 99 Fed. Cl. 133, 146

C. Termination of the Easement by Abandonment

If neither the recreational use of the right-of-way nor railbanking constitutes a railroad purpose under state law, the final question as to whether the railroad has abandoned its easement under state law will likely not need to be addressed.⁸⁵ As the *Haggart* court explained, step three of the test established in *Preseault II* regarding abandonment need not be reached unless it is determined that the easement is not limited to railroad purposes and is broad enough to

(2011) (finding that “railbanking is too hypothetical and unlikely to serve as a railroad purpose”); *Ybanez v. United States*, 98 Fed. Cl. 659, 665 (2011) (reviewing Texas state property law and finding that “recreational trails for use by the general public would be beyond the scope of easements granted for railroad purposes, whether obtained by express deed, by condemnation, or by prescription”); *Biery v. United States*, 99 Fed. Cl. 565, 574, 579 (2011) (finding that “Kansas precedent would not support a reading of ‘railroad purposes’ to include ‘recreational trail use’” and that “railbanking is not, under Kansas law and the facts of these cases, a railroad purpose sufficient to preserve the subject easements and prevent the abandonment of a railroad easement”); *Rogers v. United States*, 90 Fed. Cl. 418, 433 (2009) (concluding that “railbanking and trail use do not fall within the scope of the easement created by the Honore deed, and the conversion of the section of the railroad right-of-way governed by this deed to a public trail creates a new, unauthorized easement”); *Glosemeyer v. United States*, 45 Fed. Cl. 771, 781 (2000) (concluding that “neither component of railbanking—the preservation of the rail line for future use nor the ‘interim’ use of the easement as a recreational trail—constitutes a railroad purpose under Missouri law”); *Lawson v. State*, 730 P.2d 1308, 1313 (Wash. 1986) (holding that hiking and biking trail is not within scope of an easement granted for railroad purposes).

85. See *Longnecker Prop.*, 105 Fed. Cl. at 419 (citing *Toews*, 376 F.3d at 1376 (declining to decide the issue of abandonment because the “defining issue in this case is the question of the scope of the easements originally granted to the railroad”)) (stating that “[c]ourts in this Circuit have indicated that if the scope issue is decided in favor of plaintiffs, it could be determinative regarding the issue of abandonment”); see also *Preseault II*, 100 F.3d at 1549 (“[W]e find the question of abandonment is not the defining issue, since whether abandoned or not the Government’s use of the property for a public trail constitutes a new, unauthorized, use.”); *Jenkins*, 102 Fed. Cl. at 614–15 (“[T]he government’s narrow interpretation of the Trails Act divorces the language of the Act from its history, purpose, and regulatory scheme. The Trails Act scheme does not, as the government contends, authorize only that the railway right-of-way will not be deemed abandoned for railroad purposes if the corridor is railbanked.”); *Ybanez v. United States*, 102 Fed. Cl. 82, 87 (2011) (citing *Preseault II*, 100 F.3d at 1533; *Toews*, 376 F.3d at 1381) (“Where the scope of a new easement exceeds the original grant, a determination of whether abandonment occurs is unnecessary.”); *Whispell Foreign Cars, Inc. v. United States*, 100 Fed. Cl. 529, 541 (2011) (“Because the court has determined that recreational trail use is not within the scope of the easement, the court need not determine at this time whether the easement was abandoned under Florida law.”); *Ellamae Phillips Co. v. United States*, 99 Fed. Cl. 483, 487 (2011) (interpreting the General Railroad Right of Way Act of 1875: “Defendant raises several arguments concerning abandonment. Since we have determined that trail use exceeds the scope of the easement, we have no need to address the contingent issue of abandonment.”); *Rogers*, 90 Fed. Cl. at 432 (“Because it is clear that the Honore easement did not encompass recreational trails, this Court need not reach the third prong of the *Preseault II* analysis—i.e., whether, even if the grants of the railroad’s easements were broad enough to encompass recreational trails, these easements had terminated prior to the alleged taking.”).

include trail use or railbanking.⁸⁶ Exceeding the scope of an easement essentially extinguishes the easement, since the non-railroad use would not be permissible.⁸⁷ Abandoning an easement also extinguishes the burden on the servient estate, and the owner of the servient estate is no longer subject to a use by others.⁸⁸ When a railroad applies to the Surface Transportation Board (STB) to abandon railway service and the railroad tracks are removed, courts have concluded that abandonment has occurred by actions that would constitute abandonment under state law.⁸⁹ Although the intent of railbanking is that the transportation corridors not be abandoned under federal law,⁹⁰ the courts have held that the question of abandonment is based on state law.

The Rails-to-Trails Act provides that if the STB approves a trail-use agreement between the railroad and the third party, it issues a Notice of Interim Trail Use (NITU), which preempts the state law of abandonment and results in the interference with the servient landowner's right to be free of the easement.⁹¹ This governmental interference through the issuance of a NITU has been deemed to constitute a Fifth Amendment taking requiring the payment of just compensation.⁹² Whether the NITU is seen as evidence of abandonment of the easement by the railroad, which is then preempted by federal law, or as a Government action allowing the

86. *Haggart v. United States*, 108 Fed. Cl. 70, 82 (2012) (concluding that “[w]hat is important to the court’s analysis, rather, is whether the NITU authorized use of an easement *exceeding* one for railroad purposes”).

87. *See id.*

88. *See id.*; RESTATEMENT (THIRD) OF PROPERTY SERVITUDES §§ 1.2; 1.2 cmt. d (1998) (“Unlike most possessory estates, easements . . . may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude.”).

89. *See, e.g., Anna F. Nordhus Family Trust*, 98 Fed. Cl. 331, 337–38 (2011) (statements in railroad’s application to STB “are clear evidence of the railroad’s intent to abandon its easements”); *Glosemeyer*, 45 Fed. Cl. at 777 (railroads’ applications for permission to abandon lines and subsequent removal of tracks constituted abandonment under Missouri law).

90. *See Wright, Shifting Sands, supra* note 69, at 714 (arguing that land granted to railroads under the 1875 Act were not mere easements because federal government retained interest in corridors for transportation and communication uses).

91. *See* 16 U.S.C. § 1247(d) (2012) (interim use of rights of way as trails “shall not be treated, for purposes of any law or rule of law, as an abandonment of such rights-of-way for railroad purposes”); *see also Jenkins v. United States*, 102 Fed. Cl. 598, 619 (2011) (holding that “the government’s taking liability in this case extends to the foreseeable consequences of the actions that arose from issuance of the subject NITU which blocked the ability of the underlying fee owners to reclaim their property free of any railroad easement”).

92. *Jenkins*, 102 Fed. Cl. at 619 (noting that government’s taking liability “extends to all of the uses authorized by the NITU,” including both railbanking and recreational trail use).

scope of the easement to be exceeded by interim trail use, it will be considered a taking under the Fifth Amendment.⁹³

III. BRANDT DECISION AND ITS IMPACT ON RAILS-TO-TRAILS LITIGATION

An American story of property ownership began for the Brandt family when Melvin Brandt purchased a sawmill in Fox Park, Wyoming in 1946, after working at the sawmill for seven years.⁹⁴ Melvin's son, Marvin, also worked at the family sawmill beginning in 1958, and he eventually became the owner and operator from 1976 until it closed in 1991.⁹⁵ In 1976, Melvin and his wife, Lulu, received a patent from the United States for an eighty-three-acre parcel in Fox Park.⁹⁶ The patent granted a fee simple interest to the Brandts, subject to a railroad right-of-way, as explained in more detail below.⁹⁷

Litigation over the Fox Park land began in 2006 when the Government sought both a judicial declaration that the Wyoming and Colorado Railroad abandoned its right-of-way and an order that title should be quieted in the Government to this right-of-way.⁹⁸ All owners of the thirty-one parcels of land subject to this abandoned right-of-way, except for Mr. Brandt, either settled with the Government or defaulted.⁹⁹ Marvin Brandt, as the trustee on behalf of the family trust that owns the Fox Park land, filed a counterclaim against the quiet title action.¹⁰⁰ Brandt asserted that the railroad's right-of-way over the family's parcel was an easement and that the trust obtained full title to the parcel, without the burden of the easement, which was extinguished by the railroad's abandonment.¹⁰¹ The Government argued that it retained a future interest in the form of an implied reversionary interest in the right-of-way, which would

93. *See, e.g.*, *Buford v. United States*, 103 Fed. Cl. 522, 533 (2012) ("Because the easements were limited to use for railroad purposes, the issuance of the NITU, authorizing conversion of the Line for use as a recreational trail under the Trails Act, is beyond the original scope of the easement. Therefore, the Government's action constitutes a taking that entitles Plaintiffs to just compensation.").

94. *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1262 (2014).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 1263.

99. *Id.*

100. *Id.*

101. *Id.*

revert to the Government upon the railroad's abandonment or forfeiture of the right-of-way.¹⁰²

The Court explained the history of U.S. grants of rights to the railroads and held that the nature of the interest conveyed by the Government to the Laramie Hahn's Peak & Pacific Railway Company (LHP&P) in 1908, pursuant to the General Railroad Right-of-Way Act of 1875, was an easement subject to common law property rules.¹⁰³ The Brandt family parcel, obtained by patent from the Government in 1976 and expressly "subject to those rights for railroad purposes as have been granted to the Laramie Hahn's Peak & Pacific Railway Company, its successors or assigns" became unburdened by the easement upon the abandonment of the right-of-way in 2004 by the Wyoming and Colorado Railroad (which had acquired the railroad in 1987).¹⁰⁴ The decision was authored by Chief Justice Roberts, with a majority of eight and a lone dissent by Justice Sotomayor.¹⁰⁵

The Court in *Brandt* did not have before it a takings claim based upon the Rails-to-Trails Act, but instead was called upon to decide in a quiet title action whether the railroad's right-of-way was an easement, subject to common law property principles, or a limited fee interest with an implied reversionary interest held by the Government.¹⁰⁶ The Brandts' interest, obtained by patent, was a fee simple title to the land, but it was subject to limited exceptions and reservations, including being subject to LHP&P's rights for railroad purposes.¹⁰⁷ LHP&P's rights were eventually sold with the railway to Wyoming and Colorado Railroad.¹⁰⁸ The Brandts' patent did not say what would happen if the right-of-way was abandoned.¹⁰⁹

The Government argued that under the 1875 Act, the railroads were granted more than an easement and that the Government reserved an implied reversionary interest in that "greater-than-an-

102. *Id.*

103. *Id.* at 1264–66.

104. *Brandt*, 134 S. Ct. at 1262, 1266.

105. *Id.* at 1259–60, 1269.

106. *See id.* at 1260 ("This case presents the question of what happens to a railroad's right-of-way granted under a particular statute—the General Railroad Right-of-Way Act of 1875—when the railroad abandons it: does it go to the Government, or to the private party who acquired the land underlying the right-of-way?").

107. *Id.* at 1265.

108. *Id.* at 1263.

109. *Id.* at 1262.

easement” interest.¹¹⁰ If the patent had expressly stated “upon abandonment or forfeiture of the right-of-way for railroad purposes, the right-of-way will revert to the United States government,” the easement could have been interpreted as a determinable easement, subject to the condition of abandonment, which would revert to the Government.¹¹¹ However, without such language in the patent, the Court (reversing the district and circuit courts) defined the right-of-way interest as an easement using common law property principles.¹¹² In applying common law property principles to find that the abandoned easement returned to the Brandt Trust as the servient parcel owner, the Court interpreted the 1976 federal patent grant to the Brandts as conveying a fee simple absolute interest in the entire eighty-three-acre parcel, including the land underlying the railroad’s right-of-way.¹¹³ The Court rejected the Government’s argument that earlier Court decisions “concluded that patents purporting to convey the land underlying a right-of-way were ‘inoperative to pass title’” on the theory that the land underlying 1875 grants to railroads was withdrawn from the Government’s authority to grant these servient estates to subsequent patent grantees.¹¹⁴

The Court discussed the history of the public’s concern that the Government was giving away too much land to the railroads and pointed out that the 1875 Act was a reaction to the controversy regarding earlier railroad grants.¹¹⁵ The right-of-way granted originally to LHP&P was based upon the 1875 Act, not earlier legislation that was more generous to the railroads.¹¹⁶ The 1875 Act

110. *Id.* at 1264.

111. *See id.* at 1265, 1268 (noting that the right-of-way did not revert to the government because the land title at issue—a document that requires both “certainty and predictability”—did not explicitly “reserve to [the government] any interest in the right-of-way in that patent”).

112. *Id.* at 1265–66.

113. *Id.* at 1265 (concluding that “[w]hen the United States patented the Fox Park parcel to Brandt’s parents in 1976, it conveyed fee simple title to that land, ‘subject to those rights for railroad purposes.’ . . . [T]he railroad thus had an easement in its right of way over land owned by the Brandts.”).

114. *Id.* at 1266–67; *see infra* text accompanying notes 103–117. *But see* Wright, *Shifting Sands*, *supra* note 69, at 714 (citing 43 U.S.C. § 912) (discussing a 1922 statute that provided that if a federally-granted railroad right-of-way was abandoned, the federal interest remaining would either be transferred to a municipality, be used for a public highway, or be passed to adjacent landowners).

115. *Brandt*, 134 S. Ct. at 1260–62. *But see generally* Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way*, *supra* note 69.

116. *Brandt*, 134 S. Ct. at 1261–62.

gave a right-of-way, not a land grant, through public lands of the Government and provided that any encumbered land that was transferred would be subject to the right-of-way.¹¹⁷ The Court also gave a lot of weight to the Government's position in the *Great Northern Railway* decision in 1942,¹¹⁸ where the Government successfully argued that railroad rights-of-way over public lands granted under the 1875 Act were mere easements and that the underlying parcels were owned by the Government.¹¹⁹ The Court's determination in the *Great Northern Railway* decision worked in the Government's favor at the time by allowing it to retain all interests beneath the surface and enjoin the railroad from drilling for oil beneath its right-of-way over public lands.¹²⁰

Rails-to-Trails expert, Professor Danaya C. Wright, argues that the Supreme Court got it wrong in *Brandt* by repeating the Federal Circuit's mistake in *Hash v. United States*,¹²¹ which failed to analyze "the complex nature of the railroad easement as a hybrid property right" and did not "address the actual question of abandonment of *this* [federally-granted right-of-way] by *this* railroad."¹²² Wright discusses the history of railroad development in the United States since the 1830s and explains that although the various congressional acts conveying property to the railroads differed in the type of property interest given to the railroads, all of these federal grants used the same term—right-of-way—to describe the interests conveyed.¹²³ However, the federal grants to the railroads were complicated because land speculators and settlers would purchase land from the Government in the likely path of the railroads, and the railroad would find itself hit with private lawsuits seeking compensation for rights-of-way that the railroad had thought were

117. *Id.*

118. *Great N. Ry. Co. v. United States*, 315 U.S. 262 (1942).

119. *Brandt*, 134 S. Ct. at 1264.

120. *Id.*

121. 403 F.3d 1308 (Fed. Cir. 2005).

122. Danaya C. Wright, *Expert Commentary on Hash v. U.S.*, 403 F.3d 1308 (Fed. Cir. 2005) and Marvin M. Brandt Revocable Trust v. U.S., (12-1173) at 19–20 (Sept. 19, 2014) (draft on file with author), presented at the 17th Annual Conference on Litigating Takings Challenges to Land Use and Environmental Regulations [hereinafter Wright, *Expert Commentary*]; see also Danaya C. Wright, *A New Era of Lavish Land Grants*, 28 PROB. & PROP. 30, 35 (2014) [hereinafter Wright, *A New Era*] ("As in *Hash*, the *Brandt Revocable Trust* Court did not address the longstanding line of cases . . . holding that FGROW lands were not public lands available for transfer to patentees.").

123. Wright, *A New Era*, *supra* note 122, at 31–32.

across public land.¹²⁴ The land office introduced a withdrawal policy to withdraw from settlement any land located adjacent to the railroad route until after the railroad route map was filed.¹²⁵

Early judicial decisions interpreted the federal grants to railroads to be fee simple absolute interests such that any adjacent landowners receiving a federal patent would be subject to the railroad's right-of-way and would not receive any of the lands previously granted to a railroad.¹²⁶ The U.S. Supreme Court in 1880 held that a federal grant of a right-of-way between 1862 and 1871 would be a fee simple absolute interest in the corridor land and that the railroad would retain this land for disposition, even after railroad services had terminated.¹²⁷ However, many of the federal grants to railroads did not get used, and there was pressure to return this land to the public land bank.¹²⁸ In 1903, the Court in *Northern Pacific Railway Co. v. Townsend*¹²⁹ revised its interpretation of the railroad grants from 1862 to 1871 and held that the grants were not in fee simple absolute, but instead were fee simple interests subject to an implied condition that they would revert to the Government when railroad services ended.¹³⁰ In 1915, the Court in *Rio Grande Western Railway Co. v. Stringham*¹³¹ applied the same interpretation to grants made pursuant to the 1875 Act, holding that the federal grant was made on a condition subsequent that it would revert to the Government.¹³² Professor Wright maintains that it "was the clear understanding of the Congressmen who passed the 1875 Act and the federal courts interpreting the acts throughout the nineteenth and early twentieth centuries" that the railroad's grant would not revert to a private landowner.¹³³ Instead, because the land was granted for public transportation, only the government could enforce the grant's

124. *See id.* at 31.

125. *Id.* at 31–32.

126. *Id.* at 32.

127. *Id.* at 33 (citing *St. Joseph & Denver City R.R. Co. v. Baldwin*, 103 U.S. 426 (1880)).

128. *Id.*

129. 190 U.S. 267 (1903), *superseded by statute*, 43 U.S.C. § 912 (2015), *as recognized in* *King Cty. V. Burlington N. R.R. Corp.* (W.D. Wash. 1994).

130. Wright, *A New Era*, *supra* note 122, at 33 (citing *Townsend*, 190 U.S. at 271).

131. 239 U.S. 44 (1915), *abrogated by* *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257 (2014).

132. Wright, *A New Era*, *supra* note 122, at 33.

133. Wright, *Expert Commentary*, *supra* note 122, at 15.

termination and, if the power of termination was exercised, the land would return to federal control for future beneficial public uses.¹³⁴

As of 1922, when Congress passed 43 U.S.C. § 912 to return abandoned railroad corridors to the Government, federal grants to railroads were considered to be “either a fee simple absolute or a limited fee with an implied condition of reverter.”¹³⁵ In 1942, however, the Court changed its course in *Great Northern Railway*¹³⁶ (the case relied upon heavily by the Court in *Brandt*) and reversed *Stringham*, holding that some railroad rights-of-way should be interpreted under state common law as easements.¹³⁷ Professor Wright laments the *Great Northern Railway* decision because the Court failed to recognize that the railroad rights-of-way were hybrid property rights that sometimes acted like a fee—because they allowed exclusive possession and alteration of the land surface—and sometimes acted like an easement—because upon termination it was not desirable to transfer strips of land to strangers.¹³⁸

Justice Sotomayor’s dissent distinguished the Court’s decision in *Great Northern Railway* from the *Brandt* litigation based on the fact that the Government in *Great Northern Railway* was arguing that the 1875 legislation would not have given subsurface mineral rights to railroads, whereas in *Brandt* the issue was the nature of the easement interest granted and whether the servient estate was retained by the Government or conveyed to the Brandts in the 1976 patent.¹³⁹ Justice Sotomayor pointed out that the Government’s argument in *Brandt* is also supported by the history of the less generous 1875 legislation, which would have granted the railroads a

134. *Id.*

135. Wright, *A New Era*, *supra* note 122, at 33. It is interesting to note that regulatory takings were not recognized until the U.S. Supreme Court case, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), decided the same year that § 912 was enacted. Therefore, it seems unlikely that Congress in 1922 or even the Court in 1942, when it decided *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942), was thinking about potential takings claims against the Government.

136. *Great N. Ry. Co. v. United States*, 315 U.S. 262 (1942).

137. Wright, *A New Era*, *supra* note 122, at 34 (“*Great Northern Railway Co.* . . . was based on a long history of state common law cases interpreting railroad rights-of-way to be easements.”).

138. Wright, *Expert Commentary*, *supra* note 122, at 16.

139. *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1270–71 (2014) (Sotomayor, J., dissenting); *see also* Wright, *Reliance Interests and Takings Liability*, *supra* note 5, at 10177 (noting the “well-established doctrine that property rights are relative” and arguing that under this doctrine the railroad’s right could be an easement with regard to the government but a fee in regards to adjacent owners).

defeasible easement interest with a reversion to the Government, rather than a typical easement interest.¹⁴⁰ Only in the last paragraph of her dissent is the import of the majority decision's impact on Rails-to-Trails legislation mentioned.¹⁴¹ Justice Sotomayor states that the Court's decision could potentially "cost American taxpayers hundreds of millions of dollars" in litigation "challenging the conversion of former rails to recreational trails."¹⁴²

IV. CONCLUSION

The *Brandt* decision was a quiet title action to establish ownership of the easement and the underlying servient parcels following abandonment of the railroad's right-of-way.¹⁴³ Thus, only the first step in the *Preseault II* analysis—determining the *type of interest granted* to the railroad—was required.¹⁴⁴ However, since there was no reference to the Rails-to-Trails legislation, except indirectly in Justice Sotomayor's dissent, there was no reference to *Preseault* and the other takings cases discussed above.¹⁴⁵ The Court decided that the railroad's interest was a "mere easement" and not an "implied reversionary interest in the right-of-way."¹⁴⁶ Therefore, abandonment by the railroad extinguished the easement, and the underlying parcel, deemed to be owned by the Brandt family, was no longer subject to the encumbrance.¹⁴⁷ The Government had no interest in either the underlying parcel or the right-of-way, which no longer existed.¹⁴⁸

Property owners subject to railway rights of use have typically prevailed in litigation challenging the Rails-to-Trails conversions to recreational trails.¹⁴⁹ As discussed above, federal courts, but not necessarily state courts, have generally found that under the second step of examining the scope of the easement, recreational trails and railbanking are not within the scope of an easement for railroad

140. *Brandt*, 134 S. Ct. at 1271–72 (Sotomayor, J., dissenting).

141. *Id.* at 1272.

142. *Id.*

143. *Id.* at 1263 (majority opinion).

144. *Preseault II*, 100 F.3d 1525, 1533 (Fed. Cir. 1996) (en banc).

145. *Brandt*, 134 S. Ct. at 1272 (Sotomayor, J., dissenting) (noting for the first and only time in the opinion the impact of the majority's decision on Rails-to-Trails legislation).

146. *Id.* at 1263 (majority opinion).

147. *Id.* at 1266.

148. *Id.* at 1265–66.

149. *See supra* note 84 and accompanying text.

purposes.¹⁵⁰ The third step of determining if the easement has been terminated by abandonment may not be reached when courts find that the scope of the easement has been exceeded.¹⁵¹ Therefore, the Government's only remaining hope to avoid paying just compensation for the Rails-to-Trails conversion is to argue that the type of interest granted to the railroad is either a fee simple, not an easement, such as was done in *Hochstetler Living Trust v. Friends of Pumpkinvine Nature Trail, Inc.*,¹⁵² *Miller*, and *Rasmuson*, or show that the railroad's easement was defeasible with a reversionary interest to the Government.¹⁵³ The Government attempted this argument in *Beres v. United States*¹⁵⁴ and *Brandt* and lost in both decisions.¹⁵⁵

Landowners and the Government both wanted the U.S. Supreme Court to hear this case to establish the nature of the interest granted railroads under the 1875 Act.¹⁵⁶ Litigation over the Rails-to-Trails conversion has been fierce, and a win for the Government would have allowed it to prevail by arguing under step one that it retained the railway corridor easement as either a reversionary interest in a defeasible easement or as the fee simple owner of the property interest underlying the railway corridors. If it could prevail at step one, the Government would no longer need to continue with its generally unsuccessful argument under step two—that railbanking and recreational trails are within the easement's scope. The Court's decision in *Brandt* to employ common law property principles allows landowners to rely on a standard interpretation of titles and deeds to determine ownership without needing to address the statutory and judicial history of railroad grants. Although the common law has allowed easements to be implied in certain circumstances, the Government's argument for an implied reversionary interest would have potentially clouded title for property with a federal land grant in its chain of title.

150. See *supra* Part II.B; see also Hodges, *supra* note 5, at nn. 106–11.

151. See *supra* Part II.C.

152. 947 N.E.2d 928 (Ind. Ct. App. 2011).

153. See *supra* notes 38–47 and accompanying text.

154. 104 Fed. Cl. 408 (2012).

155. See *supra* Part III.

156. Petition for Writ of Certiorari at 15–17, *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257 (2014) (No. 12-1173); Brief for Respondent at 8, *Brandt*, 134 S. Ct. 1257 (No. 12-1173).

Converting railway corridors into recreational trails for the public and preserving these corridors for future public transportation and communication is a brilliant idea and honors the public trust doctrine to preserve these rights for the public. However, after the *Brandt* decision, the taxpaying public will potentially need to compensate landowners impacted by the Rails-to-Trails legislation, even though these landowners originally received their property from the public trust. Property rights advocates are pleased with this result, and the Rails-to-Trails proponents have been delivered another blow.

