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Pauline Nelson

OIL AND GAS RIGHTS IN RAILROAD RIGHTS OF WAY – THE *UNION PACIFIC* CASE

BY PAULINE NELSON

Pauline Nelson is a student at the University of Denver College of Law. This note received second prize in the writing competition sponsored by the Rocky Mountain Mineral Law Foundation.

The status of oil and gas rights in railroad rights of way has been a matter of controversy for fifty years, and a troublesome question for federal oil and gas lessees since the enactment of the Mineral Leasing Act in 1920. *United States v. Union Pacific R.R. Co.*[1] has settled the question between the United States and the Union Pacific. But the case has created more problems than it has solved, and while the rights of the railroad have been determined, there are other contenders whose interests are undecided.

In the *Union Pacific* case the Court held the railroad is not the owner of the mineral estate in the right of way granted to it by the Act of July 1, 1862.[2] The decision was based upon what the Court found to be a reservation of minerals to the United States. Section 2 of the 1862 act gave the railroad company "the right of way through the public lands,' and Section 3 subsidized construction of the road by a grant of alternate sections on either side of the right of way, with the proviso that "all mineral lands shall be excepted from the operation of this act." The mineral exception, the Court held, applied not only to Section 3 but to the entire act, and hence applied to the right of way as well as to the subsidy lands.

Until this decision the mineral land exceptions in railroad land grants were not construed as mineral reservations. The subsidy sections given to the railroads were those sections not known to contain minerals at the time the patents issued. The mineral or non-mineral character of the land was determined by the Interior Department before issuance of the patent, and the administrative determination was final. The railroad's title could not be upset by a subsequent discovery of minerals in the patented sections, and if such minerals were found they belonged to the railroad.[3] This was not a reservation of minerals, but a classification of land, with a conveyance only of those sections classified as non-mineral.

The same mineral exception is now held to be a mineral reservation also. The Court in applying the exception has made a distinction between the alternate sections and the right of way. The exception is held to apply to both; but the classification method used in applying it to the alternate sections is not workable in dealing with the right of way, and the proviso must therefore be interpreted, where the right of way is concerned, as a mineral reservation. The right of way grant, therefore, conveyed the surface only, with the minerals reserved to the United States.

The decision is in keeping with the rule that a grant of land by the sovereign must be construed strictly against the grantee,

[1] 77 Sup. Ct. 685 (1957).
[2] 12 Stat. 489, amended 13 Stat. 356 (1864).
[3] Burke v. Southern Pac. R.R. Co., 234 U.S. 669 (1914).

and that nothing will pass by inference or implication unless essential to the use of the thing granted.[4] It is also generally stated that in construing such a grant there must be considered not only the language of the act itself but other Congressional acts and the apparent governmental policy of the time.[5] In this case the Court has applied these rules perhaps with greater rigor than in any other land grant case. While Congress in 1862 followed a policy of holding back mineral lands, none of the public land acts of that time contained any reservations. It may be said the Court has considered not only the policy of the time but the wisdom that comes afterwards, and has read into an 1862 act a Congressional policy of separating the surface and mineral estates and reserving minerals to the United States—a policy in fact not fully developed until the early years of the 20th century.[6]

The result reached is more favorable to the United States than any of the prior oil and gas cases arising under the railroad acts.

This is the third case in the federal courts in which the United States has sought to enjoin a railroad from drilling for and removing oil and gas from its right of way. In the first, the *Great Northern* case,[7] it was held that under the General Right of Way Act of 1875[8]

[4] Great Northern Ry. Co. v. United States, 315 U.S. 262 (1942); Caldwell v. United States, 250 U.S. 14 (1919); United States v. Oregon & C. R.R. Co., 164 U.S. 526 (1896); Barden v. Northern Pac. R.R. Co., 154 U.S. 288 (1894).

[5] United States v. Union Pac. R.R. Co., 91 U.S. 72 (1875).

[6] Statutes enacted in 1909 and 1910 (35 Stat. 844; 36 Stat. 583) permitted agricultural entrymen on land subsequently found to contain minerals to obtain patents with minerals reserved. The policy of reserving minerals was first generally applied in the Surface Patent Act of 1914, 38 Stat. 509, and the Stockraising Homestead Act, 39 Stat. 862 (1916), 43 U.S.C. 291-302 (1952).

[7] Great Northern Ry. Co. v. United States, 315 U.S. 262 (1942).

[8] 18 Stat. 482, 43 U.S.C. 934-39 (1952).

the railroad acquired nothing more than an easement—a right of use and occupancy—and hence had no right in the underlying minerals. In the second, the *Illinois Central* case[9] the Court of Appeals for the Seventh Circuit held that under its specefic right of way grant[10] the railroad received a "determinable fee" in the right of way, and that the interest granted included the mineral rights. The *Union Pacific* case reaches still a third result. Whatever the nature of the railroad's interest, the Court says, there was a specific reservation of minerals to the United States.

The difference in result in the three cases is traceable to their different statutory bases, and reflects the changing public land policy of the United States in the second half of the 19th century. Prior to 1860 the government made a number of railroad grants, giving to the railroads a right of way across public lands and a bonus consisting of alternate sections of land on either side of the right of way.[11] There was no exception of mineral lands in these acts. The Illinois Central grant was probably the largest in this period. By the 1850 act the railroad received a right of way 200 feet wide, and every alternate section of public land, whether mineral or non-mineral, for a width of six sections on each side of the right of way.

The period from 1860 to 1871 was a period of lavish grants in aid of the transcontinental railroads. As an inducement for the construction of roads across thousands of miles of vacant territory, millions of acres of public land were given to the Union Pacific, the Northern Pacific, and other railroads.[12] The total has been estimated at more than 158 million acres.[13] But while Congress was prodigal in dealing with the railroads, there also developed an increasing jealousy of the nation's mineral resources. All the railroad grants of this period, like other public land acts, excepted mineral lands.

In the period after 1871 the Congressional attitude toward the railroads changed. The prodigality ceased. There continued to be grants of right of way across the public domain,[14] but there were no more gifts of public lands adjoining the railroad route. The General Right of Way Act of 1875[15] put an end to grants by special act of Congress, and delegated authority to the Interior Department. The act embodied the policy of the special acts of the early 1870's that railroads should be subsidized only to the extent of the necessary rights of way, and provided that public lands should be disposed of subject to such rights of way.

Until the time of the oil and gas cases all right of way grants, under whatever act of Congress they were made, received a uniform interpretation in the courts. It was held that the nature of the railroad's use of its right of way precluded a holding that the right of way was an intangible right of passage only; that since the use was continuous and involved permanent improvements, a grant of right of way to a railroad required the fee for its enjoyment. But since

[9] United States v. Illinois Cent. R.R. Co., 187 F.2d 374 (7th Cir. 1951), *affirming* 89 F. Supp. 17 (E.D. Ill. 1949).

[10] Act of September 20, 1850, 9 Stat. 466.

[11] Atlantic and Gulf, and Mobile and Ohio grants, 9 Stat. 771-72 (1849); Illinois Central grant, 9 Stat. 466 (1850).

[12] Among others, the Union Pacific grant, 12 Stat. 489 (1862); Northern Pacific, 13 Stat. 365 (1864); California and Oregon R.R., 14 Stat. 239 (1866); Atlantic and Pacific R.R., 14 Stat. 292 (1866).

[13] See United States v. Union Pac. R.R. Co., 77 Sup. Ct. at 692.

[14] Portland, Dalles & S.L.R.R. grant, 17 Stat. 52 (1872); Central Pacific grant, 18 Stat. 306 (1875).

[15] 18 Stat. 482, 43 U.S.C. 934-39 (1952).

the grant was made for the purpose of construction and operation of a railroad, it did not convey an unqualified fee simple title, but a "fee simple determinable, sometimes called a base, qualified or limited fee,"[16] subject only to the condition that in the event the land ceased to be used for railroad purposes it would revert to the United States.

In *Northern Pac. Ry. Co. v. Townsend*[17] the Court held the land forming the right of way was taken out of the category of public lands and was not subject to further disposition by the government. An adjoining landowner could acquire no rights in it, either by adverse possession or by virtue of a patent covering the entire legal subdivision.

Most of the cases interpreting the right of way acts involved the land-grant railroads and right of way acts of the pre-1871 period. But in a decision later overruled by the *Great Northern* case the Court applied the same reasoning to the General Right of Way Act. The right of way acquired under the provisions of that act was held to be not a mere easement but a determinable fee.[18]

Did a grant of this character also convey to the railroad the mineral rights in the right of way land? The question arose as early

[16] New Mexico v. United States Trust Co., 172 U.S. 171, 183 (1898).
[17] 190 U.S. 267 (1903). See also Stuart v. Union Pac. R.R. Co., 227 U.S. 342 (1913) ;Clairmont v. United States, 225 U.S. 551 (1912); Missouri, K. & T. Ry. Co. v. Roberts, 152 U.S. 114 (1894); St. Joseph & D.C.R.R. Co. v. Baldwin, 103 U.S. 426 (1881); Barnes v. Southern Pac. R.R. Co., 16 F.2d 100 (9th Cir. 1926); City of Reno v. Southern Pac. R.R. Co., 268 Fed. 751 (9th Cir. 1920); Holland v. Northern Pac. Ry. Co.,214 Fed. 920 (9th Cir. 1914); Union Pac. R.R. Co. v. Davenport, 102 Kan. 513, 170 Pac. 993 (1918).
[18] Rio Grande Western Ry. Co. v. Stringham, 239 U.S. 44 (1915).

as 1905, and the Interior Department then adopted a position it has adhered to consistently ever since. A right of way grant to a railroad, it held, was for railroad purposes only; the grantee and its lessees had no rights in the underlying minerals and could not drill for and remove oil and gas.[19]

This position of the Department was contrary to most of the decided cases interpreting determinable fee titles. Such a title, courts have held, gives the owner rights equivalent to those of an owner in fee simple, except that his fee may be defeated by the occurrence of the contingency by which it is determined.[20] The estate is a fee because it may last forever; it is determinable because it may end on the happening of the contingency. It is generally held the owner has the entire present interest in the land, including the right to remove timber, stone and minerals. Since the grantor retains nothing more than a possibility of reversion, upon a contingency that may never occur, the removal of minerals is not such waste as he could enjoin.[21]

The question acquired greater importance after the enactment of the Mineral Leasing Act of 1920,[22] when oil and gas leasing of public lands brought another party—the federal lessee—into the controversy. Oil and gas leases covered entire subdivisions, without excepting the right of way, and the lessees claimed their interests included the oil and gas under the right of way. The Department, however, ruled otherwise, holding that neither the federal lessee nor the owner of the right of way had any right to the minerals in the right of way strip. Applying the ruling of the *Townsend* case, the Department held a lessee, standing in the same position as the patentee in the *Townsend* case, could acquire no interest in the right of way strip, but since the right of way was given for one purpose only the right of way owner also had no right to remove the minerals.[23]

Because of the impasse thus created—a situation in which no one could legally drill for oil and gas on a public domain right of way—the Department sponsored and Congress passed the leasing act of 1930,[24] which authorized the Secretary to grant oil and gas leases on rights of way—such leases to be given only to the owner of the right of way, or, upon competitive bidding, to the owner or lessee of adjoining acreage. And in a number of subsequent decisions the Department held the railroads could not drill for oil and gas on a right of way without first acquiring a lease under the 1930 act.[25]

The first test of the issue came in the *Great Northern* case, which was decided against the railroad—not on the ground a deter-

[19] Missouri, K. & T. Ry. Co., 33 L.D. 470 (1905). See also Missouri, K. & T. Ry. Co., 34 L.D. 504 (1906).

[20] 1 American Law of Property, § 2.6 (1952); 2 Tiffany, Real Property, § 220 (3d ed. 1939).

[21] Gannon v. Peterson, 193 Ill. 372, 62 N.E. 210 (1901); Hillis v. Dils, 53 Ind. App. 576, 100 N.E. 1047 (1913); Landers v. Landers, 161 Ky. 800, 151 S.W. 386 (1912); First Universalist Society v. Boland, 155 Mass. 171, 29 N.E. 524 (1892); Quinn v. Pere Marquette Ry. Co., 256 Mich. 143, 239 N.W. 376 (1931); Board v. Nevada School District, 363 Mo. 328, 251 S.W.2d 20 (1952); Davis v. Skipper, 124 Tex. 364, 83 S.W.2d 318 (1935). *Contra:* Los Angeles & Salt Lake R. Co. v. United States, 140 F.2d 436 (9th Cir. 1944); Union Missionary Baptist Church v. Fyke, 179 Okla. 102, 64 P.2d 1203 (1937).

[22] 41 Stat. 437, 30 U.S.C. 181-263 (1952).

[23] Windsor Reservoir & Canal Co. v. Miller, 51 I.D. 27, *aff'd on rehearing*, 51 I.D. 305 (1925). The Windsor case involved a reservoir site acquired under the 1891 irrigation act [26 Stat. 1101, 43 U.S.C. 946-49 (1952)]. That act also had been interpreted as conveying a determinable fee title.

[24] 46 Stat. 373, 30 U.S.C. 301-06 (1952).

[25] Ownership of Minerals Beneath Land Grant Act Right of Way, 58 I.D. 160 (1942); Use of Railroad Right of Way for Extracting Oil, 56 I.D. 206 (1937); Charles A. Son, 53 I.D. 270 (1931).

minable fee title in the right of way did not include mineral rights, but on the ground that the right of way grant did not convey the fee at all. The 1875 act, the Court said, clearly grants only an easement and not the fee. The Court, however, distinguished the 1875 act from the pre-1871 grants, leaving unaffected the holding that the prior grants conveyed a greater interest than a mere easement.

Then in the *Illinois Central* case the Court of Appeals squarely upset the Department's contention and held the right of way grant, a determinable fee, conveyed the entire interest in the right of way, including mineral rights and the right to use the land for any purpose so long as the operation of the railroad continued.

While the *Union Pacific* decision is based fundamentally on what the Court finds to be an express reservation of minerals, it also indicates—in accord with the Department's thesis and contrary to the *Illinois Central* case—that a grant for railroad purposes must be for railroad purposes only. "Whatever may be the nature of the Union Pacific's interest in the right of way,"[26] the Court said, drilling for oil is not a railroad purpose within the meaning of the land grant act.

The Court did not re-determine the nature of the Union Pacific's interest. But if it had been determined the right of way is an easement only, it would have been unnecessary for the Court to find specific language in the grant reserving the minerals. An easement is nothing more than a right to use the land for a specific purpose, and never carries with it the mineral interest. Since the Court did find a specific reservation of minerals, it is apparent the railroad's interest is more than a mere easement, and that the "limited fee" cases are not disturbed. The Court distinguished those cases; it did not overrule them. None of them, the Court stated, involved a controversy between the United States and the railroad over mineral rights. "The most that the 'limited fee' cases decided was that the railroads received all surface rights to the right of way and all rights incident to a use for railroad purposes."[27]

It would seem, then, the Union Pacific's interest is just what the courts have determined it to be since the beginning of the railroad litigation, a determinable fee estate, but with the minerals reserved to the United States. If this is the nature of the railroad's title, the question then arises as to the effect of subsequent patents

[26] 77 Sup. Ct. at 686.
[27] Id. at 689.

of the land traversed by the right of way. Did a homesteader whose patent covered the entire quarter section, without excepting the right of way strip and without a reservation of minerals, thereby acquire the mineral interest in the right of way?

The *Union Pacific* case decides nothing more than that the railroad has no interest in the minerals. It does not determine title as between the United States and subsequent patentees. The case is not like the *Great Northern* decision, in which judgment determining title in the United States was limited to those sections of the right of way crossing land still owned by the United States, and where a patentee taking land subject to the railroad easement acquired the fee, including the mineral interest, in the right of way.[28] The *Union Pacific* decision leaves open a question that can only be decided by future litigation.

In his dissenting opinion, Justice Frankfurter indicated that if mineral rights had not been included in the right of way grant, those rights would have been conveyed by the patents subsequently issued for the sections crossed by the right of way.[29]

Contrary to Justice Frankfurter's opinion, however, is an Interior Department decision, squarely in point, in which the Assistant Secretary held the State of Wyoming acquired no interest in the minerals under the Union Pacific right of way by virtue of a school land patent covering the entire section.[30] The Government may be expected to reaffirm this contention—that it has never parted with the mineral interest in the right of way, either by the right of way grant itself or by subsequent patent, and that the United States is the owner of the mineral rights in the entire length of the right of way grant.

There are a few cases in which the courts have been faced with a similar problem, involving not the Government, however, but individual grantors. Where a person conveys a parcel of land, reserving the minerals, and in a subsequent conveyance includes a general description covering the land first conveyed as well as other land, does the second grantee acquire the reserved mineral interest? The results of the cases vary, depending in each instance upon a construction of the deed and a determination of the intent of the parties.[31]

Where the government is the grantor, there are additional factors to be considered. Conveyances under a public land act must be construed to give effect to the intent of Congress. The act must

[28] The Government's claim was not originally limited to that part of the right of way on public domain. An owner of land adjoining the railroad attempted to intervene in the suit, claiming an interest in the minerals underlying the right of way on the quarter section patented to his predecessor. The district court refused to permit intervention, and the court of appeals affirmed, holding his interest was adequately represented by the Government, and whatever issue remained between the intervener and the Government should be left for future adjudication. MacDonald v. United States, 119 F.2d 821 (9th Cir. 1941). In the Supreme Court, however, the Court determined the United States was not entitled to judgment on the state of the record, which contained no proof that title to the land was in the United States, but allowed this defect to be cured by stipulation, limiting the judgment to a tract of land owned by the United States. 315 U.S. at 280.

[29] 77 Sup. Ct. at 695.

[30] State of Wyoming, 58 I.D. 128 (1942).

[31] See, e.g., Holloway's Heirs v. Whatley, 133 Tex. 608, 131 S.W.2d 89 (1939); Annot., 123 A.L.R. 848 (1940); 2 American Law of Property, § 10.6 (1952).

be applied in such a way as to carry out its purposes while still recognizing the legitimate interest of the public.[32]

Where there are exceptions intended for the benefit of the public the courts have been liberal in interpreting the act in a manner most favorable to the government. Even where the statute is silent, as in some of the school land cases, the courts have looked beyond the statute to precedent and policy and have determined that mineral land was excepted from a grant which did not in express terms contain any exceptions; mineral lands were not included in a grant unless the act expressly so provided.[33] Having found a Congressional policy of withholding mineral lands, the courts held it would be illogical to assume Congress would dispose of such lands except by statute specifically relating to them. The same reasoning may be applied to the reserved minerals in a railroad right of way.

The solution may depend in the first instance on the rule of the *Townsend* case that once the right of way grant took effect that strip of land was no longer public land and was not subject to further disposition by the Government. It is true the rule may have been founded on a belief that the Government had nothing further to give, while it is now held the Government did have a reserved mineral interest in the right of way. But the *Townsend* case dealt with a claimant under the Homestead Act—a general act concerning non-mineral public lands. It may be contended whatever interest the government had in the right of way could not be acquired by the homesteader. The extent of his interest depends on the statute under which it was acquired, and that statute did not authorize a grant to him of the severed mineral estate in the right of way.

It has been stated repeatedly in the public land cases that "nothing passes but what is conveyed in clear and explicit language."[34] It is reasonable to conclude that, having once reserved the mineral estate, the government would not subsequently authorize disposition of it except by statute dealing with the reserved minerals in explicit terms.

If this contention is upheld, the situation is one in which the 1930 leasing act is peculiarly applicable. That act provides the Secretary of the Interior may lease deposits of oil and gas in rights of way acquired under any law of the United States, "whether the same be a base fee or mere easement."[35] The legislative history of the act would indicate it was designed to resolve the situation in which, because of the nature of the right of way grant, no one could develop the underlying minerals, with the result the oil might be drained from beneath the right of way by wells on adjoining land. If the adjoining land were privately owned there would be a consequent loss of revenue to the government.[36]

This situation could only occur if the Government retained the mineral interest in the right of way while conveying surface rights

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[32] Missouri, K. & T. Ry. Co. v. Kansas Pac. Ry. Co., 97 U.S. 491 (1878).

[33] United States v. Sweet, 245 U.S. 563 (1918); Ivanhoe Mining Co. v. Keystone Consol. Mining Co., 102 U.S. 167 (1880).

[34] E.g., Great Northern Ry. Co. v. United States, 315 U.S. 262, 272 (1942), and cases there cited.

[35] 46 Stat. 373, 30 U.S.C. 301 (1952).

[36] The history of this act is discussed in United States v. Great Northern Ry. Co., 32 F. Supp. 651 (D. Mont. 1940); and in Phillips Petroleum Co., 61 I.D. 93 (1953).

to the right of way strip and fee simple title to the adjoining lands. This will be the situation resulting from the Union Pacific decision, if in fact it is determined the Government did retain the minerals in the right of way even after the land was patented.

The 1930 act has been described by a court of appeals as "little more than a self-serving declaration,"[37] as it was enacted at a time when ownership of minerals underlying rights of way had become a subject of controversy. In eliminating at least a part of the controversy the *Union Pacific* decision may give the act its justification.

Because of recent interpretations of the act, however, it adds another facet to the consequences of the *Union Pacific* decision. Does the 1930 act also apply to the right of way where the adjoining land is still public domain? Or does a lease under the 1920 Mineral Leasing Act, on land crossed by the right of way, include the minerals underlying the right of way?

Where the Government receives an equal royalty in either event, it would seem of little consequence to the United States whether the oil was drained by the 1920 act lessee or by the lessee of the right of way. The original departmental regulations provided that no lease would be authorized under the 1930 act unless it was necessary to offset or prevent drainage and loss to the Government.[38] This provision, however, was deleted from the 1946 revision of the regulations,[39] and in a case involving the rights of Phillips Petroleum Company in a railroad right of way the Department ruled that minerals underlying the right of way on federal lands are not included in a 1920 act lease, but may be developed only under the provisions of the 1930 act; and the right of way may be leased regardless of the status of ownership of the oil and gas in the adjoining land.[40] The right of way involved in the *Phillips* case was an easement only, and the same ruling would apply a fortiori where the right of way is a determinable fee.

The 1930 act gives the railroad the exclusive right to make application for a lease of the right of way, and the lease is given to the railroad unless a higher bid of compensatory royalty is made by the adjoining owner or lessee. Thus, while the railroad is determined not to be the owner of the oil and gas, it does have the exclusive right to acquire the oil and gas rights as lessee.

The result of the *Union Pacific* decision, then, is to leave the railroad without title to the oil and gas in any part of the right of way; to leave undetermined the title to the minerals underlying the right of way where it crosses land now held by private owners; to determine the mineral ownership is in the United States where the right of way is on public land; and to give the railroad a leasing privilege, at least where the right of way crosses federal land, and if the United States owns the minerals in other sections also, then for its entire length.

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[37] MacDonald v. United States, 119 F.2d 821, 827 (9th Cir. 1941).
[38] 53 I.D. 137 (1930).
[39] 43 C.F.R. 200.80 to 200.87 (1954).
[40] Phillips Petroleum Co., 61 I.D. 93 (1953), *aff'd*, Phillips Petroleum Co. v. McKay (Dist. Ct. for D.C., No. 5024-53, June 17, 1955).