ENDANGERING RAILS TO TRAILS

Recent Supreme Court ruling is expected to affect the future of this valuable program

BY LARRY STEVENS, SR/WA

The impulse to create the Rails-to-Trails Program in the United States came about from a desire to construct a nationwide network of recreational trails from former rail lines and connecting corridors to facilitate healthier communities. Today, there are more than 1,600 preserved pathways that form the backbone of a growing trail system that spans communities across the country. With their level grades and wide rights of way, rail trails are easily accessible and often beautiful and scenic. As a result, the Rails-to-Trails Program has become a vital part of the supply of urban, suburban and rural recreational offerings in the nation.

However, on March 10th, the U.S. Supreme Court decided the case of Marvin M. Brandt v. United States in a landmark ruling that will seriously impact this important network of recreational trails. The case involved a single property owner protesting the right to take part of his property for a rail-trail project in Wyoming on a rail line that was abandoned in 1996. The case hinges on whether the Federal government retains an interest in railroad rights of way that were created by the Federal General Railroad Right of Way Act of 1875, after railroad activity on the corridor has ceased. But what does it mean for the future of this valuable recreational system?

A Shift in Demand

The history of rails-to-trails begins with America's westward expansion in the second half of the 19th century. To serve the burgeoning nation and its growing economy, Congress gave public land to private railroads as an inducement to build a transcontinental transportation network. Not every project was successful. Over time, if certain routes suffered from a loss of patrons, the railroad companies abandoned them. Furthermore, by the 1950s and 1960s, transportation began to shift. Highway construction under the Interstate Highway Program was in full swing, and antiquated and costly federal regulations of railroads and increased competition from trucking companies eroded the rail industry's dominance. By the early 1970s, nearly a quarter of the nation's railroad lines were operating under bankruptcy protection, and 38,000 miles of rights of way had become unprofitable and were abandoned. Stagnation in innovation and deferred maintenance only exacerbated the industry's problems.

It was under this bleak cloud that Congress passed the Staggers Rails Act of 1980, which deregulated the railroads and made it easier for them to abandon non-operating lines. Although railroads were able to streamline their operations and diversify successfully, this deregulation triggered a mass wave of rail line abandonments. By 1990, the deterioration and subsequent abandonments escalated to a staggering 65,000 miles.

The Birth of Railbanking

Congress was spurred into action because of concern over this dramatic industry decline and the potential effects that losses to the railroad infrastructure would have over time. The solution involved preserving these abandoned corridors for potential future transportation uses. As published in the History of Railbanking, "In 1983, Congress amended Section 8(d) of the National Trails System Act to create a program called 'railbanking,' a method by which corridors that would otherwise be abandoned [could] be preserved for future rail use by converting them to interim trails."

The question of whether corridor rights acquired prior to the General Railroad Right of Way Act of 1875 were transferrable came into question when it was asked whether MCI Telecommunications Corporation (MCI) or Southern Pacific Railroad was required to obtain additional right of way grants for fiber optic lines. The Acting Solicitor for the Interior Department rendered an opinion that addressed two sets of laws affecting railroad rights of way. The first was a series of charters that were granted to individual railroad enterprises for specific corridors between 1850 and 1871. The second was the Railroad Act of 1875. In the first instance, the Acting Solicitor opined that the Supreme Court ruling in Northern Pacific Railway v. Townsend was "controlling precedent" on pre-1871 rights and these rights, with the exception of mineral rights, were deemed fee ownership. In the case of the Railroad Act of 1875, the Acting Solicitor "acknowledged that the railroads obtained an 'easement,' but most emphatically not 'an ordinary common-law easement.'" Instead, the Acting Solicitor said, the interest "includes . . . exclusive use of the surface" and is "tantamount to fee ownership, including the right to use and authorize others to use (where not inconsistent with railroad operations) the surface, subsurface and airspace." With the legal precedents in hand, the Federal government initiated the Rails-to-Trails Program, which is administered under the non-profit Washington-based Rails-to-Trails Conservancy (RTC).

The Brandt vs. U.S. Case

This came to a halt when Marvin Brandt challenged the "the right to take" on his 83-acre parcel that lies along the corridor of the Medicine Bow Rail Trail, a 31 parcel, 66-mile long rails-to-trails project. All the affected owners, save Mr. Brandt, acquiesced to the planned project, and it progressed while Mr. Brandt's legal challenge wended its way through the court system. Mr. Brandt, represented by the Mountain States Legal Foundation, contended that under the Railroad Act of 1875, the easement rights were restricted to a specific purpose and that the rights granted expired with the railroad's abandonment of the corridor in 1996.

The Medicine Bow Rail Trail is a 31 parcel, 66-mile long rails-to-trails project on an abandoned rail line that runs through Marvin Brandt's property.

The Court rejected the government's argument for an "implied reversionary interest" on the abandonment, voting 8-1, with Justice Sonya Sotomayor as the lone dissenter. Chief Justice John Roberts, who wrote the majority opinion, fell back on a 1942 case (Northern Railway Co. v. United States) that rejected the railroad's plan to drill for oil on its right of way in Montana. "At that time, Roberts said, the government argued that Congress 'granted an easement and nothing more.' Just as the Court said then, the easement included no right 'to the underlying oil and minerals,' today it provides no right for continued use of the right of way for hikers and bicyclists." The court emphasized that the scope of its opinion is narrow and that it applied only to the rights granted to the Brandt's under the terms of the Railroad Act of 1875, and further "noted that conveyances made pursuant to pre-1871 charter statues might turn out differently . . . ."

Future Expectations

The ruling means that thousands of miles of existing rail-to-trails and railbanked rights of way may be open to Fourth Amendment challenges for compensation. That means as many as 10,000 in-process parcels in 30 states are now in legal limbo. By upsetting the status quo and holding that the government retains no interest in thousands of miles of abandoned railroad easements, the Supreme Court likely guaranteed that the Justice Department's current litigation efforts will be dwarfed by new rails-to-trails takings claims. Depending on whether the rights involved in these cases are pre-1871 fee or Railroad Act of 1875 easements, the costs could result in the expenditure of millions of dollars and possibly in the complete collapse of the Rails-to-Trails Program. Having filed an amicus (friend of the court) brief, the RTC called the ruling "disappointing."

While the RTC was disappointed by the decision, a closer examination of the details of Brandt v. U.S's potential impact reveals that the RTC has reason to believe that the vast majority of existing and planned rail-trails will not be directly affected by this decision as long as the following conditions are met:

- The rail corridor is railbanked, which is the federal process of preserving former railway corridors for potential service by converting them to multi-use trails.
- The rail corridor was originally acquired by the railroad by a federally-granted right of way through federal lands before 1875.
- The railroad originally acquired the corridor from a private land owner.
- The trail manager owns the land adjacent to the rail corridor.
- The trail manager owns full title (fee simple) to the corridor.
- The railroad corridor falls within the original 13 colonies.

Conclusion

Regardless of whether we view the glass as half empty or half full, the ruling, even if limited, will have a dramatic impact on the future of the Rails-to-Trails Program. Undoubtedly, there will be more challenges by property owners resentful of government intrusions no matter the reason. All the Railroad Act of 1875 parcels that are currently in the court process will be subject to either eminent domain litigation or abandonment, depending on the RTC's proclivity in fighting these legal actions.

The RTC will be faced with three possibilities for future Railroad Act of 1875 generated projects - abandon all such projects, proceed with only railbanking projects or face a normal appraisal-acquisition-eminent domain process. For the remainder of RTC's laundry list of viable projects, they can only hope that the Supreme Court's ruling under Marvin M. Brandt v. United States remains limited. Only time and additional challenges will define the ongoing survival of the Rails-to-Trails Program as we know it today. ✪

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