

Editor's note: Appealed -- aff'd, sub nom. Rice v. U.S., Civ. No. 1127 (D. N.D. Sept 29, 1972), 348 F.Supp. 254, aff'd, No. 72-1738 (8th Cir. April 20, 1973), 479 F.2d 58, cert denied, S. Ct. No. 73-137 (Oct. 9, 1973), 414 U.S. 858, 94 S.Ct. 66

GEORGE W. ZARAK ET AL.
CARDINAL PETROLEUM COMPANY

IBLA 71-2

71-185

Decided November 10, 1971

Oil and Gas Leases: Rights-of-Way Leases -- Oil and Gas Leases: Lands Subject to

The Secretary of the Interior has authority under the Act of May 21, 1930, to dispose of deposits of oil and gas underlying the right-of-way granted to the Northern Pacific Railroad Company pursuant to the Act of July 2, 1864, 13 Stat. 367, even though the lands traversed by the right-of-way were later patented under the Act of May 20, 1862, 43 U.S.C. § 161 (1964).

Rules of Practice: Protests

Where an assignee of the preference right of a railroad company to an oil and gas lease under the Act of May 21, 1930, is determined to be qualified to receive such a lease for the oil and gas deposits underlying the railroad right-of-way granted pursuant to the Act of July 2, 1864, it is proper to dismiss a protest against issuance of such lease submitted by a successor to the original patentee of the subdivision of land traversed by the antecedent right-of-way.

Oil and Gas Leases: Rights-of-Way Leases -- Railroad Grant Lands -- Rights-of-Way: Nature of
Interest Granted -- Homesteads: Generally

The oil and gas deposits underlying the right-of-way granted to a railroad company pursuant to the Acts of July 1, 1862, or July 2, 1864, remain in the United States, even though the lands traversed by the right-of-way were later patented pursuant to the general homestead laws without any specific reservation of the minerals.

IBLA 71-2 : M 15377, M 15944
71-185

GEORGE W. ZARAK ET AL. : Protests against oil
CARDINAL PETROLEUM COMPANY : and gas leases dismissed

: Affirmed

DECISION

George W. Zarak and others 1/ appeal to the Board of Land Appeals from a decision dated July 15, 1970, in which the Montana land office of the Bureau of Land Management dismissed their protest against issuance of oil and gas lease M 15377 (ND), pursuant to the Act of May 21, 1930, 30 U.S.C. § 301 *et seq.* (1970), to A. G. Golden for deposits underlying the railroad right-of-way of the Northern Pacific Railway Company 2/ in the N 1/2 sec. 8, T. 139 N., R. 98 W., 5th P.M., Stark County, North Dakota. 3/

Cardinal Petroleum Company appeals from a decision dated January 14, 1971, whereby the Montana land office dismissed its protest against issuance of oil and gas lease M 15944 (ND) pursuant to the Act of May 21, 1930, *supra*, to Tenneco Oil Company for deposits underlying the Burlington Northern railroad right-of-way in the S 1/2 sec. 6, T. 139 N., R. 98 W., 5th P.M.

1/ This appeal has been taken in the names of George W. Zarak, Arlene Zarak, William J. Zarak, Jr., Darlene Zarak, and Toney Rice.

2/ Burlington Northern, Inc., is the corporate name of the present successor to the Northern Pacific Railway Company.

3/ Northern Pacific Railway Company, successor in interest to the railroad right-of-way, has assigned its right to apply for a Federal oil and gas lease underlying the right-of-way in sec. 8, T. 139 N., R. 98 W., 5th P.M., to A. G. Golden by an instrument dated December 31, 1969, and in section 6, same township, to Tenneco Oil Company by an instrument dated November 20, 1969.

As both appeals present the same issue, they will be treated in this single decision.

In dismissing the protests, the land office relied on the holding by the Director, Bureau of Land Management, in Union Pacific Railroad Company, Wyoming 0294508 (Nebraska) (February 20, 1968), which held that where the railroad right-of-way was granted under the Acts of July 1, 1862, 12 Stat. 489, and of July 2, 1864, 13 Stat. 356, and a part of the surface was subsequently patented, the oil and gas deposits underlying such railroad right-of-way are subject to leasing only by the Secretary of the Interior pursuant to the Act of May 21, 1930, supra.

The Act of July 2, 1864, 13 Stat. 365, granted to a predecessor of the Burlington Northern a 400-foot right-of-way for construction of a railroad line from Lake Superior to Puget Sound. The plat of survey of T. 139 N., R. 98 W., 5th P.M., approved by the Commissioner of the General Land Office October 29, 1884, shows the center line of the right-of-way traversing the S 1/2 section 6 and the N 1/2 section 8 of the township. The railroad was constructed and has not been abandoned. Construction of the railroad antedated by several years the inception of rights under the homestead or any other public land laws to any of the lands in said S 1/2 section 6 or the said N 1/2 section 8. Patents in satisfaction of perfected homestead entries pursuant to the General Homestead Act of May 20, 1862, 43 U.S.C. § 161 et seq. (1970), were issued for the subject lands as follows: SE 1/4 section 6: Patent 3177, July 8, 1895; lots 6, 7 E 1/2 SW 1/4, section 6: patent 3662, June 23, 1898; N 1/2 N 1/2 section 8: patent 113254, February 23, 1910; and S 1/2 NE 1/4 section 8: patent 5893, February 24, 1903. None of the patents contained any reference to the railroad right-of-way, nor did they mention any reservation of the minerals underlying the right-of-way.

The question thus presented is whether the Secretary of the Interior has authority under the Act of May 21, 1930, supra, to dispose of oil and gas deposits underlying the right-of-way of the Burlington Northern as property of the United States, or whether the Secretary lacks such authority because the minerals retained by the United States under the railroad right-of-way grant passed to the subsequent patentees of homestead entries embracing the legal subdivisions traversed by the right-of-way.

The question is similar to that resolved by the Bureau of Land Management in Union Pacific, supra. The decision relied on Union Pacific Railroad Company, 72 I.D. 76 (1965), which held that the Secretary of the Interior has authority under the Act of May 21, 1930, to dispose of deposits of oil and gas underlying the right-of-way granted to the Union Pacific Railroad Company pursuant to the Acts of July 1, 1962, and July 2, 1864, even though the lands traversed by the right-of-way were later granted to Wyoming as school lands. In the Bureau decision it was pointed out:

The legality of the Department's conclusions in Union Pacific Railroad Company, supra, was challenged in the Courts in litigation styled State of Wyoming and Gulf Oil Corporation v. Udall, et al., in the United States District Court for the District of Wyoming. That Court held that grant of school land to the State of Wyoming, under a grant specifically exempting mineral lands, exempted mineral rights in a previously granted railroad right-of-way (255 F. Supp. 481 (1966)). This conclusion was affirmed by the Court of Appeals for the Tenth Circuit (379 F. 2d 635 (1967)). On December 4, 1967, the United States Supreme Court denied certiorari.

In Union Pacific Railroad Company, supra, at page 80, it is held that a comparison of Great Northern Railway v. United States, 315 U.S. 262 (1942) (which held that rights-of-way granted under the Act of March 3, 1875 (43 U.S.C. §§ 934-939) are easements only, not fees) and United States v. Union Pacific Railroad, 353 U.S. 112 (1957), demonstrates that the latter case "left unaltered the rule that a right-of-way granted under the 1862 and 1864 acts, supra, separated the land from the public domain and that subsequent grantees of lands traversed by the right-of-way gained no rights in it." It was further held, at page 81, that just as the Supreme Court held in Northern Pacific Railway v. Townsend, 190 U.S. 267 (1903), that

a subsequent homestead patentee cannot acquire rights against the railroad, so, in the case before the Department, "the State, a subsequent grantee, can acquire no rights against the United States which holds all the interest in the right-of-way not held by the railroad." It was concluded that:

Whatever the exact nature of the estate created by the 1862 and 1864 acts may be, it is clear that it is more than an easement and sufficient to take the lands covered by the right-of-way out of the category of public lands subject to further disposition to the State. 72 I.D. at 81.

The appellants concede that the railroad was constructed many years before the United States issued patents to the homestead entrymen, and that the patents are subject to the railroad right-of-way even though it is not specifically mentioned in the patents. But they contend that as no rights to the oil and gas were conveyed by the United States by the grant of land for a right-of-way, the rights to the oil and gas must have passed to the original patentees by the instruments which had no reservation of such oil and gas to the United States, and now they, through mesne conveyances, have acceded to the title to the oil and gas deposits. They argue that the 1930 Act is inapplicable here and that such a view was expressed by the Director, Bureau of Land Management, in a letter dated March 28, 1968, to Mr. John L. Sherman, an attorney of Dickinson, North Dakota, in which it was stated, in regard to the N 1/2 N 1/2 sec. 8, T. 139 N., R. 98 W., 5th P.M., "since the patent did not contain a reservation of the oil and gas to the government, the 1930 Act is not applicable, and the question whether the Northern Pacific Railway has a preferential right to a lease of such deposits is therefore moot." The appellants further argue that United States v. Union Pacific Railroad Company, 353 U.S. 112, holds that the United States retained the oil and gas deposits under the right-of-way as against the railroad company but it does not hold that when the interest of the United States in the subdivision was conveyed by patent to a homestead entryman, the oil and gas under the right-of-way was retained. Further, they argue that Wyoming v. Udall, 379 F.2d 635 (10th Cir. 1967), cert. denied, 389 U.S. 985 (1967), does not support the land office decision, because it turns only on the narrow issue that the State school land grant did not

attach to lands previously sold or disposed of by the United States, and for which the State of Wyoming could select indemnity lands in lieu thereof. They assert the decision is more of an interpretation of the State Enabling Act than the railroad right-of-way act. They suggest that Northern Pacific v. Townsend, supra, dealt principally with the question of adverse possession under state law, and the nature of a right-of-way easement granted to a railroad had not been defined in 1903, when Townsend was decided.

The major contention of the appellants that the rights to the oil and gas deposits underlying the railroad right-of-way passed from the United States with the land patents, was rejected by the Department in the Union Pacific case, supra. Although in Wyoming v. Udall, supra, the Court relied on certain provisions of the Wyoming State Enabling Act of July 10, 1890, 26 Stat. 222, to buttress its conclusion, it did not reject the Department's position that the land in the right-of-way was taken out of the category of public lands. The Court also noted that the railroad has under the right-of-way grant the right to explore for coal and iron and to extract them if discovered. It said, "Such right [right-of-way grant] is in a different category from a surface easement." 379 F.2d at 640. This conclusion supports the Department's holding that a pre-1875 right-of-way is more than an easement; it is an interest sufficient to remove the land it covers from the category of public land available for disposition under the general land laws.

A leading definitive study of the mining laws, after discussing railroad rights-of-way, states:

It is to be concluded that mineral rights in a right-of-way such as was involved in the Union Pacific decision, and any others [e.g., Northern Pacific] to which the ruling may be extended, are presently held by the United States. Since there is no statutory authority for location of reserved minerals apart from the surface, no mining claim may be made, but the right-of-way may be leased for oil and gas development pursuant to the Right-of-way Leasing Act of 1930. I American Law of Mining, at 492. (A footnote refers to Phillips Petroleum Company, 61 I.D. 93 (1963)).

As the right-of-way grant to the Northern Pacific was made by the 1864 Act, which was similar in all respects, *mutatis*

mutandis, to the 1862 and 1864 Acts which granted the right-of-way to the Union Pacific, the ruling in Union Pacific, supra, affirmed in Wyoming v. Udall, supra, is controlling here. The land office correctly issued a lease under the 1930 Act for the oil and gas deposits lying within the limits of the Northern Pacific right-of-way in section 8, and likewise may correctly issue a lease for the oil and gas deposits underlying the right-of-way in section 6, township above named.

We do not know the circumstances which prompted the letter of March 28, 1968, from the Director, Bureau of Land Management, to Mr. Sherman, nor its apparent conclusion that the 1930 Act was not applicable to the tract therein named, and under discussion here. However, it is at variance with the views expressed herein and does not bind the Department.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decisions of the land office are affirmed.

Francis E. Mayhue, Member

We concur:

Martin Ritvo, Member

Edward W. Stuebing, Member (concurring specially)

Edward W. Stuebing, concurring.

The result reached in this case is wholly out of consonance with the law which would apply to an identical fact situation involving different parties. But because the case law dealing with federally created railroad rights-of-way has treated the status of such land as somehow unique, a crucial element of complexity has been infused into what otherwise would be a straightforward legal problem of elemental simplicity.

A owns Blackacre in fee simple absolute. A conveys to B an interest of less than the whole fee in a portion of Blackacre, A retaining an interest which includes the oil and gas and certain other minerals and a right of reversion. Subsequently, A conveys the entirety of Blackacre to C in fee simple without reservation or exception. Query: Does A thereafter own the oil and gas underlying that portion of Blackacre involved in the limited conveyance to B and included in the subsequent conveyance to C?

The answer, of course, is that A cannot own the oil and gas, having conveyed all interests in the property to either B or C. If it were held that, despite these conveyances, A nevertheless retained an implied estate in Blackacre, the law of real property in the United States would be cast into a state of irreconcilable turmoil and confusion, and virtually no title would be certain. But in our analogy A is the United States, B is the railroad, the limited interest conveyed to B is a railroad right-of-way, Blackacre represents the entire legal subdivision upon which the right-of-way is imposed and which is then conveyed to the homestead entryman, C; and out of these relationships a special body of case law has evolved.

The departure from the usual application of the law relating to the conveyancing of real property had its inception in the ensuing confusion over just what sort of an estate in the land was created by the statutes conferring upon the railroads the rights-of-way over public lands. As noted in the main opinion, the Supreme Court, in Northern Pacific v. Townsend, 190 U.S. 265, 270 (1903), said:

At the outset, we premise that, as the grant of the right-of-way, the filing of the map of definite location, and the construction of the railroad within the quarter sectioning question preceded the filing of the homestead entries on such section, the land forming the right-of-way therein was taken out of the category of public lands subject to preemption and sale, and the land department was therefore

without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right-of-way because of the fact that the grant to them was of the full legal subdivisions.

Although we are unable to perceive how the foregoing was necessary, or even contributory to the rationale of the decision in that case, the fact remains that the Court so stated, and that statement has served to define the rights of the parties in a succession of subsequent cases. It was also in this case that the railroad right-of-way was conceived to be a grant "of a limited fee, made on an implied condition of reverter," a concept which has been so eroded by later decisions as to have been virtually negated.

In Wyoming v. Udall, 379 F.2d 635 (10th Cir. 1967), the Court said that the concept that the right-of-way was a limited fee with an implied reverter became "unnecessary" when the meaning of "easement" was expanded. However, while so dismissing the limited fee concept, the Court continued to adhere to the idea that the creation of the right-of-way had the effect of removing the land so burdened from the public domain, so that the grant of a state school section would not be effective as to the right-of-way, even if limited to the subsurface minerals.

Justice Douglas, author of the Supreme Court's opinion in United States v. Union Pacific R. Co., 253 U.S. 112 (1957), discussed the limited fee concept created by the Court in a line of earlier decisions stating, "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 the use for railroad purposes." Id. at 119. The Court held that the grant of the right-of-way through the public lands did not convey the title to oil and gas deposits underlying the right-of-way, and that the railroad company could not remove or dispose of such deposits.

In this context it is informative to note that in Justice Frankfurter's dissent from the Court's decision in the 1957 Union Pacific case he quotes a colloquy from the House debate on the bill which became the Act of March 3, 1909, 35 Stat. 844, as illustrative of the fact that theretofore the United States did not separate the surface ownership from the ownership of the subsoil and that such a concept was a novelty in 1909. A portion of this colloquy follows:

Mr. Mondell [of Wyoming, Chairman of the House Public Lands Committee] . . . this bill simply provides that in any case where, subsequent to the location or the entry, the character

of the land has been called into question the entryman may, if he so allege, accept a limited patent. It is the first legislation before Congress providing for a limited patent or a patent reserving the mineral

Mr. Stevens of Texas. Is it not a fact that valuable minerals are reserved now to the Government?

Mr. Mondell. No; that is not true. The patent having issued, the patent carries everything in the land with it

.....

In other words, the patents issued by the Government of the United States heretofore have been patents in fee. 43 Cong. Rec. 2504.

The homesteaders in these cases, who came after the railroad was in place and entered subdivisions which were bifurcated by the right-of-way, applied for patent to and were granted the entirety of the subdivisions affected, for which they paid fees and commissions on a per-acre basis, as required by the land office. The fact of payment is not as significant as the fact that payment was charged and made for each individual acre in the subdivision. Why did they pay \$2.50 for each acre occupied by the railroad? The apparent answer is that the homestead statute requires that the entered lands be contiguous. Unless the lands occupied by the right-of-way were included in the entries the lands on either side would be separated by the right-of-way and non-contiguous. Therefore, the land office required the entrymen to include the right-of-way in their entries and pay the fees for that land, and it issued the patents for the entirety.

There are two ways to view the Department's treatment of this matter. We can assume that the land department believed that the railroad owned the fee and, despite this belief, it charged the homesteaders for the land and issued a patent which only confused the title and conveyed nothing within the right-of-way, and that it did so for the sole purpose of masking its failure to apply the plain prohibition against non-contiguity contained in the homestead law, a law which it was charged with administering. I reject this explanation, but this is the one which best comports with the majority view holding that the patentees took nothing in the right-of-way despite their payments and issuance of patents therefor. The only other explanation is that the land department recognized that the United States retained an interest in the land occupied by the right-of-way, and further recognized that

by including this interest in the entry and conveying it in good faith to the entrymen it could serve as a legitimate link between the two portions which would otherwise be non-contiguous. This is, by far, the more credible explanation.

If we accept the latter explanation as correct, we see that the imposition of the railroad right-of-way did not remove the land from the category of public land because the Department thereafter dealt with it as public land in conveying it under authority of the statute relating exclusively to the public land. It is now settled law that the United States did retain an interest, or servient estate, in the land granted to the railroad for right-of-way purposes. United States v. Union Pacific R. Co., *supra*. It follows that if it conveyed any interest to the homesteaders it conveyed all that it had, including the oil and gas, as the separation and reservation of minerals was not then a feature of federal conveyancing, and because the conveyance was not made subject to any reservations or exceptions.

In discussing the nature of the right-of-way granted to the railroads by the Act of March 3, 1875 (18 Stat. 482), the Department said:

A railroad company to which a right-of-way is granted does not secure a full and complete title to the land out of which the right-of-way is located. It obtains only the right to use the land for the purposes for which it is granted and for no other purposes and may hold such possession, if it is necessary to that use, only as long as that use continues. The Government conveys the fee simple title in the land over which the right-of-way is granted to the person to whom patent issues for the legal subdivision on which the right-of-way is located, and such patentee takes the fee subject only to the railroad company's right of use and possession. All persons settling on a tract of public land, to part of which right-of-way has attached, take the same subject to such right-of-way, and at the total area of the subdivision entered, there being no authority to make deduction in such cases. 37 L.D. 787, 788 (1909).

I submit that in light of the analysis by the Supreme Court in United States v. Union Pacific R. Co., supra, the nature of the grant to the railroads under the 1862 and 1864 Acts did not differ materially from the right acquired by the railroads under the 1875 Act. In each instance all that the railroads got was the surface right to the right-of-way to use for railroad purposes (in addition to the iron and coal). In each instance an estate in the land remained vested in the United States. There is no discernible reason why this estate could not have passed to the patentee of the United States regardless of the statute by which the railroad happen to acquire its right-of-way.

A further test of the effect of the patents issued to the entrymen is to hypothesize the result of the railroad's abandonment of the right-of-way. Would the United States, having spread on the records patents evincing ownership in private individuals, then be heard to assert ownership of the entirety of the lands previously dominated by the right-of-way? And, if so, could such an assertion be sustained?

In view of the present definition of the nature of the right acquired by the railroads under the 1862 and 1864 Acts there is no longer any need to continue to assert that the United States did a vain and useless thing when it issued its patents to include the lands here at issue.

A conclusion that patents issued prior to 1930 without a reservation of minerals for lands traversed by railroad rights-of-way operated to convey titles to the oil and gas thereunder would do no violence to the Act of May 21, 1930; 46 Stat. 373, 30 U.S.C. 301 (1964). The Act would have continued application to federal lands and to lands conveyed with the reservation of oil and gas to the United States.

Nevertheless, while maintaining my personal dissatisfaction with the current state of the law in this area, I am obliged to recognize that it is correctly expressed in the main opinion and that the strictures of stare decisis bind us to this conclusion. While certain distinctions can be drawn between the circumstances which prevailed in the landmark cases cited in the principal opinion and those which obtain in these cases, the distinctions are not such as would reasonably provide a basis for a different result.

Accordingly, I must add my concurrence, albeit reluctantly.

