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REAL ESTATE PRACTICE GROUP | MARCH 2014

Otten Johnson Alert -

Railroad Rights-of-Way Are Not Forever

Railroad Rights-of-Way Granted Under 1875 Act are Easements that Terminate When Abandoned, Making Way for Possible Takings Claims by Owners of Underlying Land

Over the course of 101 years, the federal government granted railroad companies rights-of-way stretching thousands of miles across the United States under the General Railroad Right-of-Way Act of 1875 (the "1875 Act"). These rights-of-way served an integral role in the country's economic development and westward expansion. Later, as railroad use dwindled, railroad companies frequently abandoned these rights-of-way. When this occurs, what happens to the right-of-way? Does it revert back to the United States to repurpose it—for example, as a recreational trail? Or does the abandoned right-of-way go to the private party who acquired the land underneath it? If it goes to the private party, use by the federal government might constitute a taking under the Fifth Amendment.

In *Marvin M. Brandt Revocable Trust et al. v. United States*, 575 U.S. ____ (2014), decided March 10, 2014, the U.S. Supreme Court ruled that the right-of-way goes to the party who owns the land underneath it. The Supreme Court defined the nature of the interest granted by the 1875 Act as an easement, and not, as the United States argued, a limited fee interest made on an implied condition of reverter. Consequently, under common law, the right-of-way terminates upon abandonment, leaving the underlying land unburdened by the right-of-way.

This ruling could have significant implications for the federal government and private landowners. Large swaths of land are impacted by the 1875 Act, as the rights-of-way were up to 200 feet wide and stretched for miles. In *Marvin*, for example, the portion on the plaintiff's property alone was 200 feet wide, one-half mile long, and part of a 66-mile right-of-way. The federal government has repurposed many of these abandoned rights-of-way—most notably as recreational trails pursuant to the National Trails Systems Act, more commonly known as the Rails-to-Trails Act. But under *Marvin* the federal government is not entitled to do so because the rights-of-way extinguished upon abandonment. As a result, a private landowner whose land underlies these areas may have a takings claim under the

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Fifth Amendment. The success of such claim would depend on a number of factors, including whether the patent to the underlying land reserved an interest in the right-of-way to the United States. Nonetheless, the aggregate amount of takings claims related to Rails-to-Trail Act conversions alone is estimated to be hundreds of millions of dollars.

For an expanded examination of this topic and discussion of *Marvin*, please see the April 16, 2014 edition of the *Colorado Real Estate Journal*.

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