

Volume 26: Issue 1  
January, 2015



# **LINES & POINTS**

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## PUBLICATIONS COMMITTEE

Committee Chair ● Larry Perry, PLS  
arpentator@yahoo.com

Editor in Chief ● Michael Flaim, PELS  
mike.flaim@bresnan.net

Treasurer & Advertising ● John "Jack" Studley, PLS  
jklz0318@gmail.com

Circulation ● Joel Ebner, PLS  
joel\_ebner@blm.gov

Emeritus Member ● Pete Hutchison, PELS  
peteh@bresnan.net

Copy Editor ● Herbert W. Stoughton, PhD, PELS, CP  
hws.geod.engr@bresnan.net

Editor at Large ● Steven "Dennis" Dawson, PLS  
dennieamdbarb@aol.com

Website ● Sonja "Suzie" Sparks, PLS  
s75sparks@blm.gov

PLSW (Professional Land Surveyors of Wyoming) is a statewide organization of Land Surveyors registered to practice in the Equality State of Wyoming. PLSW is dedicated to improving the technical, legal, and business aspects of surveying in the State of Wyoming. PLSW is affiliated with the National Society of Professional Surveyors (NSPS) and the Western Federation of Professional Land Surveyors (WestFed).

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On The Cover

STONE MONUMENT  
PHOTO BY  
LAND SURVEYING  
INCORPORATED

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Lyle Casiato, PLS

## 2014 PLSW SUSTAINING MEMBERS

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Business Card	\$40	\$10
Employment	Free	Free

Special Rates apply for PLSW Chapters and cover placements.

For more information please contact Pete Hutchison or Jack Studley.

Hello fellow surveyors,

Happy holidays to all of you, this is the time of year to spend a little extra time with your loved ones, and maybe put work on hold, at least for a few days, and enjoy family and friends. I hope everyone is healthy and whole, and preparing to meet the coming New Year with a smile!

Winter is here to stay, and as I look upon a fresh snowfall this morning, this may be the one that lasts until spring arrives. So be it, we all just switch into wintertime mode, realizing that what was probably "easier" prior to the snowpack becomes a little harder and more time consuming now that the ground is frozen and obscured. This is the opportunity to catch up on those drawings and related office work we have put off just waiting for this very event to come along. So, slaving over a hot computer is the order of the day, and I hope we are all comfortable with that.

This will be my last message for Lines and Points as your President, and has the year ever gone by quickly! A year just doesn't seem to be enough time to address all the ideas, thoughts, plans and opportunities that come along in the course of a person's short tenure as President, and hopefully I have been able to stay on top of the current issues that have come up in the last year. I am sending another set of comments to the legislators who are involved with Senate File 0085 "Trespassing to collect data" proposed bill. The last draft I saw (which can be found by googling "Wyoming Legislators", click on "Interim Committee Activities", then under "Joint Interim Committees", click on "Judiciary", then "Bill Drafts", then 15LSO-0003 Trespassing to Collect Data). That will get you to the latest revision of the proposal, which was last revised on August 15, 2014. I think PLSW needs to weigh in to specific legislators just to be sure the exception for surveyors in the performance of their statutory duties stays in the bill. Thanks go to Don Schramm for his work in staying on top of the issue.

All should be aware of the upcoming Wyoming Engineering Society convention in Cheyenne, on February 5th and 6th at the Holiday Inn, which will include a board meeting and also our annual meeting. If you have performed a unique or unusual survey in the last year, or have performed an interesting survey which would be fun to share, be aware that the annual Presidential Project of the Year competition for recognition of such projects is held in conjunction with the convention. Don't miss the opportunity to enter and be recognized! If you need more information on

## PRESIDENT'S MESSAGE



the requirements of the presentation, let me know and I will forward the details, or visit the WES website: [wyomingengineeringsociety.org](http://wyomingengineeringsociety.org).

On another note, at the last board meeting, Marlowe gave notice of his intent to resign as Secretary/Treasurer, and we cannot thank Marlowe enough for his ten years of service to PLSW in that capacity. That means, however, we need to find someone to step up and take over that position. Marlowe has agreed to stay on until his replacement can be found, so if you are looking for a way to serve, and are willing to take the next step, please let Cevin Imus know, or contact me, and we'll sign you right up! Otherwise, I am pleased to have the opportunity to pass the gavel to Sonja "Suzie" Sparks at the February meeting, and I know she will do a great job as your President through the coming year. Let's give her a big round of applause for volunteering for this critical position! It has been an honor to serve as President this past year, and I look forward to continuing to be involved with PLSW as in-coming first past president. Thanks also to all who have served on the board or a committee over the last year, and thanks to all the membership who make this organization a voice for and support of the profession of Land Surveying here in Wyoming. Kudos to all.

Lastly, in memoriam, to Paul Reid, and his family, rest in peace, Paul, you will be missed.

With thanks,

Carl R. Carmichael, PLS

President, Professional Land Surveyors of Wyoming

# ANNOUNCEMENTS

Professional Land Surveyors of Wyoming are looking for member volunteers for the following positions:

- State Secretary and/or Treasurer  
Interested parties please contact  
Cevin Imus (307) 682-1661
- Wyoming Delegate to the Western Federation of Professional Surveyors  
Interested parties please contact  
Carl Carmichael (307) 634-2319

## CONGRATULATIONS!

• The members of the Professional Land Surveyors of Wyoming would like to recognize the achievement of the following new Wyoming registrants

Zane Flowers	Powell, WY	LSIT 166
Matthew Morris	Choteau, MT	LS 14680

THE WYOMING ENGINEERING SOCIETY is soliciting applications for the 2014 President's Project of the Year Award. The guidelines for submission of a project may be found at [www.eng.uwyo.edu/societies/wes](http://www.eng.uwyo.edu/societies/wes). Entries must be received in Laramie on or before Thursday, January 6, 2015.

THE 2009 MANUAL OF SURVEY INSTRUCTION is now available online through the BLM website at [http://www.blm.gov/pgdata/content/wo/en/prog/more/cadastralsurvey/2009\\_edition.html](http://www.blm.gov/pgdata/content/wo/en/prog/more/cadastralsurvey/2009_edition.html). It can also be accessed directly at [plsw.org](http://plsw.org) on the "References" page.

## OPUS PROJECTS MANAGER'S TRAINING

February 4-5, 2015

Information available [plsw.org](http://plsw.org)

### Fall Technical Session - Scholarship Raffle.

**Donors (in red), items and Winners**

- **Rob Shook-Survey Supply Services** donated a lath bag  
Winner: Tom Johnson

- **Apex Surveying** donated a tool sharpener  
Winner: Bill Chupka

- **Bureau of Land Management** donated 2009 Manuals  
Winners: Tom Effinger & Anthony Barnett

- **Inberg-Miller Engineers** donated Rocky Mountain Sports Gift Certificates

Winners: Doug Elgin (\$25), Bill Chupka (\$25) & Bruce Perryman (\$50)

- **Frontier Precision** donated Bottles of Scotch  
Winners: Anthony Barnett & Ted McMahon

- **Bill Chupka** donated a framed Hayden Wind River Photo  
Winner: Lyle Cosciato

- **Selby's** donated a Garmin Montana GPS  
Winner: Dick Kohler

Total ticket sales was \$706.00. **Thanks to all.**

## LINES AND POINTS ARTICLE ROTATION SUBMISSION SCHEDULE BY CHAPTER

Responsible Chapter	First Call Date	Last Call Date	Publication Date
Northeast Chapter	THANK YOU!! (SEE "100 YEARS OF RESURVEYS IN THE POWDER RIVER BASIN")		
Northwest Chapter	March 1	March 15	April 1, 2015
West Chapter	June 1	June 15	July 1, 2015
Central Chapter	September 1	September 15	October 1, 2015
South Central Chapter	December 1	December 15, 2015	January 1, 2016
Southeast Chapter	March 1	March 15	April 1, 2016
Laramie Valley Chapter	June 1	June 15	July 1, 2016
Upper Platte Chapter	September 1	September 15	October 1, 2016



# Marvin M. Brandt Revocable Trust et al. v. United States

by Herbert W. Stoughton, PhD, PELS, CP  
Geodetic Engineer

## BACKGROUND

This case pertains to the disposition of an easement granted in 1908 for a subsequently abandoned railroad across lands patented in 1976. The location of these lands and right-of-way are in Fox Park, Wyoming, in the Medicine Bow - Routt National Forest. The first portion of this paper is a verbatim transcription of the "Syllabus", which constitutes no part of the opinion of the Court decision but has been prepared by the Reporter of Decisions for the convenience of the reader. The second portion of this paper is an abbreviated discussion of the majority decision of the Court which has been extracted from the published decision and is based upon the arguments presented by Brandt. The analysis of arguments submitted by the United States and the dissenting opinion are not presented. Readers interested in reviewing the entire decision and these omitted portions are referred to No. 12-1173 dated 10 March 2014.

## SYLLABUS

No. 12-1173. Argued: January 14, 2014 -  
Decided: March 10, 2014

Congress passed the General Railroad Right-of-Way Act of 1875 to provide railroad companies "right[s] of way through the public lands of the United States," 43 U.S.C. §934. One such right of way, obtained by a railroad in 1908, crosses the land that the United States conveyed to the Brandt family in a 1976 land patent. The patent stated, as relevant here, that the land was granted subject to the railroad's rights in the 1875 Act right of way, but it did not specify what would occur if the railroad later relinquished those rights. Years later, a successor railroad abandoned the right of way with federal approval. The Government then sought a judicial declaration of abandonment and an order quieting title in the United States to the abandoned right of way, including the stretch that crossed the land conveyed in the Brandt patent. Petitioners contested the claim, asserting that the right of way was a mere easement that was extinguished when the railroad abandoned it, so that Brandt now enjoys full title to his land

without the burden of easement. The Government countered that the 1875 Act granted the railroad something more than a mere easement, and that the United States retained a reversionary interest in that land once the railroad abandoned it. The District Court granted summary judgment to the Government and quieted title in the United States to the right of way. The Tenth Circuit affirmed.

**Held:** The right of way was an easement that was terminated by the railroad's abandonment, leaving Brandt's land unburdened. Pp. 8 - 17.

(a) The Government loses this case in large part because it won when it argued the opposite in *Great Northern R. Co. v. United States*, 315 U.S. 262. There, the Government contended that the 1875 Act (unlike pre-1871 statutes granting rights of way) granted nothing more than an easement, and that the railroad in that case therefore had no interest in the resources beneath the surface of its right of way. This Court adopted the Government's position in full. It found the 1875 Act's text "wholly inconsistent" with the grant of a fee interest, *id.* at 271; agreed with the Government that cases describing the nature of rights of way granted prior to 1871 were "not controlling" because of a major shift in congressional policy concerning land grants to railroads after that year, *id.*, at 278; and held that the 1875 Act "clearly grants only an easement," *id.*, at 271. Under well-established common law property principles, an easement disappears when abandoned by its beneficiary, leaving the owner of the underlying land to resume a full and unencumbered interest in the land. See *Smith v. Townsend*, 148 U.S. 190, 499. Pp. 8 - 12.

(b) The Government asks the Court to limit *Great Northern's* characterization of 1875 Act rights of way as easements to the question of who owns the oil and minerals beneath a right of way. But nothing in the 1875 Act's text supports that reading, and the Government's reliance on the

(Continued on Page 13)

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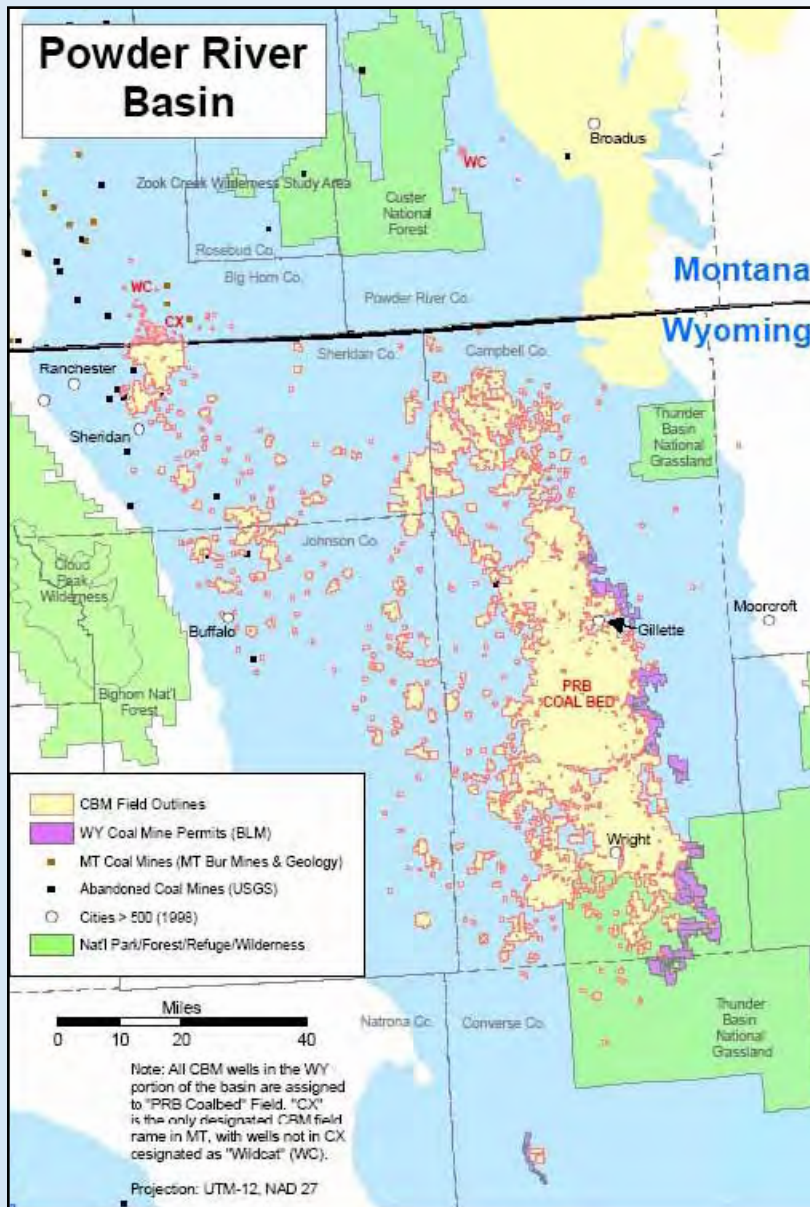
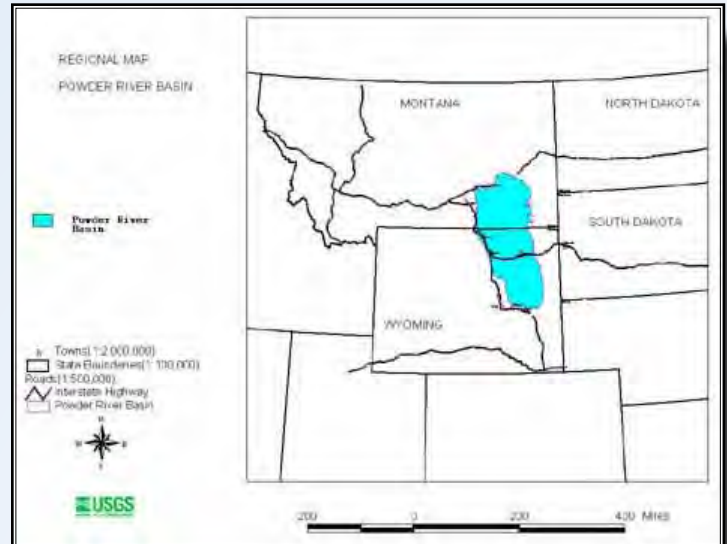


# 100 YEARS OF RESURVEYS

## IN THE POWDER RIVER BASIN

by Ray Scott, PLS

– submitted by the Northeast Chapter PLSW  
(Much of the information in this article was obtained from various memorandums, presentations and publications provided by Joel Ebner, a BLM Cadastral Surveyor who participated in the Dependent Resurvey which took place from 1986-2007, and is used with his permission)



The Powder River Basin (PRB) is described as a geologic structural basin stretching from southeastern Montana into northeastern Wyoming. It's about 200 miles north-south and 120 miles east-west. It encompasses all of Campbell county along with portions of Sheridan, Johnson, Natrona, Converse, Niobrara, Weston and Crook Counties. The terrain is unique and varied, ranging from rolling grasslands and sagebrush prairies, rim-rocked buttes, sandstone canyons and even mountainous breaks with trophy elk herds. Other resident wildlife in the PRB is typical of Wyoming and includes antelope, mule and whitetail deer, coyote, badger, fox, rabbits, snakes and sage grouse. Home to great buffalo herds that grazed the tall grass prior to white settlement, it's no wonder the area easily adapted to livestock ranching and that explains why most of the surface (70%) is privately owned. Conversely, a significant portion of the subsurface



minerals were retained by the government when the lands were patented and each township had two sections (16 and 36) reserved as school sections for the state, resulting in a mixture of mineral ownership. Minerals in a typical lease unit of 40 acres could be federal, private or state owned.

The dominant geographic feature of Campbell County are the Pumpkin Buttes which served as landmarks from ancient times on into the great western migration of settlers in the 19th and early 20th centuries. Part of the Thunder Basin National Grassland is within southeastern Campbell County and extends south into Converse County and northeasterly where it covers much of Weston County. A portion of the Bozeman Trail, where it ran from Ft. Fetterman to Ft. Reno on its way to Ft. Phil Kearny and the Montana gold fields, skirts the southeastern Powder River Basin. The basin is drained by its namesake the Powder River. "A mile wide and an inch deep; too thick to drink and too thin to plow", it exits the state through the northwest corner of Campbell County. The Belle Fourche River flows northeasterly through the county enroute to South Dakota, but, like most of the state, the basin is pretty arid.

The PRB is more recently, and perhaps better, known for its wealth of hydrocarbon mineral reserves. It is the single largest source (40%) of coal mined in the United States. The county seat is Gillette, whose tagline is "THE ENERGY CAPITAL OF THE NATION", and rightly so since it is surrounded by approximately 14 open pit coal mines that in 2012 produced 388.4 million tons of the much sought after low sulphur sub-bituminous coal. To put this in perspective, Wyoming's total coal output was 401.5 million tons. Also a player in

the coalbed methane boom and decline, the PRB, like many areas of Wyoming, is no stranger to boom and bust cycles of energy exploration. Much of the area is now involved in the resurgence of oil and gas production which utilizes horizontal drilling and hydraulic fracturing techniques. From a production low of 38,000 barrels per day in 2009, that number has risen significantly to 78,000 barrels per day in the first quarter of 2014. The mineral wealth of the basin was certainly a contributing factor in the decision establishing BLM's largest project office.



As it was put by one of the cadastral surveyors who spent much of his career in the PRB, "government resurvey's came and went over the past 100 years". The original contract surveys in Wyoming took place in the late 1800's with the majority being completed by the early 1900's, excluding Yellowstone National Park and the more rugged and remote areas of the Bridger-Teton and Shoshone National

forests. Problems associated with some of the original surveys in the PRB were identified within 4-5 years after the original surveys and by the teens some of those surveys were determined to be fraudulent resulting in the General Land Office (GLO) executing Independent Resurveys under the direct system. Approximately 80 townships in the north-central part of the state were included during this period. Many of these fraudulent surveys were attributed to surveyors associated with John Adelbert Benson, head of the infamous Benson Syndicate. Much has been written about the Benson Syndicate and there isn't sufficient space or time in this article to try and do justice to outlining the entire scheme but it was based on the Deposit System.





On May 30, 1862, Congress enacted a statute entitled, "An act to reduce the expenses of the survey and sale of public lands". Section 10 provided for surveys of public lands payable from deposits made by individuals. In 1864, Congress directed that deposits made for the surveys were available as appropriations for the surveying service. In 1871, Congress further enacted that the deposited funds could go in partial payment for the lands to be purchased. The last amendment, on March 3, 1879, provided that the Government depository certificates issued for the deposit system "may be assigned by endorsement and received at

all the district land offices in payment for any public lands entered by settlers under the pre-emption and homestead laws." This last act made the certificates equal to cash in the purchase of lands. Benson hired deputy surveyors, clerks, draftsmen and even GLO personnel to "work" the Deposit System. Employing "fictitious" settlers, these people signed sworn affidavits, and made the requisite deposits. The certificates were transferred ('signed over') to Benson to use to pay for lands anywhere. The GLO would then let contracts to Benson's surveyors. The syndicate controlled every phase of the deposit system process. The surveyors sometimes executed

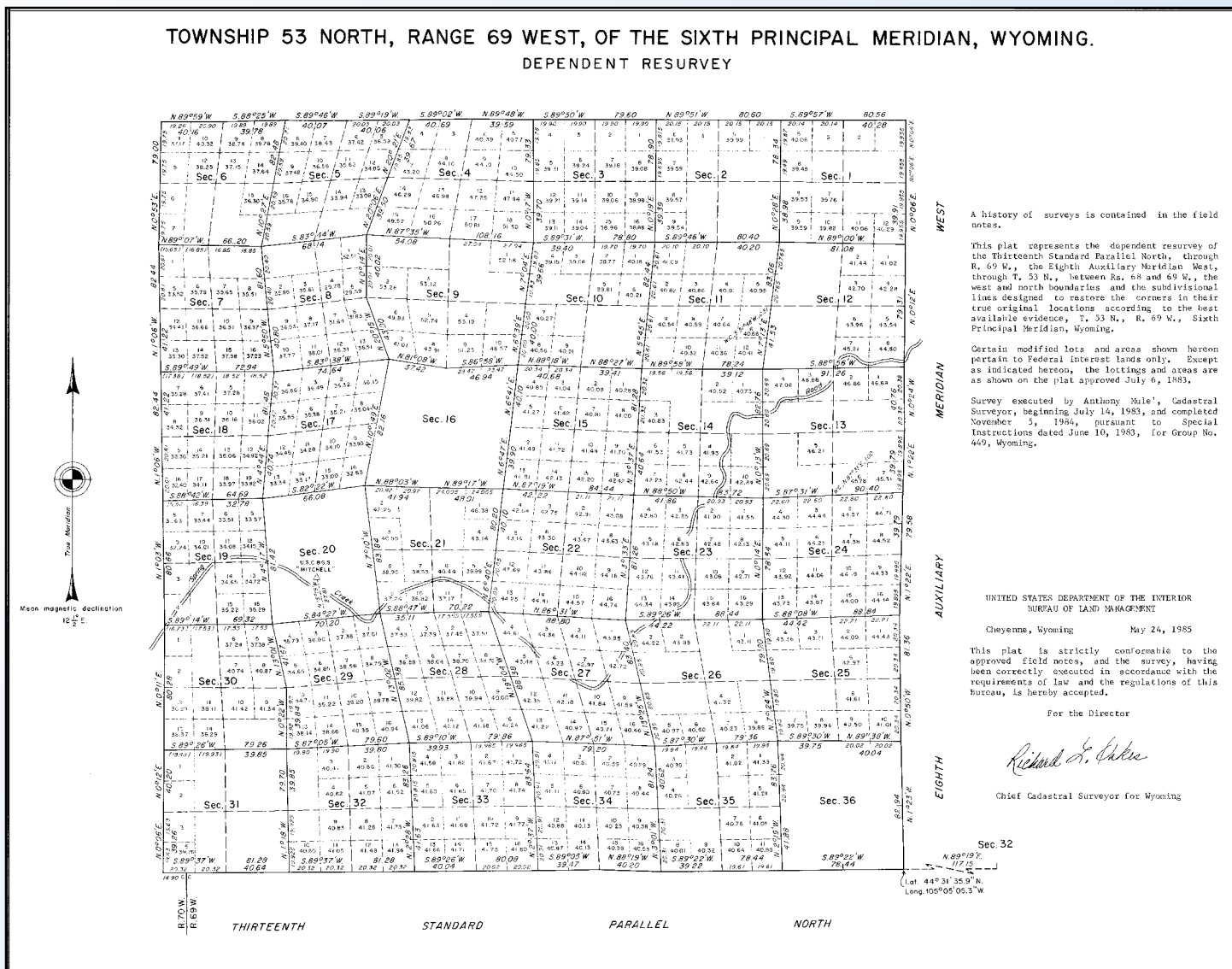


the surveys, but in most instances did not perform the surveys or set corner monuments.<sup>1</sup>

While it is difficult to list those surveys that are affected by this legacy, on the opposing page is the original plat of Township 53 North, Range 69 West, 6th P.M., approved July 6, 1883. The subdivision lines were run by L. F. Stahle, a known associate of Benson. The approved plat typically depicts mostly cardinal bearings with section lines 80 chains long that were supposedly run over the course of 6 days, from August 29 through September 5, 1882. The next image is of the dependent resurvey of the same township that was executed by BLM cadastral surveyor Anthony Mule, beginning July 14, 1983, completed November 5, 1984, and approved on May 24, 1985. On the other hand,

Mr. Stahle is also credited with the original subdivision of Township 53 North, Range 70 West, 6th P.M. and the dependent resurvey of that township reflects that it was accurately surveyed and apparently well monumented.

From about 1930 to 1946, the GLO executed both Independent and Dependent Resurveys throughout the state. The Act of July 16, 1946, 60 Stat. 1100, known as the Reorganization Plan No. 3 or the "Organic Act", consolidated the GLO, the Grazing Service, the Oregon and California Administration, Alaska Fire Control and others into one new bureau to be called the Bureau of Land Management (BLM). The GLO was abolished and the duties of the Commissioner were assigned to the Director of the BLM.<sup>2</sup>



<sup>1</sup> Stoughton, Herbert W., PhD; *Fraudulent Surveys and the Benson Syndicate*, (Self Published for Presentation), 1998, p. 1

<sup>2</sup> White, C. Albert; *A History of the Rectangular Survey System*, U. S. Government Printing Office, 1983, p. 191



In 1963, service centers were established in Denver, Colorado, and Portland, Oregon, providing reimbursable cadastral survey crews for the western states. Cadastral crews were placed in the Wyoming State Office (WSO) in Cheyenne. Until review and approval authority was transferred to the Denver Service Center (DSC) in 1978, this authority resided in Washington, D.C. In 1982, this authority was transferred from the DSC to individual branch chiefs at the state offices, marking the end of reimbursable cadastral survey crews. From 1978 to 1986, the majority of cadastral surveys requested and executed within the jurisdiction of the WSO were performed by mobile survey crews based out of the WSO.

The energy crisis of the 1970's made developing domestic energy resources a priority. The fact that the PRB was already identified as having the largest on-shore federal mineral reserves in the United States helped spur the establishment of the Gillette Project Office (GPO). The Public Land Survey System (PLSS) original surveys are the foundation of all mineral transactions, and unfortunately in much of the Powder River Basin these original surveys were problematic. Some had been determined to be fraudulent, most were antiquated and monumented with poor quality sandstones, and in some instances,

wooden posts. Reports of difficulty locating lease boundaries poured in from private surveying firms, landowners and energy industry representatives. BLM managers soon were concerned that these high-risk boundaries were being incorrectly located.

With support of the BLM District and State Managers and cooperation of Wyoming's congressional delegates, and private industry, the Gillette Project Office (GPO) was established and opened on April 1, 1986. The office was staffed with a project manager, assistant project manager, six land surveyors, a geodesist and a staff assistant. The first GPO manager was Dale Wilson. Eighteen temporary employees (three per crew) were hired to assist the land surveyors. Each surveyor was assigned the task of resurveying one full township at a time which typically took about three months to complete. Under normal conditions a surveyor could complete two townships in a field season, typically from the first week of April until the middle of October. Winter months were spent producing field notes and plats of the surveys.

Following Dale Wilson, Jim Claflin was GPO manager from 1992 to 1999 when he left the GPO to accept a post as Cadastral Branch Chief in New Mexico. BLM Cadastral Surveyor, Joel Ebner, who started at the GPO in October 1988, and one other





# GILLETTE PROJECT OFFICE STAFF

Photo Provided  
by DICK KOHLER



Back row (L to R): Dale C. Wilson, Leroy Moore, Jim Clafin, Kurt Schenk, Paul Probst, Richard Shatto, Clyde King, Lyndon Hunt, Dave Mayer, John Mumaw, Lisa Nielsen, Dick Kohler, Mark Bush  
Front row (L to R): Jerry Barrett, Ryan Lorenzen, Jeannie Haugen, Dave Carlson, John Anderson, Randy Deones, Bill Ming, Tony Mule, Mike Whitmore

cadastral surveyor remained to complete the dependent resurvey of the remaining townships. When the Gillette Project Office officially closed on May 25, 2007, the BLM cadastral surveyors

had completed the resurvey of 111 townships comprising more than 2.5 million acres. They had run nearly 8,000 miles of survey line, and monumented approximately 16,000 corners.



THE BUTTES  
Photo by Cody Witt





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(Continued from Page 5)

similarity of the language in the 1875 Act and pre-1871 statutes directly contravenes the very promise of Great Northern: that the 1875 Act granted a fundamentally different interest than did its predecessor statutes. Nor do this Court's decisions in *Stalker v. Oregon Short Line R. Co.*, 225 U.S. 142, and *Great Northern R. Co. v. Steinke*, 261 U.S. 119, support the Government's position. The dispute in each of those cases was framed in terms of competing claims to acquire and develop a particular tract of land, and it does not appear that the Court considered - much less rejected - an argument that the railroad had only an easement in the contested land. But to the extent that those cases could be read to imply that the interest was something more, any such implication would not have survived this Court's unequivocal statement to the contrary in *Great Northern*. Finally, later enacted statutes, see 43 U.S.C. §§912, 940; 16 U.S.C. §1248(c), do not define or shed light on the nature of the interest Congress granted to railroads in their rights of way in 1875. They instead purport only to dispose of interests (if any) the United States already possesses. Pp 12-17.

496 Fed. Appx. 822, reversed and remanded.

### THE DECISION

#### BACKGROUND

Until 3 March 1875, railroads desiring rights-of-way across Federally owned Public Domain individually petitioned Congress for such grants. President Abraham Lincoln had been a successful attorney at law with several railroads being major clients. In his first presidential campaign, Lincoln proclaimed in his platform, "That a railroad to the Pacific Ocean is imperatively demanded by the interests of the whole country; that the Federal Government ought to render immediate and efficient aid in its construction." In 1862, Congress granted rights-of-way through the Public Domain accompanied by outright grants of land along the right-of-way (odd number sections within twenty miles of the right-of-way) [called "checker board" grants]. The Union Pacific and Central Pacific Railroads would then either develop or sell these lands to finance construction.

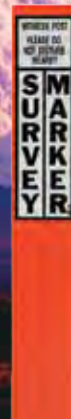
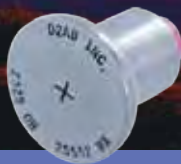
By 1870, public resentment against these generous grants eventually led Congress to



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rethink the matter. In the Congressional Globe, 42nd Congress, 2nd session, p. 1585 (1872), the House stated the change in national policy, stating: "That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law." The last "checkerboard" land grants to railroads was made in 1871. Between 1871 and 1875, at least fifteen railroad right-of-way grants without additional land grants were enacted.

In late 1874 or early 1875, Congress decided that the procedure to enact special legislation for each right-of-way should terminate. On 3 March 1875, Congress passed the "General Railroad Right-of-Way Act of 1875" (18 Stat. 482, 43 U.S.C. §§ 934 - 939). The railroad would be granted a right-of-way "to the extent of one hundred feet on each side of the centerline of said road". The railroad could obtain a right-of-way by "actual construction" or

"in advance of construction by filing a map ...". Upon approval by the Department of Interior the right-of-way (alignment) would be annotated on the land plats ..., and from that day forward "all such lands over which such right-of-way shall pass be disposed of subject to the right-of-way." This Act remained in effect until 1976.

In 1976, Congress repealed the provisions governing issuance of new rights-of-way by the Federal Land Policy and Management Act, § 706(a), 90 Stat. 2793. Chief Justice Roberts stated that the Court was thus required "to define the nature of interest granted by the 1875 Act, in order to determine what happens when a railroad abandons its right-of-way."

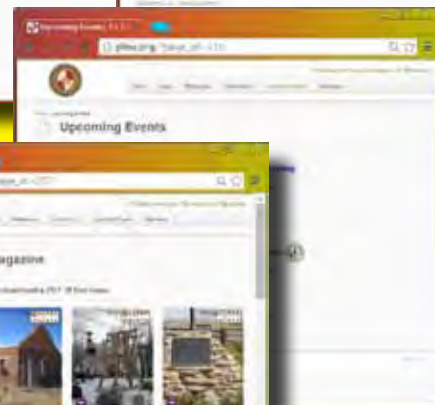
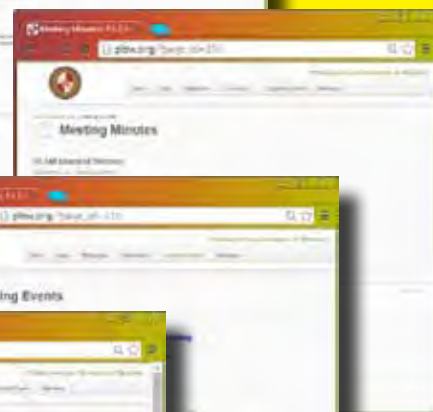
In 1939, Melvin M. Brandt commenced working at the sawmill in Fox Park (Wyoming). Subsequently, he purchased the sawmill, and moved his family to Fox Park (1946). Melvin's son, Marvin, started working at the mill in 1958. In 1976, he became owner and operated the facility until it closed in 1991.

Fox Park is surrounded by the Medicine Bow - Routt National Forest. In 1976, the United





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States issued a patent for 83 acres to Marvin and Lulu Brandt. The patent conveyed fee simple title to the lands "with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto said claimants, their successors and assigns, forever." The patent included "limited exceptions and reservations". These exceptions are enumerated and described, but have no relevance to the case. The patent concluded stating that the patent/land was granted "subject to those rights for railroad purposes as have been granted to the Laramie [.] Hahn's Peak & Pacific Railway Company (LHP&P), its successors or assigns." The patent did not specify what would occur if the railroad abandoned this right-of-way.

The right-of-way, according to the patent to Brandt, was issued in 1908, pursuant to the 1875 Act. Nearly one-half mile of right-of-way traverses (approximately ten acres) Brandt's patent. In 1911, LHP&P completed construction from Laramie, Wyoming, to Coalmont, Colorado. Between 1914 and 1935, ownership changed hands several times, until finally being acquired by the Union Pacific R.R. (at the request/urging of the Interstate Commerce Commission).

In 1987, the Union Pacific R.R. sold the rail line and right-of-way to the Wyoming and Colorado Railroad, who planned to use it as a tourist attraction. This venture did not prove profitable. In 1996, the Wyoming and Colorado Railroad notified the Surface Transportation Board (STB) of its intent to abandon the right-of-way. The company removed the track and ties. After that the STB approval completed the abandonment (2004). In 2006, the United States initiated the action of abandonment, seeking a judicial declaration of abandonment and an "order quieting title in the United States to the abandoned right-of-way." In addition to citing the railroad, the United States named as defendants the owners of 31 parcels of land crossed by the abandoned right-of-way.

All but one, Marvin Brandt, settled or defaulted with/to the Federal Government. Brandt contested and filed a counterclaim. Brandt asserted that the right-of-way across their property was an easement that was extinguished upon



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abandonment of the railroad. Furthermore, under "common law property rules" Brandt enjoyed full title to the land without burden of the easement. The Government claimed that it had all along retained a reversionary interest - a future estate that would be restored to the Government if the railroad abandoned or forfeited its interest.

The District court granted summary judgment to the United States and quieted title in the United States to the right-of-way. The Court of Appeals affirmed in 496 Fed. Appx. 822 (CA10 2012) (per curiam.) The Court of Appeals acknowledge division among lower courts regarding the nature of the Government's interest (if any) in abandoned

(Continued on Page 19)



## PHOTOS FROM THE FIELD



BLM Cadastral Survey crew conducting a Dependent Resurvey in the Big Horn Mountains, 13 miles southwesterly of Buffalo, WY, during the summer of 1999. The survey was needed to facilitate a land transfer of the area surrounding Tie-Hack Reservoir from the U.S. Forest Service to the city of Buffalo. Pictured left to right: Tyrel Hoon, Surveying Aid, Joel Ebner, Cadastral Surveyor, and Terry Kessel, Surveying Technician.

From left:  
Dave Meserve,  
Surveying  
Technician, Joel  
Ebner, Cadastral  
Surveyor, and  
Terry Kessel,  
Surveying  
Technician, in  
the Powder River  
Basin in 2001.





The witness corner 17.51 chains south of the west  $\frac{1}{4}$  corner of section 20, T. 58 N., R. 93 W., This stone monument is about 10 feet from the south ledge of Trout Creek, just upstream of its confluence with Porcupine Creek in Devil's Canyon. This picture is prior to any rehabilitation, showing the stone "as found". Photo was taken during the survey, of the E.O. Bischoff Ranch - Moss Ranch Parcels USDA/NRCS Conservation Easement, executed in 2010 by Lyle Casiato, LS 12600.



Lyle Casiato kneeling beside the witness corner to the east  $\frac{1}{4}$  corner of section 9, T. 57 N., R. 93 W. The stone monument is located on the west ledge of Devil's Canyon, 10 feet from a vertical wall plummeting 700 feet down to Porcupine Creek. Photo was taken during the survey of the E.O. Bischoff Ranch - Moss Ranch Parcels USDA/NRCS Conservation Easement, executed in 2010 by Lyle Casiato, LS 12600.





(Continued from Page 16)

1875 Act rights-of-way. However, it concluded, based on Circuit precedent, that the United States had retained an “implied reversionary interest” in the right-of-way which “then vested in the United States when the right-of-way was relinquished.”

The issue of the dispute was the “nature of the interest the Federal Government conveyed to LHP&P in 1908 pursuant to the 1875 Act”. Brandt contended that the granted right-of-way was an easement, and that when it was abandoned the underlying land (Brandt’s property) became unburdened of the easement. The Government did not dispute that the principle of reversion of easements worked this way but maintained that the 1875 Act granted to the railroads something more than an easement, and reserved an implied reversionary interest to the United States. The Court ruled that the Government loses this argument, because it won (earlier) when it argued the opposite before the Court in *Great Northern Railway Co., v. United States*, 315 U.S. 262 (1942).

In 1907, the Great Northern R.R. acquired (through succession) a right-of-way through

Public Domain lands in Glacier County, Montana. Oil was discovered, and the railroad wanted to drill beneath the right-of-way. The United States sued to enjoin the railroad from drilling, claiming the railroad had only an easement. In previous cases the Supreme Court held that the pre-1871 statutes granting rights-of-way accompanied by checker-board land subsidies conveyed to the railroads “a limited fee, made on an implied condition of reverter”. (*Northern Pacific R. Co. v. Townsend*, 190 U.S. 267, 271 (1903)). The U.S. Government disagreed arguing “that the 1875 Act granted an easement and nothing more.” In the brief for *Great Northern R. Co. v. United States*, O.T. 1941, No. 149, p. 29, “The year 1871 marks the end of one era and the beginning of a new (era) in American land grant history.” The Government contended cases construing pre-1871 statutes were inapplicable in construing the 1875 Act. Their position was that the text, background, and subsequent administrative and congressional construction of the 1875 Act all made clear that, unlike rights-of-way granted under pre-1871 land-grant statutes, those land-grants granted under the 1875 Act were mere easements.



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The Supreme Court adopted the U.S. Government's position holding that the 1875 Act "clearly grants an easement and not a fee Great Northern, 315 U.S., at 271. The Court stated it found Section 4 of the 1975 Act "especially persuasive" because it provided "all such lands over which such right-of-way shall pass shall be disposed of subject to such right-of-way."

The Court specifically disavowed the characterization of an 1875 Act right-of-way in *Rio Grande Western R. Co. v. Stringham*, 239 U.S. 44 (1915), as "a limited fee, made on an implied condition of reverter". Later, the Court concluded that it was "clear from the language of the Act (1875), its legislative history, its early administrative interpretation, and the construction placed upon it by Congress in subsequent enactments" that the railroad had obtained "only an easement in its rights-of-way acquired under the Act of 1875." *United States v. Union Pacific R. Co.*, 353 U.S. 112, 119 (1957).

When the United States patented the Fox Park parcel to Marvin Brandt (in 1976), it conveyed fee simple title to that land "subject to those rights

for railroad purposes" that had been granted to the LHP&P. "The United States did not reserve to itself any interest in the right-of-way in that patent."

The essential features of easements, including what happens when the easements cease to be used - are well settled as a matter of real property law. An easement is a "nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." [Restatement (Third) of Property: Servitudes § 1.2(1), (1998)] "Unlike most possessory estates, easements ... may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude." This means that if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land. In *Smith v. Townsend*, 148 U.S. 490, 499 (1893), "Whoever obtained title from the government to any ... land through which ran this right-of-way would acquire a fee to the whole tract subject to the easement of the company, and if ever the use

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of the right-of-way was abandoned by the railroad company the easement would cease, and the full title to the right-of-way would vest in the patentee of the land". Because the grantor of an easement has not transferred his estate or possessory interest, he has not retained a reversionary interest. He retains all his ownership interest, subject to an easement. *Preseault v. United States*, 100 F. 3d 1525, 1533-1534 (CA Fed. 1996) (en banc).

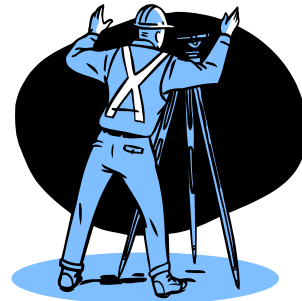
The Court then stated: "Those basic common law principles resolve this case. When the Wyoming and Colorado Railroad abandoned the right-of-way in 2004, the easement referred to in the Brandt patent terminated. Brandt's land became unburdened of the easement, conferring on him the same full rights over the right-of-way as he enjoyed over the rest of the Fox Park parcel."

The basis of the above was developed from earlier litigation. In this litigation with Brandt, the United States Government argued the contrary to its previous position in earlier cases litigated before the Supreme Court. The next four and one-half pages of the published opinion are the Court's explanation and interpretation of the United State's Government's arguments. In the opening sentence, the Court stated: "Contrary to the straight forward conclusion, the Government now tells us that Great Northern did not really mean what it said."



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In summary and closing the Court wrote:

More than 70 years ago, the Government argued before this Court that a right-of-way granted under the 1875 Act was a simple easement. The Court was persuaded, and so ruled. Now the Government argues that such a right-of-way is tantamount to a limited fee with an implied reversionary interest. We decline to endorse such a stark change in position, especially given "the special need for certainty and predictability where land titles are concerned." *Leo Sheep Co.*, 440 U.S. at 687.

The judgment of the United States Court of Appeals for the Tenth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

Chief Justice Roberts delivered the opinion of the Court, in which Scalia, Kennedy, Ginsburg, Breyer, Alito, and Kagan joined. Justice Sotomayor filed a dissenting opinion (which is not presented).

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