

DIRT Periodic Development for Friday, October 4, 2013

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The United States Supreme Court has granted certiorari in a case, *Marvin M. Brandt Revocable Trust v. U.S.*, in which the Tenth Circuit held that the U.S. retained an implied reversionary interest in a railroad right of way after the railroad's abandonment of that right of way. *Marvin M. Brandt Revocable Trust v. U.S.*, 2013 WL 1233000 (Oct. 1, 2013).

After the railroad had administratively abandoned the right of way, the U.S. brought a quiet title action against the Marvin M. Brandt Revocable Trust (the Trust). The 1976 land patent issued to the predecessor of the Trust did not explicitly reserve to the U.S. any interest in the right of way, but merely provided that the land was subject to the railroad right of way. The district court entered judgment for the United States, and the Tenth Circuit affirmed in an unpublished opinion, *Brandt v. United States*, 496 Fed.Appx. 822, 2012 WL 3935613 (10th Cir. 2012).

43 U.S.C. § 912 (enacted as part of the General Railroad Right of Way Act of 1875) provides that upon a railroad's abandonment of a right of way over public lands later transferred by the U.S., the interests of the U.S. vest in the transferee, subject to reservations of mineral rights in favor of the U.S. But Section 3 of the National Trails System Improvements Act of 1988, 16 U.S.C. § 1248(c), provides that beginning on October 4, 1988, the interests of the U.S. in any railroad rights of way would remain in the U.S. upon abandonment (to help facilitate conversion of unused railroad rights of way into recreational trails under the "rails to trails" program). The Tenth Circuit held that Section 1248(c) effectively modified Section 912 so that the abandoned right of way reverted to the U.S. rather than the Trust. The Tenth Circuit acknowledged, however, that other federal circuits have concluded that U.S. does not retain any reversionary interest in railroad rights of way granted under the General Railroad Right of Way Act of 1875.

In its certiorari petition, the Trust argues that the Tenth Circuit's decision conflicts with *Great Northern Railroad Co. v. U.S.*, 315 U.S. 262 (1942), which held that railroad rights of way under the General Railroad Right of Way Act of 1875 were only easements and not fee interests subject to an implied condition of reverter. The Trust also argues that the decision conflicts with *Leo Sheep Co. v. U. S.*, 440 U.S. 668 (1979) (land patent conveys all interest of the U.S., except as expressly reserved in the granting statute or the patent).