

BROWN W. CANNON, JR., ET AL.

IBLA 76-35

Decided March 16, 1976

Appeal from decision of the Colorado State Office, Bureau of Land Management, dismissing a protest to the acceptance of compensatory royalty bid C-22636.

Affirmed.

1. Oil and Gas Leases: Rights-of-Way Leases -- Rights-of-Way: Generally

Where a protest against the United States entering into a compensatory royalty agreement pertaining to oil and gas underlying a railroad right-of-way pursuant to the Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. § 301 et seq. (1970), is based upon an assertion that the protestants have title to the oil and gas under the right-of-way, the protest will be properly dismissed if

it is found the United States has title to those minerals.

2. Oil and Gas Leases: Rights-of-Way Leases -- Railroad Grant Lands -- Rights-of-Way: Nature of Interest Granted

Although the grants of a right-of-way to a railroad under section 2 of the Act of July 1, 1862, and of title to odd-numbered sections of land under section 3 of that Act were grants in praesenti, the railroad's interest in the right-of-way land stems solely from section 2. There is no difference in its interest in portions of the right-of-way land which cross even-numbered sections of land and in portions which cross odd-numbered sections. Minerals underlying the right-of-way were reserved to the United States in both instances.

3. Oil and Gas Leases: Rights-of-Way Leases -- Rights-of-Way: Nature of Interest Granted

Title to the oil and gas deposits underlying the right-of-way granted to a railroad by

the Act of July 1, 1862, 12 Stat. 489, did not pass under a patent to the land that the right-of-way crosses. Rather, title remains in the United States.

APPEARANCES: Robert C. Hawley, Esq., and Gretchen A. VanderWerf, Esq., of Ireland, Stapleton, Pryor and Holmes, P.C., Denver, Colorado, for appellants.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Appellants 1/ appeal from the decision dated June 5, 1975, of the Colorado State Office, Bureau of Land Management, which dismissed their protest to the acceptance by the State Office of compensatory royalty bid C-22636 by Manning Gas and Oil Company. The minerals involved underlie the right-of-way of the Union Pacific Railroad Company (hereafter referred to as the railroad) across the NW 1/4 of section 17, T. 2 N., R. 66 W., 6th P.M., Colorado. Appellants are the current titleholders to the minerals underlying the NW 1/4 of section 17. They assert in their protest that their title includes oil and gas underneath the right-of-way. The State

1/ The 10 appellants each hold a fractional ownership of varying amount in the undivided mineral interest in the adjoining lands crossed by the right-of-way described in this decision. The appellants are: Brown W. Cannon, Jr.; Charles G. Cannon; Reynolds G. Cannon; George R. Cannon; Sue M. Cannon; Margaret Cannon; George R. Cannon, Jr.; Claudia Cannon; Kerry McCan Cannon; and James R. Cannon.

Office dismissed their protest for the reason that title to any such oil and gas is in the United States.

The right-of-way here is part of the right-of-way across public lands granted to the railroad by section 2 of the Act of July 1, 1862, 12 Stat. 489, as amended. ^{2/} Section 3 of the Act of July 1, 1862, granted to the railroad odd-numbered sections of land along its right-of-way, with certain conditions and restrictions. Section 17 is one of those odd-numbered sections patented to the railroad. Appellants are, therefore, the current successors to the railroad's title.

[1] Oil and gas deposits underlying railroad or other rights-of-way acquired from the United States may be leased by the Secretary of the Interior pursuant to the Act of May 21, 1930, 30 U.S.C. § 301 et seq. (1970). Section 3 of that Act, 30 U.S.C. § 303 (1970), provides for compensatory royalty agreements with the owner or lessee of adjoining lands, or the holder of the right-of-way, whichever bids the higher amount or percentage of royalty it will

^{2/} The Act of July 1, 1862, 12 Stat. 489, contained the original land grant authorization for the Union Pacific Railroad Co. The Act was subsequently amended by: the Act of July 2, 1864, 13 Stat. 356; Resolution No. 34, May 7, 1866, 14 Stat. 355; the Act of July 3, 1866, 14 Stat. 79; and the Act of March 3, 1869, 15 Stat. 324. The 1869 amendment authorized the Union Pacific to contract with the Denver Pacific Railway and Telegraph Co. for the construction of a railroad from Denver to Cheyenne under the terms of the 1862 Act. By the time the patent for section 17 was issued, the Denver Pacific had merged with the Union Pacific.

pay. Manning Gas and Oil Company holds an oil and gas lease from appellants for the NW 1/4 of section 17 and was the only bidder for the agreement. The Act of May 21, 1930, is applicable only if the United States has title to the oil and gas deposits underlying the right-of-way. Whether the United States or appellants have title to such oil and gas deposits is, therefore, the dispositive issue in this case. Dismissal of the protest was proper if title is in the United States.

[2] Appellants argue first that the limited title to a right-of-way granted to the railroad by section 2 of the Act of July 1, 1862, applies only where the right-of-way does not cross odd-numbered sections patented to the railroad under section 3 of the same Act. In support of this, appellants cite various Supreme Court decisions which held that grants under either section 2 or section 3 of the Act of July 1, 1862, are in praesenti, i.e., title to the right-of-way and to the odd-numbered sections of land passed to the railroad as of July 1, 1862, the date of the Act, regardless of when their specific location was determined. Appellants contend that because Congress intended that the railroad receive fee simple title to the odd-numbered sections, Congress must have intended that the fee simple title also apply to a right-of-way where it crosses an odd-numbered section patented to the railroad, so that the two grants would not conflict. Therefore, appellants conclude,

the railroad received title to the minerals underlying the right-of-way across the NW 1/4 of section 17 and, by reserving only the surface interest to itself, included title to those minerals in its conveyance of the NW 1/4 to appellants' predecessors in interest. Second, appellants argue that when the United States issued patents to land traversed by a right-of-way, title to the minerals underlying the right-of-way passed to the patentee of the traversed land, in this instance the railroad.

Appellants' argument that the railroad's patent to section 17 also conveyed fee simple title to the right-of-way requires an examination of the intent of Congress in the Act of July 1, 1862. Appellants contend that it would be illogical to assume that Congress did not intend for the railroad to receive full title to its right-of-way, including the minerals, where it crossed an odd-numbered section patented to the railroad.

We do not dispute that when the railroad received a patent for odd-numbered sections of land under section 3 of the Act of July 1, 1862, it owned the land in fee simple subject to outstanding reservations. See Burke v. Southern Pacific Railroad Co., 234 U.S. 669, 685 (1914). "An absolute or fee-simple estate is one in which the owner is entitled to the entire property, with unconditional power of disposition during his life." BLACK'S LAW DICTIONARY 742 (Rev. 4th Ed. 1968). Therefore, if the railroad received fee simple

title to its right-of-way, it would be able to use the land for any purpose or to dispose of it at will.

However, for the railroad to have complete control over the use and disposition of its right-of-way does not comport with the intent of Congress in granting the right-of-way. The Supreme Court has stated:

* * * Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. * * *

Northern Pacific Railway Co. v. Townsend, 190 U.S. 267, 271 (1903).

Neither the courts nor the Department of the Interior have ever recognized that a railroad receives any greater title than that described above in its right-of-way where it crosses an odd-numbered section of land patented to the railroad. In H. A. & L. D. Holland Co. v. Northern Pacific Ry. Co., 214 F. 920 (9th Cir.

1914), 3/ the court, when considering the question of title in the right-of-way when it traverses odd-numbered sections patented to the railroad, stated:

We are unable to accept the view that, because the right of way at this place is in an odd-numbered section, the railroad company took the absolute title, unlimited by the implied condition of reverter attending the right of way grant. No substantial reason has been assigned, and clearly there is none, for assuming that Congress intended such an artificial and whimsical distinction. A strip of land 400 feet wide through the public domain was being withdrawn from private entry and dedicated as a right of way for a transcontinental railroad. The value of a right of way is dependent upon its continuity, and surely it could not have been contemplated that in case of reversion the government would get back only numerous disconnected fragments of that which it was granting as a continuous line. There is little weight in the suggestion that Congress could not have intended a uniform status for the entire right of way, because it doubtless knew that any route which might be selected would here and there traverse private holdings, and that therefore the continuity of the grant would be broken. True, absolute continuity was not to be expected, but when we consider the vast stretch of public domain over which the road would pass, and the rarity and insignificance of the private holdings, it may readily be concluded that these interruptions were thought to be negligible, as affecting the value of the right of way as a whole.

In support of their position, appellants invoke the general rule that, where two titles relate back to the same point of time, there is a merger, and the greater title prevails from the beginning. It is conceded, however, that this doctrine, if the appellants' application of it be correct, would here come into

3/ The Act of July 2, 1864, 13 Stat. 365, contained the land grant authorization for the Northern Pacific Railroad Co. This Act is not to be confused with the amendments to the Act of July 1, 1862, which are set forth at 13 Stat. 356. (See fn. 2.) Sections 2 and 3 of the 1864 Act are similar to sections 2 and 3 of the 1862 Act. See George W. Zarak, 4 IBLA 82 (1971).

conflict with the controlling principle that the granting act must be construed in such a manner as to give effect to the legislative intent, provided it be found that Congress intended that the right of way throughout should be held subject to the conditions and limitations declared in the Townsend Case. Such, we have no hesitation in finding, was the intent of Congress, and therefore it is not deemed necessary to consider the correctness of the assumptions upon which appellants' application of the rule necessarily rests, namely, that, as the terms are used in the learning upon the law of merger, the estate of the grant-in-aid is greater than that of the right of way grant, and that they both date from the same point of time.

Id. at 924-25; accord, People v. Tulare Packing Co., 25 Cal. App. 2d 717, 78 P.2d 763, 765-67 (1938);

Crandall v. Goss, 30 Idaho 661, 167 P. 1025, 1026-27 (1917).

The Department has also recognized the difference in title, particularly as it relates to underlying minerals:

* * * Moreover, even though the right-of-way crosses odd-numbered sections of land, this does not make the railroad's title, as to such segments of the right-of-way, one acquired in fee simple absolute under section 3 of the act. * * * [Citations omitted.]

Solicitor's Opinion, approved by the Secretary, 58 I.D. 160, 161 (1942).

Appellants urge that the reasoning of the Supreme Court in United States v. Union Pacific Railroad Co., 353 U.S. 112 (1957), supports their position. In that decision, the Court held that

the United States, not the railroad, owns the minerals underlying a right-of-way granted by the Act of July 1, 1862.

Appellants point to language at page 116 of that decision regarding the necessity for an administrative determination that lands were nonmineral in character before a patent would issue for an odd-numbered section of land under the section 3 grants, whereas such a determination was inappropriate for the section 2 right-of-way. They argue that the determination of nonmineral in character applies to the right-of-way where it crosses an odd-numbered section, and, therefore, the United States cannot now claim title to minerals underlying such a right-of-way. However, the overall language and tenor of Justice Douglas' opinion in that case does not support appellants' position. For example, he stated:

* * * We would have to forget history and read legislation with a jaundiced eye to hold that when Congress granted only a right of way and reserved all "mineral lands" it nonetheless endowed the railroad with the untold riches underlying the right of way. Such a construction would run counter to the established rule that the land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it. Caldwell v. United States, 250 U.S. 14, 20-21. These are the reasons we construe "mineral lands" as used in § 3 of the Act to include mineral rights in the right of way granted by § 2.

* * * * *

* * * But, construing the grant in § 2 favorably to the Government, as we must, we cannot conclude that Congress meant the policy it expressed, by excepting "mineral

lands" in § 3, to be inapplicable to § 2 in the face of its admonition that the exception is applicable to the entire Act. Nor can we conclude that, because the administrative system, by which mineral resources in the grant of land under § 3 were reserved, was inappropriate to § 2, Congress did not intend appropriate measures to reserve minerals under the right of way granted by § 2. We cannot assume that the Thirty-seventh Congress was profligate in the face of its express purpose to reserve mineral lands.

United States v. Union Pacific Railroad Co., *supra* at 116-17.

Obviously Justice Douglas was aware that the section 2 right-of-way traversed the odd-numbered sections granted by section 3 and that fee simple title to the odd-numbered sections would pass to the railroad. Yet, he made no distinction between the odd- and even-numbered sections of land as to the reservation of the minerals underlying the section 2 right-of-way. It is apparent that there was a distinction between the estates granted under sections 2 and 3. Justice Douglas distinguished earlier cases because:

* * * in none of them was there a contest between the United States and the railroad-grantee over any mineral rights underlying the right of way. 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.

Great reliance is placed on Great Northern R. Co. v. United States, 315 U.S. 262 [1942], for the view that the grant of a right of way in the year 1862 was the grant of a fee interest. In that case we noted that a great shift in congressional policy occurred in 1871: that after that period only an easement for railroad purposes was granted, while prior thereto a right of way with alternate sections of public land along the

right of way had been granted. In the latter connection we said, "When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement in the right of way granted in the same act." *Id.*, at 278. But we had no occasion to consider in the Great Northern case the grant of a right of way with the reservation of "mineral lands." The suggestion that a right of way may at times be more than an easement was made in an effort to distinguish the earlier "limited fee" cases. To complete the distinction, Mr. Justice Murphy with his usual discernment added, "None of the cases involved the problem of rights to subsurface oil and minerals." *Id.*, at 278.

The latter statement goes to the heart of the matter. There are no precedents which give the mineral rights to the owner of the right of way as against the United States. We would make a violent break with history if we construed the Act of 1862 to give such a bounty. We would, indeed, violate the language of the Act itself. To repeat, we cannot read "mineral lands" in § 3 as inapplicable to the right of way granted by § 2 and still be faithful to the standard which governs the construction of a statute that grants a part of the public domain to private interests.

United States v. Union Pacific Railroad Co., *supra* at 119-20.

The opinion was emphatic on the distinction between a right-of-way and land patented under section 3 of the Act of July 1, 1862. We find no indication that the Court defined right-of-way as only crossing even-numbered sections of land. The reasoning of the Court's opinion supports a contrary conclusion, i.e., that the right-of-way under section 2 is subject to a mineral reservation to the United States in all circumstances.

Therefore, the patent which the railroad received to section 17 carried with it no interest or title in the right-of-way which had been located across the NW 1/4 of that section. The interest which the railroad has in the right-of-way land stems solely from section 2 of the Act of July 1, 1862.

[3] The remaining question is whether the patentee of land which a right-of-way traverses acquired any interest in the minerals underlying the right-of-way. The Supreme Court has ruled that homesteaders of land traversed by a right-of-way granted by an act similar to the Act of July 1, 1862, received no interest in the right-of-way even though the homestead grant "was of the full legal subdivisions." Northern Pacific Railway Co. v. Townsend, *supra* at 270. Appellants argue that in United States v. Union Pacific Railroad Co., *supra*, the Supreme Court limited the application of its earlier holdings to the surface estate and that title to the mineral estate under the right-of-way passed with the patent to the subdivision traversed. In support of this position, they cite Chicago and North Western Railway Co. v. Continental Oil Co., 253 F.2d 468 (10th Cir. 1958). However, that decision is not applicable here because it was concerned with a right-of-way granted under the Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. § 934 *et seq.* (1970).

As stated above, we do not agree with appellant's analysis of United States v. Union Pacific Railroad Co., *supra*. Other courts

and this Board have interpreted the Act of July 1, 1862, and the Supreme Court decisions to mean that title to oil and gas deposits underlying a right-of-way granted by the Act of July 1, 1862, remains in the United States. George W. Zarak, 4 IBLA 82 (1971), aff'd sub nom. Rice v. United States, 348 F. Supp. 254 (D.N.D. 1972), aff'd per curiam, 479 F.2d 58 (8th Cir.), cert. denied, 414 U.S. 858 (1973); Wyoming v. Udall, 379 F.2d 635 (10th Cir. 1967); see Kunzman v. Union Pacific Railroad Co., 169 Colo. 374, 456 P.2d 743 (1969), cert. denied, 396 U.S. 1039 (1970). Since title to the oil and gas remains in the United States, appellants have no title to assert, and the protest was properly dismissed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joan B. Thompson
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING SPECIALLY:

The difficulties in setting forth a logical basis for the status of the law on the issues herein are set forth in detail in United States v. Union Pacific Railroad Co., supra at 120-37 (Frankfurter, Burton and Harlan, J.J., dissenting) and George W. Zarak, supra at 89-93 (Stuebing, A. J., concurring).

As an original proposition, I would have held that the railroad was intended by Congress to receive only an easement for the right-of-way under section 2 of the Act, and that the broad grant of the odd-numbered sections of land under section 3 of the Act was subject only to the railroad's interest in the right-of-way. Even though it has been determined that the easement would revert to the United States rather than to the servient owner, it would still follow that the servient owner received title to the minerals not conveyed by specific grant to the railroad.

Despite my own interpretation, however, the majority opinion in Union Pacific, supra at 115-20, leads me to conclude that the State Office decision should be affirmed by the Board.

Joseph W. Goss
Administrative Judge

