No. 12-1173

In the Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Under 43 U.S.C. 912 and 16 U.S.C. 1248(c), when a railroad ceases the use and occupancy of a right-of-way granted to it from the public lands, and the right-of-way's forfeiture or abandonment is declared or decreed by a court of competent jurisdiction or by Act of Congress, all surviving right, title, interest, and estate of the United States shall remain in the United States, except to the extent that any such right-of-way is embraced within a public highway no later than one year after the determination of abandonment or forfeiture. The question presented is:

Whether the United States retains a reversionary interest in rights-of-way granted from public lands to railroads under the General Railroad Right-of-Way Act of 1875, 43 U.S.C. 934-939, such that the disposition of such rights-of-way is governed by 43 U.S.C. 912 and 16 U.S.C. 1248(c).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is not published in the *Federal Reporter* but is reprinted at 496 Fed. Appx. 822. The opinion of the district court (Pet. App. 10-56) is not published in the *Federal Supplement* but is available at 2008 WL 7185272.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2012. A petition for rehearing was denied on December 26, 2012 (Pet. App. 67-68). The petition for a writ of certiorari was filed on March 22, 2013, and granted on October 1, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. The question in this case is whether the United States retains a reversionary interest in a right-of-way granted through public lands under the General Railroad Right-of-Way Act of 1875 (1875 Act), Act of Mar. 3, 1875, ch. 152, 18 Stat. 482 (43 U.S.C. 934-939),[1] when the parcel traversed by the right-of-way has subsequently been conveyed into non-federal ownership. Section 1 of the 1875 Act specifies that "[t]he right of way through the public lands of the United States is granted to any railroad company * * * [that has met certain requirements], to the extent of one hundred feet on each side of the central line of said road" plus station "ground[s] adjacent" thereto. 43 U.S.C. 934. Those adjacent grounds are for "station buildings, depots, machine shops, side tracks, turnouts, and water stations," and are limited to "twenty acres for each station" and "one station for each ten miles of [the] road." *Ibid.*

a. The text of the 1875 Act's right-of-way provision was drawn from prior statutes that conveyed two distinct types of property interests to railroads. The first type of interest conveyed by predecessor statutes was a right-of-way through public lands. This Court has concluded that a grant of a right-of-way under those earlier statutes was "more than an ordinary easement" and had certain "attributes of [a grant in] fee." *New Mexico* v. *United States Trust Co.*, 172 U.S. 171, 183 (1898). "In effect," the Court explained, the statutory grant of the right-of-way conveyed "a lim-

[1] Congress repealed the 1875 Act effective October 21, 1976, insofar as it applies to the issuance of rights-of-way through public and National Forest System lands. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2793.

ited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." *Northern Pac. Ry.* v. *Townsend*, 190 U.S. 267, 271 (1903). Upon "the grant of the right of way," "the land forming the right of way * * * was taken out of the category of public lands subject to preëmption and sale, and the land department was therefore without authority to convey rights therein" to others. *Id.* at 270.

The second type of interest conveyed in predecessor statutes was a separate, generous grant of land that a railroad company could sell to offset the cost of constructing its railroad. Such land-grant subsidies originated in the canal era and, by 1850, were "employed for the subsidization of * * * railroad[s]." *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 672-673 & nn.7-8 (1979). The subsidies took the form of a "'checkerboard' land-grant scheme" in which the United States would grant a railroad company every other one-square-mile section of public land extending out from both sides of the railroad for each mile of railroad it constructed. *Id.* at 672-673.[2]

Two significant land-grant statutes are illustrative: the 1862 Union Pacific Act (as amended in 1864) and the 1864 Northern Pacific Act.

i. The Union Pacific Act established the Union Pacific Railroad Company to build the eastern leg of a line that would later be linked with the western portion from Sacramento by a golden spike at Promonto-

[2] A section is a one-square-mile (640-acre) unit of land, which can be subdivided into smaller parcels. *Papasan* v. *Allain*, 478 U.S. 265, 268 n.3 (1986).

ry, Utah, to form the Nation's first transcontinental railroad. *Leo Sheep Co.*, 440 U.S. at 676-677.

That Act directed that "the right of way through the public lands be * * * granted to [Union Pacific] for the construction of [the] railroad * * * to the extent of two hundred feet in width on each side of said railroad * * * , including all necessary [station] grounds." Act of July 1, 1862 (1862 U.P. Act), ch. 120, § 2, 12 Stat. 491. The Act as amended also authorized the railroad to "enter upon, purchase, take, and hold" any privately held "lands or premises" up to 100 feet from the railroad's centerline when "necessary and proper for the construction and working of [its] road," and other land "required in [such] construction and operati[on]." Act of July, 2, 1864 (1864 U.P. Act), ch. 216, § 3, 13 Stat. 357. The Act provided a condemnation procedure that allowed the railroad to "acquire full title to the [property]" for railroad purposes. *Ibid.* (reproduced in part within 43 U.S.C. 942–3).

The Union Pacific Act separately provided a checkerboard land-grant subsidy of half the land in a 40-mile-wide band surrounding the railroad, consisting of "every alternate section of public land * * * to the amount of ten alternate sections per mile on each side." 1862 U.P. Act § 3, 12 Stat. 492, as amended by 1864 U.P. Act § 4, 13 Stat. 358. Under that provision, the United States granted Union Pacific and its associated railroads roughly 34.56 million acres (54,000 square miles) of public land—more land than all of New York or Virginia—to subsidize 2720 miles of railroad. Paul W. Gates, *History of Public Land Law Development* 367 (1968) (*Public Land*); *Atlas of North America* 151, 164 (H.J. de Blij ed. 2005). By compari-

son, a 400-foot-wide right-of-way for 2720 miles of road covers only 206 square miles of land.

ii. The 1864 Northern Pacific Act was similar. It specified that "the right of way through the public lands be * * * granted to [the railroad] for the construction of a railroad * * * to the extent of two hundred feet in width on each side * * * , including all necessary [station] ground[s]." Act of July 2, 1864 (1864 N.P. Act), ch. 217, § 2, 13 Stat. 367. It further authorized the railroad to secure private lands by a condemnation proceeding and "acquire full title" to such property. § 7, 13 Stat. 369. Like the Union Pacific Act, the Northern Pacific Act included a separate land-grant subsidy. 1864 N.P. Act § 3, 13 Stat. 367. That subsidy for building 2128 miles of railroad was an estimated 45 million acres (70,300 square miles) of land to sell, including 23% of North Dakota and 15% of Montana. *Public Land* 374-375. By comparison, a 400-foot-wide right-of-way for 2128 miles of road covers only 161 square miles.

b. By the early 1870s, railroads had become eligible for about 127 million acres of land-grant subsidies. See *Public Land* 380, 396, 455; cf. *id.* at 385 (the United States ultimately granted 94.36 million acres of public lands to railroads). In light of indications that railroads were slow to sell their lands and a fear of "land monopoly," the public "began to demand * * * an end to the practice of making land grants" and later sought "the forfeiture of unearned grants, partially earned grants, and, finally, unsold grants." *Id.* at 380, 454-456; see Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's "1871 Shift,"* 82 U. Colo. L. Rev. 85, 126-129 (2011) (*Roberts*); see also,

e.g., *Public Land* 365-366, 371-372, 375, 397-398, 460-461. In 1871, Congress enacted the last railroad land-grant statute. *Id.* at 376-377, 456; *Roberts* 132-134 & n.279.

c. The General Railroad Right-of-Way Act of 1875 parted ways from land-grant statutes by omitting any land subsidy. But the Act adopted the same language used in the earlier statutes to convey railroad rights-of-way. Section 1 of the Act, as noted, provides that "[t]he right of way through the public lands of the United States is granted to any railroad company * * * [meeting certain requirements], to the extent of one hundred feet on each side of the central line of said road" plus station "ground[s] adjacent" thereto. 43 U.S.C. 934. Section 3 provides that a railroad may condemn "private lands and possessory claims on the public lands" as provided by the law of the relevant Territory. 43 U.S.C. 936. In the absence of a territorial law, the Act directs (*ibid.*) the railroad to use the condemnation process in Section 3 of the 1864 Union Pacific Act, which permits a railroad to "acquire full title" to the property. 13 Stat. 357.

The 1875 Act "enables the railroad company to secure the grant" of its right-of-way by the "actual construction of its road." *Jamestown & N. R.R.* v. *Jones*, 177 U.S. 125, 130-131 (1900). But the Act also permits a company to do so "in advance of construction by filing a map as provided in section 4." *Id. at* 131; see *Stalker* v. *Oregon Short Line R.R.*, 225 U.S. 142, 147, 152-153 (1912). Section 4 provides that a company "secure[s]" the benefits of the Act by filing a profile map of its rail corridor with the local Interior Department land office within 12 months after survey or location of the road and that, upon Interior's approval,

the right-of-way is to be noted on the plats at that office. 43 U.S. 937. Thereafter, "all such lands over which such right of way shall pass shall be disposed of subject to such right of way." *Ibid.* Under Section 4, Interior's approval "segregate[s] [the right-of-way] from the public lands" and "withdraw[s] the land so granted from the market." *Stalker*, 225 U.S. at 153.

Finally, Section 6 expressly "reserves" Congress's "right at any time to alter, amend, or repeal [the 1875 Act], or any part thereof." 43 U.S.C. 939.

d. In 1906 and 1909, Congress enacted two statutes that declare as "forfeited to the United States" every right-of-way granted under the 1875 Act for which (as of the date of each statute) the section of railroad had not been constructed within the 1875 Act's five-year deadline, 43 U.S.C. 937. See 43 U.S.C. 940. Upon forfeiture of a right-of-way, "the United States resumes full title to the lands covered thereby free and discharged from such easement." *Ibid.* Each declared forfeiture would then, without the need of further assurance or conveyance, "inure to the benefit" of any owner of land that had been conveyed by the United States "subject to any such grant of right of way" before the 1906 or 1909 enactment dates. *Ibid.*

In 1922, Congress enacted the Railroad Right-of-Way Abandonment Act, Act of Mar. 8, 1922, ch. 94, 42 Stat. 414 (43 U.S.C. 912), to address forfeiture and abandonment of federally granted railroad rights-of-way. Congress specifically intended Section 912 to apply to rights-of-way granted under the 1875 Act. See S. Rep. No. 388, 67th Cong., 2d Sess. 1-2 (1922). Under Section 912, any railroad that was granted a right-of-way from the public lands would relinquish that right-of-way when it ceased its use and occupancy

of such lands for railroad purposes by "forfeiture" or "abandonment," as "declared or decreed by a court of competent jurisdiction or by Act of Congress." 43 U.S.C. 912. Upon such a declaration or decree, "all right, title, interest, and estate of the United States in said lands" composing the right-of-way were to be transferred to the owner of the property traversed by the right-of-way, unless the right-of-way was either embraced in a public highway established within one year or was located within a municipality. *Ibid.* Under any alternative, however, Section 912 reserved to the United States "oil, gas, and other minerals in the land so transferred." *Ibid.*

In 1988, Congress abrogated Section 912's provision for the transfer of an abandoned right-of-way to the owner of the parcel surrounding it. 16 U.S.C. 1248(c). Section 1248(c) continues to permit a public highway to be established on a right-of-way within a year after a decree or declaration of abandonment, but it otherwise provides that, "[c]ommencing October 4, 1988, any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in [43 U.S.C. 912] shall remain in the United States." *Ibid.*

2. This case involves a stretch of railroad right-of-way in southern Wyoming granted under the 1875 Act to the Laramie, Hahn's Peak and Pacific Railroad Company in 1908, when all of the surrounding land was federal or state land. Pet. App. 11, 13; Gov't C.A. Br. 8. The right-of-way crossed an 83-acre parcel that, in 1976, was patented to petitioners' predecessor in interest. J.A. 19. In 2004, the successor railroad abandoned the relevant rail line after obtaining the

Surface Transportation Board's approval. Pet. App. 13-14.

In 2006, the United States filed this action to quiet title to a stretch of the right-of-way in order to extend a pre-existing recreational trail across it. Pet. App. 11; Gov't C.A. Br. 7-8. Consistent with 43 U.S.C. 912 and 16 U.S.C. 1248(c), the United States sought a declaratory judgment that the right-of-way was abandoned, and that all right, title, and interest in it therefore vested in the United States. The United States filed the suit against 52 defendants. Gov't C.A. Br. 3. With the exception of petitioners, all of the other landowner defendants entered into non-monetary settlements with the United States or failed to appear and had default judgments entered against them. *Ibid.*; Pet. App. 12. Petitioners filed several counterclaims, including a claim to quiet title to the right-of-way in them. Pet. App. 12.

The district court declared the right-of-way abandoned and quieted title in the United States. Pet. App. 57-59. The court concluded, based on Tenth Circuit precedent, that "the United States retains a reversionary interest in all 1875 Act [rights-of-way]." *Id.* at 26 (citing *Marshall* v. *Chicago & Nw. Transp. Co.*, 31 F.3d 1028, 1032 (10th Cir. 1994)). The district court further held that, upon the court's declaration of abandonment pursuant to 43 U.S.C. 912, the right-of-way reverted to the United States pursuant to 16 U.S.C. 1248(c). Pet. App. 29-30.

3. The court of appeals affirmed, Pet. App. 1-9, concluding that this case was controlled by its precedent in *Marshall*, *id.* at 5-6. The defendants in *Marshall* contended, as petitioners do here, that Section 912 did not apply to the 1875 Act right-of-way because

the United States retained no right, title, or interest in it, relying in large part on the characterization of an 1875 Act right-of-way as an "easement" in *Great Northern Railway* v. *United States*, 315 U.S. 262 (1942). See *Marshall*, 31 F.3d at 1031.

Marshall rejected that contention. 31 F.3d at 1031. In doing so, *Marshall* relied on a historical analysis of some 100 years of case law under various statutes pertaining to federally granted railroad rights-of-way set forth in prior Tenth Circuit decisions such as *Wyoming* v. *Udall*, 379 F.2d 635, cert. denied, 389 U.S. 985 (1967), and in *Idaho* v. *Oregon Short Line Railroad*, 617 F. Supp. 207 (D. Idaho 1985). After reviewing that history and the underlying statutes, *Oregon Short Line*—which was followed by *Marshall*, 31 F.3d at 1032—concluded that, although Congress "did not intend [in the 1875 Act] to convey to the railroads a fee interest in the underlying lands," it did intend to convey a right-of-way that "carried with it the right to exclusive use and occupancy of the land," which goes beyond "a simple easement" "under traditional rules." 617 F. Supp. at 212. The court further observed that "Congress clearly felt that it had some retained interest in railroad rights-of-way" when it enacted Section 912 and similar provisions, *ibid.*, which did not need to be "shoe-horned into any specific category cognizable under the rules of real property law." *Marshall*, 31 F.3d at 1032 (quoting *Oregon Short Line*, 617 F. Supp. at 212). Thus, the *Marshall* court concluded, even assuming that the 1875 Act granted only easements, Congress intended to retain rights or interests in those easements, such that Section 912 applies to

them. See *id.* at 1032; *Oregon Short Line*, 617 F. Supp. at 212-213.[3]

Finding *Marshall*'s reasoning to be controlling, the court of appeals concluded that "the district court correctly held that the interest in the abandoned railroad right-of-way belongs to the United States." Pet. App. 6. It accordingly affirmed the decision to quiet title in favor of the United States. *Id.* at 9.

SUMMARY OF ARGUMENT

The United States retains a reversionary interest in abandoned railroad rights-of-way granted under the 1875 Act. When the district court declared the right-of-way in this case abandoned, it thus properly quieted the right-of-way's title in the United States.

1. The 1875 Act grants to a railroad company "the right of way" through the public lands of the United States. That grant confers a substantial property interest that carries some characteristics of a limited grant of the surface in "fee" and, in other respects, confers rights analogous to those conferred by an "easement." But Congress used neither term in the 1875 Act, and a proper construction of the Act must determine the scope of the rights conferred by the "right of way" in light of the particular right in question and the parties whose interests are implicated. Here, the statutory text, this Court's prior decisions, the legislative history, and subsequent Acts of Congress show that the 1875 Act's grant of a right-of-way preserves a reversionary interest in the right-of-way

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[3] *Marshall* was decided after Section 1248(c) modified Section 912 to retain the United States' interests in abandoned railroad rights-of-way, but it failed to address Section 1248(c)'s application to the case, in which the United States was not a party.

land for the United States in the event that the railroad later forfeits or abandons the right-of-way.

a. The 1875 Act's relevant text granting the statutory right-of-way is materially identical to that of prior railroad right-of-way statutes that this Court has concluded provide the United States with a reversionary interest in the right-of-way that will vest the relevant lands in the United States if a railroad forfeits the right-of-way. It is well settled that such statutes should be read *in pari materia*. Moreover, this Court has concluded in the context of predecessor statutes that practical considerations surrounding the nature of a railroad right-of-way require that the right-of-way exhibit certain characteristics of a fee interest and not a bare common-law easement. Congress would have recognized the importance of granting a railroad exclusive, continuous, and perpetual control over its right-of-way, and there is no indication that Congress intended the 1875 Act to provide inferior rights to railroads in that respect. Indeed, the 1875 Act specifically authorizes a railroad to condemn private lands within the path of its line and obtain "full title" to those private lands. In this context, it would be anomalous to interpret the Act's grant of a right-of-way across public lands as providing the rights of only a bare easement in every respect.

b. This Court's decisions in *Stalker* v. *Oregon Short Line Railroad*, 225 U.S. 142 (1912), and *Great Northern Railway* v. *Steinke*, 261 U.S. 119 (1923), establish that when public lands are conveyed "subject to" an 1875 Act right-of-way, the patent conveys no interest in the right-of-way land. In those cases, the Court determined that Interior's approval of a railroad's map under the 1875 Act is "the equivalent of a

patent," which withdraws the land granted as a right-of-way from the market and makes any subsequently issued patent for a parcel containing the right-of-way "'inoperative to pass title'" to the right-of-way to third parties. *Steinke*, 261 U.S. at 125, 131 (quoting *Stalker*, 225 U.S. at 154); *Stalker*, 225 U.S. at 153. Those decisions establish that petitioners could not obtain any interest in the right-of-way by patent and reflect that it is the United States that retains a reversionary interest in the right-of-way.

c. That conclusion is reinforced by the legislative debate and by subsequent Acts of Congress that make manifest Congress's intent that the United States retain that reversionary interest. In 1906 and 1909, Congress enacted statutes to govern forfeitures of 1875 Act rights-of-way, and those provisions make clear that, upon a declaration of forfeiture, "the United States resumes full title to the lands covered" by the right-of-way. 43 U.S.C. 940. In 1922, Congress enacted Section 912 to govern such right-of-way forfeitures on an ongoing basis and specified how the government would dispose of the "right, title, interest, and estate of the United States in said [right-of-way] lands" upon forfeiture. 43 U.S.C. 912. And in 1988, Congress modified that disposition of the United States' interests by specifying that, with one limited exception, the United States would retain its reversionary interest in forfeited rights-of-way. 16 U.S.C. 1248(c).

2. Petitioners primarily rely on *Great Northern Railway* v. *United States*, 315 U.S. 262 (1942), to support their contention that 1875 Act rights-of-way are "[no]thing but common law easements," which, at common law, would terminate when abandoned and

leave the full fee interest to the holder of a land patent for the parcel containing the right-of-way. We acknowledge that there is language in this Court's opinion in *Great Northern*, and in the government's brief in that case, that lends some support to petitioners' contrary position. But *Great Northern* involved whether the grant of the right-of-way to the railroad company conveyed to it the title to minerals underlying the right-of-way as against the United States; it did not involve the distinct questions in this case concerning the United States' reversionary interest in the right-of-way itself on the surface and the respective interests of the United States and third-party patentees when the railroad abandons the right-of-way. It has long been understood that expressions in every opinion must be read in the context in which they are used, and *Great Northern*, in our view, should not be read to control this case or reject the numerous reasons for concluding that the 1875 Act preserves a reversionary interest for the United States in a forfeited or abandoned right-of-way.

The Court in *Great Northern* was heavily influenced by Congress's decision to halt general land grants to subsidize railroads, and that change was important to deciding whether Congress intended to bestow railroads with similar mineral riches. The surface interest in a right-of-way that is forfeited once the railroad no longer provides ongoing public benefits implicates entirely different considerations.

Great Northern's statutory analysis, moreover, does not purport to address the question in this case, much less resolve it against the government. To the contrary, *Great Northern*'s reliance on Section 940's characterization of a 1875 Act right-of-way as an

"easement" demonstrates that the Court could not have used the term "easement" (as petitioners do) to mean that such rights-of-way must be treated as common-law easements in all respects, because Section 940 confirms that the government obtains "full title" to the land embraced by the right-of-way, free of the "easement" granted to the railroad, upon forfeiture by the railroad, even when it has conveyed a parcel containing the right-of-way into private ownership. Had the Court intended to address the question of a reverter to the United States upon a railroad's forfeiture or abandonment of its right-of-way, it presumably would have discussed Section 912. The Court simply had no occasion to do so.

Great Northern's favorable citations to this Court's 1875 Act decisions in *Stalker* and *Steiner* reinforce the conclusion that the Court did not perceive any inconsistency between its decision and those cases, which demonstrate that Interior's approval of a railroad's map withdraws the land so granted from the public lands available for transfer to third parties and thereby renders any subsequent patent inoperable to pass title to the right-of-way lands. Petitioners' suggestion that *Great Northern* overruled *Stalker sub silencio* is without merit. Indeed, given the special respect that is owed to this Court's statutory precedents and Congress's multiple enactments confirming the United States' reversionary interest in 1875 Act rights-of-way, the proper course in this case is to confirm the United States' ongoing interest in rights-of-way granted under that Act.

ARGUMENT

THE UNITED STATES RETAINS TITLE TO THE ABANDONED RIGHT-OF-WAY GRANTED UNDER THE 1875 ACT IN THIS CASE

The General Railroad Right-of-Way Act of 1875, 43 U.S.C. 934-939, grants to a railroad company "[t]he right of way through the public lands of the United States." 43 U.S.C. 934. That grant confers a substantial property interest that, in some respects, carries characteristics of a limited grant of the surface in "fee." In other respects, the right-of-way confers rights analogous to those conferred by an "easement." But Congress used neither term in the 1875 Act's text. It therefore is necessary to determine in any particular context the characteristics of this distinctive right-of-way grant insofar as it affects the interests of the railroad, the United States, and third parties who may have received a patent to a tract of land crossed by the right-of-way.

The 1875 Act's text, this Court's decisions construing that Act, the legislative history surrounding its enactment, and subsequent Acts of Congress demonstrate that the 1875 Act's grant of a right-of-way across public lands preserves a reversionary interest in that land for the United States in the event that the railroad to which the grant was made later forfeits or abandons the right-of-way. The United States thereby preserves its ability at that time to determine whether the right-of-way should continue to be retained for railroad or other transportation uses or other public purposes on which the adjacent communities may depend.

We acknowledge that there is language in this Court's opinion in *Great Northern Railway* v. *United*

States, 315 U.S. 262 (1942), and in the government's brief in that case, that lends some support to petitioner's contrary position. But *Great Northern* involved whether the grant of the right-of-way to the railroad company conveyed to it the title to minerals underlying the right-of-way as against the United States. It did not involve the distinct questions in this case concerning the United States' reversionary interest in the right-of-way itself on the surface and the respective interests of the United States and third-party patentees when the railroad abandons the right-of-way. *Great Northern* therefore does not control this case, and as explained below, the 1875 Act does preserve a reversionary interest for the United States in the right-of-way.

A. Congress Preserved A Reversionary Interest In 1875 Act Rights-Of-Way For The United States

1. The text of the 1875 Act shows that Congress provided the United States with a reversionary interest in rights-of-way under that Act

Section 1 of the 1875 Act provides that "[t]he right of way through the public lands of the United States is granted to any railroad company" that has met certain requirements, "to the extent of one hundred feet on each side of the central line of said road" and certain station "ground[s] adjacent" thereto. 43 U.S.C. 934. This Court has long recognized that the "term 'right of way'" can be used both to refer to "'a right of passage over any tract'" of land and to refer to "the land itself." *New Mexico* v. *United States Trust Co.*, 172 U.S. 171, 182 (1898) (quoting *Joy* v. *St. Louis*, 138 U.S. 1, 44 (1891)).

With respect to the 1875 Act, however, Congress did not write on a clean slate. Congress instead incor-

porated materially identical text from prior railroad right-of-way statutes. See Act of July 27, 1866, ch. 278, § 2, 14 Stat. 294 (Atlantic and Pacific Railroad); see also, *e.g.*, Act of Mar. 3, 1871, ch. 122, § 8, 16 Stat. 576 (Texas Pacific Railroad); Act of July 26, 1866, ch. 270, § 6, 14 Stat. 290 (Union Pacific Railroad, Southern Branch); Act of July 25, 1866, ch. 242, § 3, 14 Stat. 240 (California and Oregon Railroad); 1864 N.P. Act § 2, 13 Stat. 367; 1862 U.P. Act § 2, 12 Stat. 491.

It was settled in 1875 that such acts on the same "subject * * * constitute a common context" and thus should be read "*in pari materia*, * * * as if [they were] embraced in the same statute." *James* v. *Milwaukee*, 83 U.S. (16 Wall.) 159, 161 (1872). As such, Congress would have expected that "if [it employed] the same word" in statutes that "are *in pari materia*," the courts would presume that Congress "intended it should receive the same interpretation" absent a contrary showing in the statute itself. *Reiche* v. *Smythe*, 80 U.S. (13 Wall.) 162, 165 (1872). That principle reflects "practical experience" showing that "a legislative body generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972); see *Wachovia Bank, N.A.* v. *Schmidt*, 546 U.S. 303, 315-316 (2006).

As explained below, this Court has held that the 1875 Act's predecessor statutes confer substantial property rights on the railroad as against third parties and preserve to the United States an implied reversionary interest in the right-of-way in the event that the railroad later forfeits or abandons it. The Congress that enacted the 1875 Act would have intended it to do the same.

a. The "phrase 'the right of way'" in such predecessor statutes, this Court held more than a century ago, is not a "mere right of passage" but instead—if not tantamount to the grant of a fee in land—reflects a type of easement "'peculiar to the use of a railroad'" that has certain "attributes of the fee." *United States Trust Co.*, 172 U.S. at 181, 183 (citation omitted); see *Western Union Tel. Co.* v. *Pennsylvania R.R.*, 195 U.S. 540, 570 (1904) (describing right-of-way as like "a fee in the surface and so much beneath as may be necessary for support") (citation omitted). That interpretation flowed from multiple considerations.

i. First, this Court in *United States Trust Co.* explained that statutory text granting rights-of-way does not simply use the "phrase 'the right of way'"; it confers something that "is exactly measured as a physical thing—not as an abstract right." 172 U.S. at 181; see *id.* at 177 n.1 (1866 Act). The text instructs that the grant "is to be two hundred feet wide, and to be carefully broadened so as to include grounds for the superstructures indispensable to the railroad." *Id.* at 181. The 1875 Act is precisely the same: It defines the extent of general right-of-way lands conveyed to be 200 feet wide and expands that width for station grounds as "local extensions of the general right of way," *Great Northern Ry.* v. *Steinke*, 261 U.S. 119, 132 (1923).

The right-of-way could not, of course, be "limited to the width of the track and cars." *South Perry Townsite* v. *Reed*, 28 Pub. Lands Dec. 561, 562 (1899). As a practical matter, it "must be wide enough for the track and the embankment" below or, in the case of cuts into slopes, above the track. Am. Ry. Eng'g & Maint. of Way Ass'n, *Practical Guide to Railway Engineer-*

ing § 4.2.1, at 153 (2003) (*Practical Guide*); see 65 Am. Jur. 2d *Railroads* § 66, at 249 (2011) (Right-of-way confers "the right to tunnel the land, to cut embankments, to grade and make roadbeds."). It should provide sufficient space for access roads, ditches, and structures necessary to operate the railway; room for maintenance and construction activity on functional lines; and, when appropriate, land for future expansion (*e.g.*, double tracking). *Practical Guide* § 4.2.1, at 153; 1 William W. Hay, *Railroad Engineering* 196-197 (1953). In areas of significant snowfall and wind, a right-of-way of sufficient width is necessary to accommodate snow plowed from the tracks and snow fences located at an appropriate distance to reduce accumulation on tracks, ditches, and rail crossings. *Practical Guide* § 4.2.2, at 153; cf. *Northern Pac. Ry.* v. *Townsend*, 190 U.S. 267, 269 (1903) (snow fences 100 feet from tracks).

Congress would have recognized that rights-of-way with such characteristics were essential to advance the public interest in providing railroad transportation in the late 1800s. See *Townsend*, 190 U.S. at 272 ("Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance."). Indeed, this Court has determined that railroad companies receiving statutory grants of rights-of-way may not dispose of any land within the minimum statutory width without statutory authorization. See *Northern Pac. Ry.* v. *Ely*, 197 U.S. 1, 5-7 (1905); see also *Steinke*, 261 U.S. at 132 (1875 Act right-of-way is for "*quasi* public uses" specified by Congress and is not available for "private use or disposal"). That restriction ensures that right-of-way lands continue to be available to facilitate safe

and efficient rail operations serving the public interest.

The public purposes reflected in that restriction, and in the very grant of the right-of-way, also strongly support the conclusion that the United States retains a reversionary interest in the right-of-way if it is abandoned by the railroad company. The United States thereby preserves its ability to determine at that time whether the public interest requires that the area of the right-of-way continue to be devoted to railroad or other transportation use or other public purposes, or whether it should instead be transferred unencumbered to private ownership.

ii. Second, this Court concluded in *United States Trust Co.* that statutory grants of rights-of-way "surely [confer] more than an ordinary easement" by virtue of the nature of their intended operation. 172 U.S. at 183. Even if a statutory right-of-way is deemed a type of easement, the Court reasoned, it must logically have certain "attributes of the fee"—"perpetuity and exclusive use and possession"—and "also the remedies of the fee." *Ibid.*

As traditionally understood, a "grant of the exclusive use of land is not an easement," Leonard A. Jones, *A Treatise on the Law of Easements* § 14, at 12 (1898) (*Easements*), because an "easement" would not authorize "the entire beneficial occupation and improvement of the land," *United States Trust Co.*, 172 U.S. at 183. Yet a railroad's use of right-of-way land is necessarily "perpetual and continuous," *ibid.*, and "is, and necessarily must be, exclusive," *Choctaw,*

Okla. & Gulf R.R. v. *Mackey*, 256 U.S. 531, 539 (1921).[4]

A railroad company must also have the ability to protect its right-of-way, which constitutes "private property even to the public" and "cannot be invaded without guilt of trespass." *Western Union*, 195 U.S. at 570; see *Donovan* v. *Pennsylvania Co.*, 199 U.S. 279, 294-295 (1905). The owner of a true common-law easement, by contrast, "is not entitled to the protection which is given to those having possessory interests" and cannot "exclude others from making any use of the land which does not interfere with his." 5 Restatement (First) of Property § 450 cmt. b, at 2903 (1944) (*Restatement*); see *id.* § 510 illus. 5, at 3106-3107. Easements were thus viewed at common law as purely "incorporeal interests" given their owners' "slight degree of control" compared to that of "possessors of land." *Id.* § 450 cmt. c, at 2903. But the remedies that have long been available to a railroad to protect its right-of-way are those of "corporeal, not incorporeal, property." *United States Trust Co.*, 172 U.S. at 183.

Accordingly, even if a federally granted right-of-way might "technically [be labeled] an easement," the Court held that it is not the type of easement "spoken of in the old law books, but is peculiar to the use of a railroad." *United States Trust Co.*, 172 U.S. at 183 (citations omitted). Such a right-of-way "is a very substantial thing" and must share by necessity certain traits of a limited "fee in the surface and so much

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[4] In certain limited stretches within canyons, passes, or defiles, a right-of-way grant under the 1875 Act must be shared with other railroads. See 43 U.S.C. 935. But that cooperation between railroads does not affect the authority to exclude all others.

beneath as may be necessary for support." *Western Union*, 195 U.S. at 570; see *United States* v. *Union Pac. R.R.*, 353 U.S. 112, 119 (1957).

iii. Reflecting these significant attributes, "the rights of way conveyed" in the statutes from which the 1875 Act directly drew its text of conveyance were "held [by this Court] to be limited fees"—or at least held to have certain characteristics of limited fees—in particular contexts. See *Great Northern Ry.*, 315 U.S. at 273 n.6 (citing *Townsend*, *supra*). The Court explained in *Townsend* that when a railroad obtains a statutory right-of-way through public lands, "the land forming the right of way * * * [is] taken out of the category of public lands subject to * * * sale, and the land department [i]s therefore without authority to convey rights therein" to others. *Townsend*, 190 U.S. at 270. Congress, the Court reasoned, thereby granted the railroad "perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way." *Id.* at 271. Thus, the predecessor statutory provisions granting "the right of way through the public lands" was to be understood as conveying, "[i]n effect," a type of "limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." *Ibid.*; see *id.* at 268 (quoting 1864 N.P. Act § 2, 13 Stat. 367); cf. *United States* v. *Michigan*, 190 U.S. 379, 398 (1903) (same for 1852 canal right-of-way act).

b. Nothing in the text or purposes of the 1875 Act suggests that any different result is warranted with respect to the existence of a condition of reverter to

the United States in its grant of railroad rights-of-way through public lands. To the contrary, the operative statutory text was, as explained above, drawn directly from such predecessor provisions. See 43 U.S.C. 934; *Wyoming* v. *Udall*, 379 F.2d 635, 638 (10th Cir.) (the text is "identical in all important respects"), cert. denied, 389 U.S. 985 (1967).

Nor is there anything elsewhere in the 1875 Act suggesting that Congress intended the rights-of-way granted under it to lack the essential features discussed above that were recognized under identically worded predecessor statutes. Congress would not have intended holders of 1875 Act rights-of-way to be less able to defend the land granted from invasion by third parties. Nor are the track and structures laid and physical modifications made in an 1875 Act right-of-way less continuous and permanent than those in earlier rights-of-way. And the 1875 Act, like its predecessors, grants perpetual rights-of-way, subject to the condition that the railroad grantee use it for statutory purposes. See *Steinke*, 261 U.S. at 132 (1875 Act imposes "the implied condition that [the right-of-way] be devoted to [statutory] uses," and a "breach of the condition subjects the grant to a forfeiture by the United States").

c. Section 3 of the 1875 Act reinforces that conclusion. It provides that, in the absence of a territorial law governing the condemnation of "private lands and possessory claims on the public lands" needed for the railroad, such condemnation may be made in accordance with Section 3 of the 1864 Union Pacific Act. See 43 U.S.C. 936. The 1864 provision, in turn, expressly authorizes a railroad company to "acquire full title" to "any lands or premises that may be necessary and

proper" for "the construction and working of said road, not exceeding in width 100 feet on each side of its centre line, unless a greater width be required for the purpose of excavation or embankment," and railroad stations and other structures "required in the construction and operating of said road." 1864 U.P. Act § 3, 13 Stat. 357 (partially reproduced within 43 U.S.C. 942-3).

Congress thus expressly contemplated that the railroad could acquire the full title to the land and possessory claims necessary for railroad operations where its 200-foot-wide right-of-way passes through private lands and through public lands encumbered by "possessory claims," 43 U.S.C. 936, *i.e.*, "homestead or similar claims" to public lands reflecting "inchoate or possessory rights" that have not ripened to vest title in the claimant. See *Steinke*, 261 U.S. at 127 (interpreting Section 3 of 1875 Act); *Spokane Falls & N. Ry.* v. *Ziegler*, 167 U.S. 65, 68, 70 (1897) (discussing condemnation of private land for full value of right-of-way land under 1875 Act); cf. *Shiver* v. *United States*, 159 U.S. 491, 495-496 (1895) (explaining requirements to obtain patent for homestead).

The Senate debate focused attention on what would become Section 3 of the 1875 Act (then Section 9 of S. 378). 2 Cong. Rec. 2898-2900 (1874); see *id.* at 2897 (reproducing Section 9). The Senators recognized that the condemnation provision would enable railroads to "acquire full title" and "not a mere easement" to the premises. See, *e.g.*, *id.* at 2899 (statement of Sen. Wright). The Chairman of the Senate Committee on Railroads who reported the bill, *id.* at 2896, explained that a railroad company would acquire "title" for "the right of way" under the provision but that, if

the company later failed to "build a railroad," it would "forfeit" that "title" under the bill's forfeiture provision. *Id.* at 2900 (statement of Sen. Stewart); cf. 43 U.S.C. 937 (providing that, if rail line is not completed within five years, company will forfeit rights granted by 1875 Act as to any "uncompleted section of said road"). Because Congress intended railroads to be able to acquire "full title" to private lands within a 200-foot-wide right-of-way subject to forfeiture to the United States if the rail line was not built, it would be anomalous to interpret the 1875 Act's grant of a 200-foot-wide right-of-way through public lands not to confer a sufficient interest on the company to construct and operate the railroad and to preserve a reversionary interest in the United States.

d. Petitioners resist that conclusion and contend (Br. 19-20) that the 1875 Act confers nothing more than a bare "easement" for all purposes and in all respects. Petitioners rely on Section 4 of the Act, which provides that, once Interior approves a profile map of a line through surveyed or unsurveyed lands, "all such lands *over* which such right of way shall pass shall be disposed of *subject to* such right of way," 43 U.S.C. 937 (petitioners' emphasis). That language, petitioners contend, indicates an "intent to convey an easement" and is "wholly inconsistent with the grant of a fee." Br. 20 (quoting *Great Northern*, 315 U.S. at 271). But materially identical statutory text is present in numerous predecessor right-of-way provisions that petitioners attempt to distinguish from the 1875 Act. Such statutes routinely defined the government's grant of "the right of way *through* the public lands" by stating that "said right of way is granted * * * to the extent of [a specified] width * * * where it

may pass *over* the public lands." 1862 U.P. Act § 2, 12 Stat. 491 (emphasis added).[5] In this context, the term "over" can be understood as simply a synonym for "through." *Webster's New International Dictionary* 1533 (1917) (defining "over" to mean "[a]cross" or "through"). But in any event, that term does not address the question of reverter of the right-of-way to the United States if it be abandoned by the railroad.

The directive that the lands over which a right-of-way passes shall be disposed of "subject to" such right-of-way, 43 U.S.C. 937, likewise does not address to the question of reverter to the United States. The right-of-way granted by the 1875 Act is 200 feet wide, 43 U.S.C. 934, and it therefore will normally cover only a portion of the parcels of land over which it crosses. Cf., *e.g.*, J.A. 21 (map of parcel in this case). Disposing of the larger parcel of land "subject to" the right-of-way merely reflects the fact that the covered lands were previously committed to the railroad, such that the government conveys only the remainder. Nothing in that text suggests that the United States does not retain a reversionary interest in the right-of-way itself.

This Court in fact has used the phrase "subject to" to indicate that rights-of-way granted under pre-1872 Acts are excluded from the conveyance of lands they cross. See, *e.g.*, *Bybee* v. *Oregon & Cal. R.R.*, 139 U.S. 663, 680 (1891) (A person acquiring land containing "any part of such right of way [granted by an 1866 statute] takes it *subject to* the prior right of the rail-

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[5] See also, *e.g.*, Act of Mar. 3, 1871, ch. 122, § 8, 16 Stat. 576 (Texas Pacific Railroad); Act of July 25, 1866, ch. 242, § 3, 14 Stat. 240 (California and Oregon Railroad); 1864 U.P. Act § 18, 13 Stat. 364 (Burlington and Missouri River Railroad).

road company.") (emphasis added); *Railroad Co.* v. *Baldwin*, 103 U.S. 426, 430 (1881) ("all persons acquiring any portion of the public lands, after the passage of [1866 right-of-way statute], took the same *subject to* the right of way") (emphasis added). This Court has likewise held that the terms of Section 4 of the 1875 Act show that the railroad will not acquire "any [vested] right as against the United States" until Interior approves the railroad's map, *Stalker* v. *Oregon Short Line R.R.*, 225 U.S. 142, 151 (1912) (emphasis omitted), but that when Interior's approval is given, "the grant vest[s] in the company" and the "grounds so selected [a]re segregated from the public lands" and "withdraw[n] * * * from the market" for future transfer to third parties. *Id.* at 153.

2.* Stalker *and* Steinke *confirm that the public lands subject to an 1875 Act right-of-way are conveyed to private parties exclusive of any interest in the right-of-way

This Court's decisions in *Stalker* and *Steinke* concluded that when public lands are conveyed "subject to" an 1875 Act right-of-way, 43 U.S.C. 937, the patent does not convey an interest in the right-of-way lands.

a. In *Stalker*, the plaintiff railroad company claimed a right-of-way for station grounds under the 1875 Act based on its filing of a profile map identifying the location of its railroad and station grounds and Interior's 1888 approval of that map under Section 4. 225 U.S. at 144; see *id.* at 148-149. The register failed to mark the right-of-way on plats in the local land office and, in 1891, the government issued a patent for land, a portion of which overlapped the land granted to the railroad as the right-of-way. *Id.* at 144-145; see *id.* at 148-149. The railroad thereafter brought an

action "to quiet title to four certain lots" that fell within its grant under the 1875 Act, *id.* at 143-144, by "claim[ing] title in fee to the said premises" and asserting that, as "the owner in fee," it was "entitled to the exclusive possession" of the property. Tr. of Record 3, *Stalker*, *supra* (No. 11-225). The trial court held that the railroad was "entitled to a decree quieting its title" and entered a decree declaring that the railroad was "entitled to the exclusive possession" of the land and that the defendant was "perpetually enjoined" from "claiming any right, title, estate or interest in or to any portion of said premises." *Id.* at 7-8. The state supreme court affirmed. 225 U.S. at 143.

This Court affirmed. The Court determined that, when the Secretary approved the railroad's profile map under the 1875 Act, "the grounds so selected were segregated from the public lands" and thereby "withdraw[n] * * * from the market," even though the land was not marked on plats in the local property office. *Stalker*, 225 U.S. at 153. *Stalker* accordingly held that the "subsequent issue of a patent to the land" did not confer title to the portion previously granted to the railroad under the 1875 Act because the 1891 patent, "insofar as it included lands validly acquired theretofore, was in violation of law, and *inoperative to pass title*." *Id.* at 154 (emphasis added).

b. The Court in *Steinke* later applied *Stalker*'s rationale to conclude that, although the 1875 Act does not provide for "the issu[ance] of a patent" to a railroad, "[t]he approved map is intended to be the equivalent of a patent." *Steinke*, 261 U.S. at 125. In *Steinke*, Interior had approved a railroad's map identifying its grant under the 1875 Act; local officials failed to record that grant in the local land office; a developer

subsequently was issued a patent to land that included the railroad's right-of-way; and he later platted most of that property as a townsite and sold lots in it to the defendants. *Id.* at 121-122. The railroad company filed suit against the defendants, *id.* at 120, 122, seeking a judgment that they "be decreed to have no estate or interest in, or lien or encumbrance upon said property"; that "the defendants be forever debarred and enjoined from further asserting the same"; and that the "[railroad's] title be quieted as to such claims." Tr. of Record 4, *Steinke*, *supra* (No. 21-481). The state courts concluded that defendants had valid title to the land "under a patent from the United States to [the developer]," 261 U.S. at 120, 122, but this Court reversed and directed that judgment be entered for the railroad, *id.* at 133.

This Court rejected the argument that the defendants should prevail because they "purchased from [the developer] in good faith relying on the certificate and patent issued to him." *Steinke*, 261 U.S. at 129. "The approved [railroad] map is intended to be the equivalent of a patent" under the 1875 Act, the Court reasoned, and the "claim on which [the developer] received the certificate and patent" was made only after the disputed "grounds [had] passed to the [railroad] under the approved map." *Id.* at 125, 129. The Court ruled that the failure of "local land officers * * * to note that disposal on the township plat and tract book * * * did not prejudice or affect the [railroad's] title," and that a contrary conclusion was untenable because it would mean that Interior's issuance of "a patent or *its equivalent* * * * could be thwarted or made of no avail by a subsequent omission [by] local land officers." *Id.* at 129-130 (emphasis

added). *Steinke* explained that its holding flowed from the Court's earlier 1875 Act opinion in *Stalker*, which rested on "the * * * ground[]" that the "issue of a patent" to an individual after a railroad company has obtained "approval of its station ground map" does not transfer title to lands specified in the map, because "[t]he patent * * * , insofar as it included lands validly acquired therefore, was in violation of law, and inoperative to pass title." *Id.* at 130-131 (quoting *Stalker*, 225 U.S. at 154).

c. The judgments for the railroad companies that this Court affirmed in *Stalker* and directed in *Steinke* both (1) quieted title in the railroads based on a right-of-way grant under the 1875 Act, and (2) extinguished claims to the same land by holders of otherwise valid land patents subsequently issued by Interior. Whatever the precise scope of the title confirmed in the railroad or claims barred the patentees, those rulings refute petitioners' contention that a railroad's right-of-way under the 1875 Act is in the nature of a bare common-law easement and that the subsequent patentee of a parcel holds title that becomes full and unburdened if the easement is later abandoned.

It follows that petitioners' claim to hold title to the land covered by the 1908 right-of-way in this case as against the United States, based on a patent issued in 1976, is invalid. "[I]nsofar as [the 1976 patent] included lands validly acquired [by the railroad as a right-of-way under the 1875 Act]," the patent was "inoperative to pass title" to such lands. *Steinke*, 261 U.S. at 131 (quoting *Stalker*, 225 U.S. at 154); cf. *Swendig* v. *Washington Water Power Co.*, 265 U.S. 322, 332 (1924)

("The issuing of the patents without a reservation did not convey what the law reserved.").[6]

3. The legislative debate shows that the 1875 Act grants a right-of-way to the railroad subject to a subsequent reverter to the United States

The legislative history confirms that Congress understood and intended that the grant of a right-of-way under the 1875 Act would convey to railroads an interest in land in which the United States would also retain an interest.

When the Chairman of the House Committee on Public Lands reported the general right-of-way bill, he assured the House of Representatives that the bill was unlike prior statutes that had provided land-grant subsidies to railroads, 3 Cong. Rec. 404 (1875)—the checkerboard grants, discussed at pp. 3-5, *supra*, that extended well beyond the right of way itself. Chairman Townsend explained that "[a]ll our grants of public lands" in the bill "have been narrowed down to rights of way." 3 Cong. Rec. at 404. That description of the grant of rights-of-way as a "grant[] of public lands," *ibid.*, paralleled the characterization in the

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[6] Petitioners contend (Br. 37-39) that *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979), shows that the government retains only property interests "expressly reserved in [a] patent," and that *Leo Sheep* thus controls this case because petitioners' patent merely states that it is subject to a railroad's "rights for railroad purposes" under the 1875 Act, Pet. App. 78. *Leo Sheep* offers petitioners no support. The concluding paragraph in *Leo Sheep* noted that the easement sought by the government had not been reserved in a land patent, 440 U.S. at 687, but the Court explained that "[t]he pertinent inquiry * * * is the intent of Congress when it granted [the] land" into private ownership. *Id.* at 681. The Court thus interpreted the statutes in dispute and found no intent to preserve a statutory easement. *Id.* at 681-687.

Senate, where the Chairman of the Committee on Railroads explained that the legislation would provide "no grant of lands *except* for stations and depots and the right of way over the public lands." 2 Cong. Rec. 2898 (1874) (statement of Sen. Stewart) (emphasis added).

A colloquy between Chairman Townsend and Representative Hoar later clarified that the legal status of such grants of rights-of-way would be the same as those previously granted by statute to the Union Pacific Railroad. 3 Cong. Rec. at 406. Representative Hoar observed that, under the bill, the land on which the roadbed lies would be "owned by the United States" and that a State would lack authority to "meddle" with "a right of way within its limits granted by the United States." *Ibid.* He further explained that the "United States may in the course of years or generations have *parted with all its public lands* in the State or in the vicinity of the road," but that the railroad would still be able to avoid state regulation because its right-of-way land would remain "the property of the United States," thus requiring the State "to come to Congress" for authority. *Ibid.* (emphasis added). Chairman Townsend then asked, "[i]s not that the condition in which the Union Pacific Railroad stands [elsewhere]?" *Ibid.* Representative Hoar acknowledged, "Undoubtedly." *Ibid.*; cf. *id.* at 2217.

That debate reflects the understanding in Congress that the rights-of-way granted by what would become the 1875 Act were similar to those previously granted to the Union Pacific Railroad—at least to the extent that the United States would always hold a form of ownership interest in the right-of-way, even after the

United States had "parted with all its public lands in the State or in the vicinity of the road."

4. Later statutes implementing the 1875 Act's requirements that confirm that right-of-way lands revert to the United States

Congress made manifest its intent that the United States retain a reversionary interest in 1875 Act rights-of-way in statutes specifically enacted to implement the 1875 Act's provisions governing continuing ownership of rights-of-way granted under the Act. "It is settled that 'subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.'" *Great Northern*, 315 U.S. at 277 (quoting *Tiger* v. *Western Inv. Co.*, 221 U.S. 286, 309 (1911)). And that principle carries particular force here, where Congress has exercised its ongoing authority over the 1875 Act's forfeiture conditions by enacting such legislation.

This Court held in *Stalker* that Interior's approval of a railroad company's profile map under Section 4 of the 1875 Act completes the statute's right-of-way grant, such that "the grant vest[s] in the company" and the company obtains a property "right as against the United States" upon such approval. 225 U.S. at 152-153 (citation and emphasis omitted); see also, *e.g.*, *Steinke*, 261 U.S. at 125. But the 1875 Act, like its predecessors, imposes on that grant two conditions subsequent—one express and one implied—which, if breached by the grantee, can result in forfeiture of the right-of-way. See, *e.g.*, *Townsend*, 190 U.S. at 271 ("present grant" is "subject to conditions"). First, Section 4 of the 1875 Act specifies that if a railroad company fails to complete a section of its road within a five-year period, the right-of-way previously granted

"shall be forfeited as to any such uncompleted section." 43 U.S.C. 937. Second, this Court concluded in *Steinke* that the 1875 Act grants a right-of-way "only for the *quasi* public uses named in the act" and accordingly includes an "implied condition that it be devoted to those uses"; if the company breaches that condition (by, *e.g.*, discontinuing its public rail service), it "subjects the grant to a forfeiture by the United States." 261 U.S. at 132.

Under this Court's decision in *Schulenberg* v. *Harriman*, 88 U.S. (21 Wall.) 44, 63 (1875), however, a forfeiture of a federally granted right-of-way triggered by the grantee's failure to meet any such "condition subsequent" may be enforced only by the government (as grantor), either in "a suit by the United States to enforce [the] forfeiture" or by an Act of Congress declaring it. *Bybee*, 139 U.S. at 674-676 (citation omitted); *id.* at 665-666 (forfeiture of railroad right-of-way). Accord, *e.g.*, *Spokane & B.C. Ry.* v. *Washington & Great N. Ry.*, 219 U.S. 166, 169-170, 173-175 (1911) (right-of-way granted by 1898 statute); *United States* v. *Northern Pac. R.R.*, 177 U.S. 435, 440-441 (1900). Congress addressed right-of-way forfeitures under the 1875 Act in 1906 and 1909 by enacting 43 U.S.C. 940, and later in 1922 and 1988 by enacting 43 U.S.C. 912 and 16 U.S.C. 1248(c). Those enactments confirm the United States' reversionary interest in forfeited 1875 Act rights-of-way.

a. First, in 1906, Congress enacted a statute now codified at 43 U.S.C. 940 to declare the forfeiture of all rights-of-way granted under the 1875 Act with respect to which a grantee company had not (by 1906) timely constructed its railroad. Act of June 26, 1906, ch. 3550, 34 Stat. 482; see S. Rep. No. 2732, 59th Cong.,

1st Sess. 1 (1906) (explaining that 1875 Act's forfeiture requirement "is not self-executing" and that "[e]ither a Congressional or judicial forfeiture must be declared"). Congress renewed that "affirmative declaration of forfeiture" in 1909 for forfeitures occurring up to that date, S. Rep. No. 961, 60th Cong., 2d Sess. 1-2 (1909). See Act of Feb. 25, 1909, ch. 191, 35 Stat. 647. As relevant here, Section 940 provides that "[e]ach and every grant of right of way and station grounds * * * under sections 934 to 939 [the 1875 Act]" for which the relevant five-year period "had on [February 25, 1909] expired" is "declared forfeited to the United States * * * and the *United States resumes the full title to the lands* covered thereby free and discharged from such easement." 43 U.S.C. 940 (emphasis added). Section 940 then provides that "the forfeiture declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land" that the United States had previously conveyed to such owner or owners "subject to any such grant of right of way." *Ibid.*

Those provisions make clear that, upon the forfeiture of an 1875 Act right-of-way, it is the *United States* that acquires "full title" to the land thereunder. Section 940, moreover, specifically provides that the United States resumes "full title" *even if* the United States previously conveyed into private ownership (when the right-of-way was still held by the railroad) a parcel that contained the right-of-way within its borders. Section 940 thereby confirms that the United States' conveyance of a parcel of public lands "subject to" an 1875 Act right-of-way, 43 U.S.C. 937, conveys only that portion of land within the parcel not encompassed by the right-of-way. See pp. 28-31, *supra*.

Otherwise, the subsequent grantee of the surrounding parcel would have held an interest in the "lands covered []by [the right-of-way]" and the United States would not, as Section 940 requires, "resume[] the full title to th[ose] lands" upon forfeiture, 43 U.S.C. 940.

Petitioners suggest (Br. 46 n.17) that Congress's decision to allow the forfeiture declared by Section 940 to "inure to the benefit" of the private owner of the surrounding land undermines the conclusion that the United States resumes full title. That is incorrect. The provision on which petitioners rely merely reflects Congress's decision that once the right-of-way is forfeited, the benefit of it should in turn be transferred. That very transfer is premised on the government's retention of a reversionary interest providing "full title" to the land.

Petitioners likewise note (Br. 46) that this Court in *Great Northern* concluded that an 1875 Act right-of-way is an "easement" in part because Section 940's text characterizes it as an "easement." See 315 U.S. at 276; 43 U.S.C. 940 (forfeiture of right-of-way frees the United States' title "from such easement"). But petitioners' observation shows that *Great Northern* employed the term "easement" in a manner different than petitioners do.

In petitioners' view, 1875 Act rights-of-way are bare "*common*[-]*law* easements." Br. 31-32 (emphasis added). At common law, petitioners explain, (1) when G owns a fee-simple title in land that is burdened by an easement, (2) G then conveys that title to P, and (3) the easement is later abandoned, the abandonment simply unburdens the land such that P obtains full title and G enjoys *no* reversionary property interest. Br. 32-34. But that cannot be the type of "ease-

ment" described in Section 940. Under that section, it is the *government* (G) that "resumes the full title" to the lands covered by the forfeited right-of-way, free from such "easement." Congress's use of the term "easement" in this particular 1875 Act context thus must mean something different than a mere common-law easement: The term must refer to a type of interest in land in which the government retains a full reversionary interest.

b. The Act of March 8, 1922, ch. 94, 42 Stat. 414 (43 U.S.C. 912), likewise shows that Congress intended the United States to retain, and therefore control disposition of, a full-title reversionary interest in the right-of-way. Section 912 applies "[w]henever" a court or Act of Congress declares the forfeiture or abandonment of a right-of-way originally "granted to any railroad company" using "public lands of the United States," 43 U.S.C. 912, including those granted under the 1875 Act. See H.R. Rep. No. 217, 67th Cong., 1st Sess. 1 (1921) (*1921 House Report*) ("most" of the rights-of-way affected by Section 912 were granted under "[t]he act of March 3, 1875").

In enacting the 1922 Act, Congress concluded that the United States' title to forfeited right-of-way lands (including lands forfeited by abandonment) should be dealt with in different ways, depending on the circumstances. Congress determined that there is a "public interest" in establishing roads, granting municipalities such lands "within the[ir] limits," *1921 House Report* 2, and retaining the government's potentially "very valuable" interest in "oil, gas, and mineral rights" in the lands covered by the right-of-way, 61 Cong. Rec.

4496 (1921).[7] Congress therefore provided that the United States would transfer or reserve its title as necessary to further those public purposes. Congress otherwise concluded (at that time) that it "seemed" that other forfeited rights-of-way lands would have "little or no value" and should be transferred to those who acquired parcels containing them. *1921 House Report* 2. To implement this plan, Section 912 directs that when a railroad company has ceased "use and occupancy" of right-of-way lands by a forfeiture or abandonment that has been "declared or decreed by a court of competent jurisdiction or by Act of Congress," then, upon such decree or Act, "all right, title, interest, and estate of the United States in said lands shall * * * be transferred to and vested in any person" owning the legal subdivision occupied by the right-of-way lands, unless a public highway is established within a year on the land or the land is within a municipality. 43 U.S.C. 912.

By providing for the post-abandonment conveyance of rights-of-way crossing private lands to municipalities and for public highways, and by otherwise affirmatively "transfer[ring]" them to owners of the under-

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[7] The Act of May 21, 1930, ch. 307, 46 Stat. 373-374, authorized Interior to lease deposits of oil and gas owned by the United States that were located beneath federally granted rights-of-way. In 1976, the Interior Board of Land Appeals concluded that a patent to a land parcel crossed by a right-of-way granted under the 1875 Act confers the subsurface mineral rights under the right-of-way, where the mineral rights were not expressly reserved in the patent. *Amerada Hess Corp.*, 24 I.B.L.A. 360 (1976). The question of subsurface mineral rights is not at issue in this case and the Board's conclusion thus does not affect the disposition of this case. Cf. Pet. App. 76 (patent issued pursuant to 16 U.S.C. 485); 16 U.S.C. 485 (authorizing transfer of nonmineral lands).

lying land, Section 912 again demonstrates Congress's understanding that the United States retains substantial interests in those rights-of-way. Petitioners discount (Br. 40-49) this conclusion for several reasons, none of which is persuasive.

Petitioners argue (Br. 42) that Congress could not have foreseen the need for Section 912's distribution rules in 1875. But *Schulenberg*—which holds that a judicial or legislative act is required to declare a federal grant forfeited for failing to meet a condition subsequent—was decided on January 25, 1875, before Congress enacted the 1875 Act in March. Congress thus reasonably could have anticipated that the United States would have to make decisions about what to do with forfeited lands, which were contemplated by Section 4 of the 1875 Act, 43 U.S.C. 937, in situations in which the rail line was never built.

Moreover, petitioners' argument fails to recognize that no provision of the 1875 Act expressly addresses forfeiture of any section of right-of-way for which a company has already built, but then abandoned, its rail line. Instead, this Court has recognized that such lands may be forfeited because of an "*implied* condition that [the right-of-way] be devoted to [statutory] uses," which, when breached, "subjects the grant to a forfeiture *by the United States*." *Steinke*, 261 U.S. at 132 (emphases added). The Court has thus held that private individuals cannot themselves enforce such a forfeiture, nor can they obtain "any interest in the tract" or "a right to use it for private purposes, without the sanction of the United States." *Id.* at 132-133. Section 912 simply provided (until 1988) the authorization of the United States to convey forfeited right-of-

way land to private owners if not within a municipality or needed for a highway.

Petitioners argue (Br. 42-45) that Section 912 should be disregarded because it was enacted in light of this Court's recognition in *Rio Grande Western Railway* v. *Stringham*, 239 U.S. 44, 47 (1915), that an 1875 Act right-of-way is "a limited fee, made on an implied condition of reverter," but that *Great Northern* subsequently concluded that such a right-of-way is in the nature of an "easement." Petitioners' response, however, does not address the fact that in 1906 and 1909—well before *Stringham*—Congress concluded that the United States retains a "full title" reversionary interest upon the forfeiture of an 1875 Act right-of-way. See 43 U.S.C. 940. Section 940 provided for one method of disposing of the United States' interest in the land to which it had "full title" after a forfeiture has been declared by specifying that the forfeiture shall inure to the benefit of the patentee of the parcel containing it. Section 912 simply redefined on an ongoing basis how the United States would dispose of or retain such an interest. Moreover, as explained below, *Great Northern* involved a railroad's right to minerals as against the United States while a right-of-way was still in effect. It addressed neither the extent of the United States' reversionary interest in a right-of-way upon forfeiture nor the resulting rights of the United States as against the patentee with respect to the right-of-way. See pp. 45-53, *infra*.

c. Finally, in 1988, Congress once again altered its policy governing disposition of the United States' interests previously governed by Section 912. Congress specified that, "[c]ommencing October 4, 1988," "all rights-of-way of the type described in section 912

* * * shall remain in the United States upon the[ir] abandonment or forfeiture," except for lands on which highways are established within one year. 16 U.S.C. 1248(c). Section 1248(c) thus demonstrates that Congress has continued to recognize the United States' reversionary interest in, and its right to control the disposition of, 1875 Act rights-of-way.[8]

d. Despite Congress's repeated enactments confirming the United States' reversionary interest in 1875 Act rights-of-way, petitioners contend (Br. 28-30) that their "easement" theory is supported by Interior regulations stating that private owners of a parcel surrounding an 1875 Act right-of-way take the large parcel subject only to the railroad's right of "*use and possession.*" Br. 28-29 (citing 43 C.F.R. 2841.1(a) (1976)) (emphasis added by petitioner). But those regulations do not define the scope of the United States' underlying interest in the right-of-way or reject a federal reversionary interest. Indeed, a 1904 regulation not cited by petitioners states that the aforementioned right of use and possession includes "a reversionary interest remaining in the United States" that, according to the regulation, was to be "conveyed" by the United States to the larger parcel's patent holder. *Regulations Concerning Railroad Right of Way over the Public Lands*, 32 Pub. Lands Dec. 481, 482-483 (1904). That regulation affirmative-

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[8] Additional statutes reflect Congress's conclusion that it may authorize transfers of rights-of-way. See 23 U.S.C. 316 (enacted 1958) (authorizing "any" railroad to convey "any part of its right-of-way" acquired by federal grant to state transportation department); 43 U.S.C. 913 (enacted 1920) (authorizing "[a]ll railroad companies" granted rights-of-way through public lands to convey portions of rights-of-way for use as "public highway or street").

ly recognizes the government's ongoing interest and appears to anticipate (somewhat like the later-enacted Section 940) ensuring transfer of that interest to private parties.

Since 1912, *Stalker* (as reinforced by *Steinke* in 1923) has made clear that a patent for a parcel surrounding an 1875 right-of-way conveys no title to the right-of-way. Interior's decisions have not been entirely clear as the agency attempted to apply the "easement" and limited "fee" terminology used by the courts. But statutes enacted from 1906, through 1922, to 1988 have made clear that the United States retains a reversionary interest and resumes full title upon the forfeiture or abandonment of a right-of-way.

e. Petitioners suggest (Br. 23, 34) that *Smith* v. *Townsend*, 148 U.S. 490 (1893), supports their view that the government lacks a reversionary interest in 1875 Act rights-of-way. That is incorrect. *Smith* involved a different statute and addressed competing claims by two homesteaders to a parcel in Oklahoma either near or traversed by a railroad right-of-way through Indian lands. *Id.* at 491-492, 498, 502. That right-of-way was granted under an 1884 Act that specified that, if the railroad ceased using the right-of-way for operating its railroad and its telegraph and telephone lines, the right-of-way would revert directly to the Tribe from which it was taken. *Id.* at 498. An 1889 statute, however, converted all "lands acquired by the United States" by treaty with the Tribe into "the public domain" and further directed that those lands then be "disposed of" under homestead acts. *Id.* at 493 (citation omitted). The Court noted (in dictum) that, if the railroad were to abandon its "use of that right of way," "the full title to that right of way would

vest in the patentee of the land." *Id.* at 499. That passing observation appears to have been based at least in part on the fact that the Tribe had a direct reversionary interest and, when it obtained the land, the United States by statute elected to dispose of such lands to homesteaders. Moreover, the 1884 right-of-way statute, which the Court characterized as granting an easement, not only provided for the right-of-way's reversion to the Tribe, it also contained provisions that strictly regulated non-Indian conduct within the right-of-way and prohibited the railroad from advising or assisting any effort to "change the present tenure of the Indians in their lands" or to secure such lands or occupancy therein; and ultimately provided for the right-of-way to revert to the Tribe. *Id.* at 498. Those distinctive provisions bear no resemblance to the 1875 Act.

f. Owners of parcels crossed by 1875 Act rights-of-way could have no settled and reasonable expectation to obtain the right-of-way land upon its forfeiture or abandonment by a railroad. The rights-of-way are marked on plats at local land offices, 43 U.S.C. 937; most rail lines have been physically present for many decades (in this case about one century); the Court's decisions in *Stalker* and *Steinke* show that no interest in the right-of-way is passed by patent; and Congress has repeatedly enacted statutes identifying the United States' reversionary interest in those rights-of-way. Any such subjectively held belief would be unreasonable. See *Steinke*, 261 U.S. at 131-132; cf. *United States* v. *California*, 332 U.S. 19, 39-40 (1947) (The government "holds its [land] interests here as elsewhere in trust for all the people" and those interests

cannot be divested under "principles similar to laches, estoppel or adverse possession.").

B. *Great Northern* Did Not Address The Question Of Reverter To The United States And Does Not Control This Case

Petitioners primarily rely (Br. 18-28) on this Court's 1942 decision in *Great Northern* to support their ultimate contention (Br. 31-33) that 1875 Act rights-of-way are "[no]thing but common law easements," which, at common law, would terminate when abandoned and leave a full fee interest in the holder of the land patent for the parcel containing the right-of-way. We acknowledge that there is language in the *Great Northern* opinion and the government brief in that case that lends support to petitioners' position. But *Great Northern* did not address a question concerning the reversionary interests of the United States, and it does not resolve this case.

Great Northern addressed the distinct question, in the context of a suit brought by the United States against a railroad, "whether [the railroad] has any right to the oil and minerals underlying its right of way acquired under the [1875 Act]." 315 U.S. at 270. The Court was not presented with any question about property rights of any third parties to whom the government subsequently conveyed the tracts crossed by the right-of-way, and the government informed the Court that that "additional question" would implicate different considerations. Gov't Br. 10 n.4, *Great Northern*, *supra* (No. 41-149) (*GN* Br.).[9] When viewed

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[9] Indeed, because of pleading issues, the Court at the close of its opinion limited its judgment to situations where the government

in context, *Great Northern* held only that the 1875 Act confers on a railroad "no right to the underlying oil and minerals" because, with respect to such subsurface rights, and as against the United States, its "right of way is but an easement." 315 U.S. at 279.

It has long been understood that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994) (quoting *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.)), and not as "referring to quite different circumstances that the Court was not then considering," *Illinois* v. *Lidster*, 540 U.S. 419, 424 (2004). Accord, *e.g.*, *Bramwell* v. *United States Fid. & Guar. Co.*, 269 U.S. 483, 489 (1926). That principle has particular force here, because the text Congress enacted in 1875 employs only the term "right of way," not "easement." Cf. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341-342 (1979) (the language of an opinion is not to be "parsed as though we were dealing with language of a statute"). The Court's holding in *Great Northern* does not foreclose the conclusion that the right-of-way, even if labeled as an "easement," can in other respects carry characteristics of a limited fee and can in any event include an implicit condition of reverter to the United States if the right-of-way is abandoned.

1. The government's arguments in *Great Northern* do not suggest such issues were before the Court. The government argued that the 1875 Act's text, its historical context, Congress's subsequent enactment of 43 U.S.C. 940 in 1906 and 1909, and Interior's per-

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had "retained title to [the relevant] tracts of land" crossed by the right-of-way. *Great Northern*, 315 U.S. at 279-280.

tinent decisions showed that the Act's grant of a right-of-way "is in the nature of an easement" that does not convey subsurface minerals to the railroad. *GN* Br. 8, 29 (emphasis added; capitalization omitted); see *id.* at 8-34. It explained that the Court's decision in *Stringham* was not controlling and that other decisions describing such rights as "limited fees" did not address the railroad's ownership of mineral rights. *Id.* at 31-34. The government additionally argued that, even if an 1875 Act right-of-way were viewed as a "limited fee," it would not convey such minerals to the railroad. *Id.* at 35-37.

In arguing that the 1875 Act's right-of-way grant was in the nature of an "easement," the government did not attempt to discuss comprehensively what that label would mean in contexts not involving claims to mineral rights as between the railroad and the United States—such as with respect to reversionary interests of the United States or the respective interests of the United States and the patentees of land through which the right-of-way passes if the right-of-way was later abandoned by the railroad. It acknowledged, for instance, the "fact" that the Act's right-of-way had "some of the attributes of a fee"—including "'perpetuity and exclusive use and possession,'" and "'the remedies of the fee'" and "'corporeal'" property—but explained that those traits were consistent with describing the railroad's right-of-way as an "easement." *GN* Br. 36-37 (quoting *United States Trust Co.*, 172 U.S. at 183). The government likewise stated that "[a] fee may * * * exist in an easement" granted "on an implied condition of reverter." *Id.* at 36 (emphasis and citations omitted). And the government explained that it was "well settled that an

easement may be held in fee determinable," *ibid.* (citing, *e.g.*, *Easements* § 16, at 14; *Hall* v. *Turner*, 14 S.E. 791, 795 (N.C. 1892)), which can take the form of a defeasible fee subject to a "condition subsequent" that, if triggered, gives the entity that conveyed the fee the power to terminate it and reacquire its original fee interest by reverter. See 1 *Restatement* §§ 16, 24 & cmts. b, d and g, at 43, 59-61, 63 (1936); 2 *Restatement* §§ 154 & cmt. a, 155 & cmt. c, at 525-526, 532-534 (1936); see *Carver* v. *Jackson*, 29 U.S. (4 Pet.) 1, 90 (1830) (Story, J.) (An "estate in fee might be defeasible, and determinable upon a subsequent contingency."); *Easements* § 16, at 14 ("An easement may be held in fee."). The government likewise explained that the case did not raise the "additional question" whether persons who have subsequently acquired "legal subdivisions crossed by railroad rights of way" would "succeed[] to the mineral rights of the Government," explaining that the Court's resolution of that issue would need to be based on additional analysis. *GN* Br. 10 n.4.

2. The Court in *Great Northern* largely adopted the government's arguments in holding that the 1875 Act granted the railroad company an "easement" and thus provided it "no right to the underlying oil and minerals." 315 U.S. at 279. Although the Court did not discuss how its decision should apply outside the context of mineral rights as between the railroad and the United States, *Great Northern* is fairly read as resolving that issue without determining whether the Act's rights-of-way must be interpreted as having only the effects of a bare common-law easement in every respect.

a. The Court in *Great Northern*, for instance, was heavily influenced by a significant "change in Congressional policy" that by 1872 ended generous land grants to subsidize railroads. 315 U.S. at 273-275. That change was important to the question whether Congress intended in 1875 to provide another subsidy—"mineral riches" (*id.* at 275)—to railroads by granting them subsurface mineral rights. On that question, the Court had little reason to conclude that Congress intended a new form of subsidy. The Court, for example, quoted an 1872 legislative colloquy indicating that an earlier right-of-way bill analogous to the 1875 Act "grant[ed] no land to any railroad," *id.* at 271 n.3 (citation omitted), which reflected that that bill (unlike its previously debated direct predecessor) no longer contained a checkerboard land subsidy and merely granted land for rights-of-way. See *Roberts* 154-157 (discussing legislative history). The Court likewise explained that the 1875 Act's purpose did not warrant interpreting its right-of-way grant to the railroad as "conveying a fee title to the land and the underlying minerals." 315 U.S. at 272.

The nature of a *surface* interest in the right-of-way land needed to operate a railroad serving the public, however, is quite different. Such grants—defined in physical terms, existing in perpetuity, and exclusive—were necessary to accomplish the vital public purpose of developing a meaningful rail transportation system in the undeveloped "Western vastnesses," because public lands were immune from eminent domain and adverse possession. *Great Northern*, 315 U.S. at 274. Moreover, the right-of-way grant is forfeited under the 1875 Act, as under predecessor acts, if the railroad ceases to use it for the functions specified by Con-

gress. See pp. 23-24, 34-35, *supra*. The grant thus is contingent on the railroad's *ongoing* provision of public benefits.

b. *Great Northern* also stated that the 1875 Act "clearly grants only an easement, and not a fee" that could confer mineral rights. 315 U.S. at 271. The Court's statutory analysis in this regard is not entirely clear. The Court stated that the article "the" in "the right of way" suggests merely a right of passage, *ibid.*, but that precise phrase appeared in numerous pre-1872 right-of-way provisions deemed to bear hallmarks of limited fees. See pp. 18-19, *supra*. The Court noted that Section 2 forbids a railroad from preventing any other railroad company from the "*use and occupancy*" of a canyon, pass, or defile for its railroad "*in common*" with the first railroad located, 315 U.S. at 271, but that provision simply imposes a statutory condition that the railroad granted the right-of-way must allow shared use and occupancy by other railroads; it does not speak to the nature of the property interest of the railroad or the United States in the right-of-way. The Court concluded that Section 4 was "wholly inconsistent with the grant of a fee" and reflected "intent to convey an easement" because it directed that public lands "*over*" which the right-of-way passes shall be disposed "*subject to*" the right-of-way, *ibid.*, but this Court previously used such terms differently in connection with earlier right-of-way acts. See pp. 26-28, *supra*. In any event, the Court did not address any reversionary interests of the United States or its rights in rights-of-way as against third parties.

Indeed, *Great Northern*'s reliance on Section 940's description of an 1875 Act right-of-way as an "ease-

ment" to support its holding, 315 U.S. at 276, demonstrates that the Court could not have used the term "easement" to mean that such rights-of-way must be treated as common-law easements in all respects—and in particular, to deny a right of reverter in the United States. As discussed, Section 940 in fact confirms that, when the government has conveyed title to the surrounding parcel into private hands, it is the *government* that obtains "full title" to the land embraced by the right-of-way, free of the "easement" granted to the railroad, upon forfeiture by the railroad. See pp. 35-38, *supra*.[10]

Had the Court intended to address the question of a reverter to the United States upon a railroad's forfeiture or abandonment of its right-of-way, the Court presumably would have discussed the 1922 Act, which vests "all right, title, interest, and estate" in forfeited or abandoned 1875 Act rights-of-way in the United States. 43 U.S.C. 912. *Great Northern* simply had no

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[10] The Court's subsequent decision in *Union Pacific* reflects the Court's recognition that labels such as "easement" and "limited fee" used in prior decisions to describe the statutory term "right of way" should not drive the outcome in all contexts. The Court there declined to conclude that a railroad right-of-way granted under a pre-1872 right-of-way statute necessarily conveyed mineral rights simply because prior decisions had described the-right-of-way as a "limited fee." 353 U.S. at 118-119. Instead, the Court construed the relevant statute and its prior decisions to hold that the right-of-way provided no mineral rights. *Id*. at 114-117, 120. Application of that interpretative approach, which examines the relevant right-of-way context and is not strictly tied to prior characterizations of the statutory term "right of way," confirms that the United States retains a reversionary interest in the right-of-way forfeited by the railroad in this case.

occasion to do so. Nor did the United States discuss the 1922 Act in its brief.

c. That understanding of *Great Northern* is reinforced by the fact that *Great Northern* cited both *Stalker* and *Steinke* favorably. 315 U.S. at 272 & n.4. The Court apparently perceived no inconsistency between (1) its conclusion that, as against the United States, an 1875 Act right-of-way should be viewed as granting the railroad company an "easement" that did not convey "underlying oil and minerals" to the railroad, *id.* at 279, and (2) the holdings in *Stalker* and *Steinke*, which establish that Interior's approval of a railroad's profile map "withdraw[s] the land so granted from the market," *Stalker*, 225 U.S. at 153, and is "the equivalent of a patent" that makes any subsequently issued patent for the larger parcel "'inoperative to pass title'" to the right-of-way to third parties, *Steinke*, 261 U.S. at 125, 131 (quoting *Stalker*, 225 U.S. at 154). See pp. 28-31, *supra*.

Petitioners erroneously assert (Br. 52) that *Great Northern* "effectively overruled" this Court's 1875 Act decision in *Stalker sub silentio*. *Great Northern* concluded that (1) the Court's prior decisions concerning pre-1872 right-of-way statutes did not "involve[] the problem of rights to subsurface oil and minerals" and were "not controlling" in the mineral-rights dispute before it, and (2) language in *Stringham* describing an 1875 Act right-of-way as a "limited fee" (which was not necessary to its holding) was likewise "not regard[ed] * * * as controlling." 315 U.S. at 278-279 (explaining that *Stringham* affirmed a state-court judgment that had awarded the plaintiff railroad a "right of way" because that judgment "describe[d] the right of way in the exact terms of the right-of-way act,

and evidently uses those terms with the same meaning they have in the act"). Neither conclusion is inconsistent with *Stalker*.

Moreover, it is well settled that "*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what [the Court has] done.'" *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989)); see, *e.g.*, *United States* v. *Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1841 (2012). That principle has particular force here. After *Stalker* (1912), this Court applied *Stalker*'s holding in *Steinke* in 1923, see pp. 29-31, *supra*, and Congress has enacted multiple statutes confirming that the United States retains its reversionary interest in abandoned 1875 Act rights-of-way, see pp. 35-42, *supra*. Altering this Court's interpretation of the legal effect of Interior's Section 4 approvals in *Stalker* and *Steinke* nearly a hundred years after those decisions—and in derogation of a number of statutes, enacted before and after those decisions, that confirm the United States' reversionary interests—"would ill serve the goals of 'stability' and 'predictability' that the doctrine of statutory *stare decisis* aims to ensure." *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2641 (2011) (quoting *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 16 U.S.C. 1248(c) provides:

Easements and rights-of-way

(c) Abandoned railroad grants; retention of rights

Commencing October 4, 1988, any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in section 912 of title 43, shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such section.

2. 43 U.S.C. 912 provides:

Disposition of abandoned or forfeited railroad grants

Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year

after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: *Provided*, That this section shall not affect conveyances made by any railroad company of portions of its right of way if such conveyance be among those which have been or may after March 8, 1922, and before such forfeiture or abandonment be validated and confirmed by any Act of Congress; nor shall this section affect any public highway on said right of way on March 8, 1922: *Provided further*, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same.

3. 43 U.S.C. 913 provides:

Conveyance by land grant railroads of portions of rights of way to State, county, or municipality

All railroad companies to which grants for rights of way through the public lands have been made by Congress, or their successors in interest or assigns, are authorized to convey to any State, county, or municipality any portion of such right of way to be used as a public highway or street: *Provided*, That no such conveyance shall have the effect to diminish the right of way of such railroad company to a less width than 50 feet on each side of the center of the main track of the railroad as now established and maintained.

4. 43 U.S.C. 934 (Section 1 of the 1875 Act) provides:

Right of way through public lands granted to railroads

The right of way through the public lands of the United States is granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each

station, to the extent of one station for each ten miles of its road.

5. 43 U.S.C. 935 (Section 2 of the 1875 Act) provides:

Several roads through canyons

Any railroad company whose right of way, or whose track or roadbed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, on the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway located therein on March 3, 1875, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructted at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

6. 43 U.S.C. 936 (Section 3 of the 1875 Act) provides:

Condemnation of private land

The legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section 3 of the act entitled "An Act to amend an Act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July 1, 1862,'" approved July 2, 1864 [43 U.S.C. 942-3].

7. 43 U.S.C. 937 (Section 4 of the 1875 Act) provides:

Filing profile of road; forfeiture of rights

Any railroad company desiring to secure the benefits of sections 934 to 939 of this title, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the officer, as the Secretary of the Interior may designate, of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall

not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

8. 43 U.S.C. 938 (Section 5 of the 1875 Act) provides:

Lands excepted

Sections 934 to 939 of this title shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands especially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by Act of Congress passed prior to March 3, 1875.

9. 43 U.S.C. 939 (Section 6 of the 1875 Act) provides:

Alteration, amendment, or repeal

Congress reserves the right at any time to alter, amend, or repeal sections 934 to 939 of this title, or any part thereof.

10. 43 U.S.C. 940 provides:

Forfeiture of rights where railroad not constructed in five years after location

Each and every grant of right of way and station grounds made prior to February 25, 1909, to any railroad corporation under sections 934 to 939 of this title, where such railroad had not been constructed and the period of five years next following the location of said road, or any section thereof, had on that date expired,

is declared forfeited to the United States, to the extent of any portion of such located line then remaining unconstructed, and the United States resumes the full title to the lands covered thereby free and discharged from such easement, and the forfeiture declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land conveyed by the United States prior to such date subject to any such grant of right of way or station grounds: *Provided*, That no right of way on which construction was progressing in good faith on February 25, 1909, shall be in any wise affected, validated, or invalidated, by the provisions of this section.

11. Act of July 1, 1862, ch. 120, 12 Stat. 489, as amended by the Act of July 2, 1864, ch. 216, § 4, 13 Stat. 358 (with text added and ~~deleted~~ by amendment indicated), provides in pertinent part:

* * * * *

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to [The Union Pacific Railroad Company] for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings,

workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made.

SEC. 3. *And be it further enacted*, That there be, and is hereby, granted to the said company, for the purpose of 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, every alternate section of public land, designated by odd numbers, to the amount of ~~five~~ ten alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ~~ten~~ twenty miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preëmption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

* * * * *

12. Act of July, 2, 1864, ch. 216, 13 Stat. 356, provides in pertinent part:

* * * * *

SEC. 3. *And be it further enacted*, That the Union Pacific Railroad Company, and all other companies provided for in this act and the act to which this is an amendment, be, and hereby are, empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of its centre line, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station house[s], or any other structures required in the construction and operating of said road. And each of said companies shall have the right to cut and remove trees or other materials that might by falling encumber its road-bed, though standing or being more than one hundred feet therefrom. And in case the owner or claimant of such lands or premises and such company cannot agree as to the damages, the amount shall be determined by the appraisal of three disinterested commissioners, who may be appointed upon application by any party to any judge of a court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners, in their assessments of damages, shall appraise such premises at what would have been the value thereof if the road had not been built; and upon return into court of such appraisement, and upon the payment to the clerk thereof of the amount so

awarded by the commissioners for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved by said assessment may, within thirty days, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary in the construction of its road. And said party appealing shall give bonds with sufficient surety or sureties, for the payment of any costs that may arise upon such appeal. And in case the party appealing does not obtain a more favorable verdict, such party shall pay the whole cost incurred by the appellee, as well as its own. And the payment into court for the use of the owner or claimant, of a sum equal to that finally awarded shall be held to vest in said company the title of said land, and the right to use and occupy the same for the construction, maintaining, and operating of the road of said company. And in case any of the lands to be taken as aforesaid shall be held by any person residing without the territory, or subject to any legal disability, the court may appoint a proper person who shall give bonds with sufficient surety or sureties, for the faithful execution of his trust, and who may represent in court the person disqualified or absent as aforesaid, when the same proceeding shall be had in reference to the appraisement of the premises to be taken, and with the same effect as have been already described. And the title of the company to the land taken by virtue of this act shall not be affected nor impaired by reason of any failure by any guardian to discharge

faithfully his trust. And in case it shall be necessary for either of the said companies to enter upon lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purpose of its said railroad, and may institute proceedings in manner described for the purpose of ascertaining the value of, and acquiring a title to, the same; and the court may determine the kind of notice to be served on such owner or owners, and may in its discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claim to damages against said company shall be barred. It shall be competent for the legal guardian of any infant, or any other person under guardianship, to agree with the proper company as to damages sustained by reason of the taking of any lands of any such person under disability, as aforesaid, for the use as aforesaid; and upon such agreement being made, and approved by the court having supervision of the official acts of said guardian, the said guardian shall have full power to make and execute a conveyance thereof to the said company which shall vest the title thereto in the said company.

* * * * *

SEC. 18. *And be it further enacted*, That the Burlington and Missouri River Railroad Company, a corporation organized under and by virtue of the laws of the State of Iowa, be, and hereby is, authorized to extend i[t]s road through the Territory of Nebraska from the point where it strikes the Missouri River,

south of the mouth of the Platte River, to some point not further west than the one hundredth meridian of west longitude, so as to connect, by the most practicable route, with the main trunk of the Union Pacific Railroad, or that part of it which runs from Omaha to the said one hundredth meridian of west longitude. And, for the purpose of enableing [per original] said Burlington and Missouri River Railroad Company to construct that portion of their road herein authorized, the right of way through the public lands is hereby granted to said company for the construction of said road. And the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof. Said right of way is granted to said company to the extent of two hnndred feet where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, depots, machine shops, switches, side-tracks, turn-tables, and water-stations. And the United States shall extinguish, as rapidly as may be, consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this section and required for the said right of way and grant of land herein made.

* * * * *

13. Act of July 2, 1864, ch. 217, 13 Stat. 365, provides in pertinent part:

* * * * *

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said "Northern Pacific Railroad Company," its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water-stations; and the right of way shall be exempt from taxation within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill.

SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the "Northern Pacific Railroad Company," its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of

public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided*, *further*, That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a

like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided: *And provided, further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided, further*, That no money shall be drawn from the treasury of the United States to aid in the construction of the said "Northern Pacific Railroad."

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14. Act of Mar. 3, 1871, ch. 122, 16 Stat. 573, provides in pertinent part:

* * * * *

SEC. 8. That the right of way through the public lands be, and the same is hereby, granted to the [Texas Pacific Railroad Company] for the construction of the said railroad and telegraph line, and the right, power, and authority is hereby given to said company to take, from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof. Said right of way is granted to said company to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands; and there is also hereby granted to said company grounds for stations, buildings, workshops, wharves, switches, side-tracks, turn-tables, water-stations, and such other structures as may be necessary for said railroad, not exceeding forty acres of land at any one point.

SEC. 9. That for the purpose of aiding in the construction of the railroad and telegraph line herein provided for, there is hereby granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as such line may be adopted by said company, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have *not have* been sold, reserved, or otherwise disposed of by the United States, and to which a pre- emption or homestead claim may not have attached at the time the line of said road is definitely fixed. In case any of said lands shall have been sold, reserved, occupied, or pre-empted, or otherwise disposed of, other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named, and not including the reserved numbers. If, in the too near approach of the said railroad line to the boundary of Mexico, the number of sections of land to which the company is entitled cannot be selected immediately on the line of said railroad, or in lieu of mineral lands excluded from this grant, a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections nearest the line of said railroad may be selected as above provided; and the word "mineral," where it occurs in this act, shall not be held to include iron or coal: *Provided*, *however*, That no public lands are hereby granted within the

State of California further than twenty miles on each side of said road, except to make up deficiencies as aforesaid, and then not to exceed twenty miles from the lands originally granted. The term "ship's channel," as used in this bill, shall not be construed as conveying any greater right to said company to the water front of San Diego bay than it may acquire by gift, grant, purchase, or otherwise, except the right of way, as herein granted: *And provided further*, That all such lands, so granted by this section to said company, which shall not be sold, or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre- emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted.

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