

**Editor's note: 83 I.D. 364 (not printed in IBLA volume in I.D. format); Appealed -- aff'd, Civ. No. C77-034 (D.Wyo. Sept. 8, 1977), 436 F.Supp. 933; aff'd, No. 77-2031 (10th Cir. July 18, 1979), 602 F.2d 1379**

STATE OF WYOMING (Published)

IBLA 71-87  
72-283

Decided September 29, 1976

Appeals from decisions of the Wyoming State Office, Bureau of Land Management, rejecting the State of Wyoming's applications for patents for school land in place excepting railroad right-of-way and for school indemnity with railroad right-of-way as base.

Affirmed.

1. Railroad Grant Lands -- School Lands: Indemnity Selections -- State Selections

A railroad right-of-way, granted under the Act of July 1, 1862, 12 Stat. 489, as amended by Act of July 2, 1864, 13 Stat. 356, crossing a school section, does not constitute lands "otherwise disposed of by the United States" within the ambit of the school indemnity statutes. Therefore a rejection of an indemnity selection application, offering such base, is proper.

2. Patents of Public Lands: Generally -- School Lands: Generally

An application for patent to school lands in place, pursuant to 43 U.S.C. § 871a (1970), which requests an exclusion of the right-of-way granted under the Act of July 1, 1862, as amended July 2, 1864, must be rejected. Such a patent must be issued "subject to" the right-of-way.

APPEARANCES: A. E. King, Commissioner of Public Lands, State of Wyoming, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

The State of Wyoming appeals from two decisions of the Wyoming State Office, Bureau of Land Management (BLM). The first, dated October 6, 1970, rejected the State's application, W-24998, seeking patent pursuant to 43 U.S.C. § 871a (1970) for certain school land sections within Laramie County, Wyoming, except for those traversed by the right-of-way of the original main line of the Union Pacific Railroad Company. The stated basis for this rejection was that the application failed to describe "full legal subdivisions." It described "a number of full sections or aliquot parts thereof, but each description was qualified by the clause, 'except that portion of the original main line right-of-way of the Union Pacific Railroad Company'." BLM held:

Patents must issue for lands described by full legal subdivisions in accordance with an official Government survey. Therefore, an application for patent which describes lands as cited above is improper. The right-of-way grant to the Railroad Company \* \* \* would be reserved in any patent issued to the State, but it could not properly be excluded from such a patent. The Department has held that the State took title under its grant of school lands in place, subject to the right-of-way (State of Wyoming, 58 I.D. 128).

A timely appeal from the October 6, 1970, decision was filed, and on December 10, 1971, the State filed application W-32556, pursuant to 43 U.S.C. §§ 851, 852 (1970), seeking lands as indemnity lieu selections for some of the acreage covered by that portion of the Union Pacific's right-of-way excluded from the previous application for patent. On January 25, 1972, BLM issued a decision concerning the indemnity lieu selection application, finding it defective because: (1) the State took title to school sections subject to the right-of-way granted to the railroad by the Act of July 1, 1862, 12 Stat. 489, as amended, by Act of July 2, 1864, 13 Stat. 356, State of Wyoming, supra; and (2) the railroad right-of-way grant to the Union Pacific Railroad Company by the Acts of 1862 and 1864 was a "special grant" from Congress, and the Department had previously held that:

No provision is made by law for indemnifying the State in cases where the school section is crossed by railroads, claiming the right of way either under the act of March 3, 1875, or by a special grant from Congress \* \* \*.

State of North Dakota, 13 L.D. 454 (1891).

At appellant's request, these appeals have been consolidated for decision.

Wyoming contends that the original main line right-of-way of the Union Pacific is land which was previously disposed of under the laws of the United States. Therefore, it asserts the right to exclude that area from its patents for school sections in place and to make lieu indemnity selections for the lands lost.

Wyoming, by section 4 of its Statehood Act of July 10, 1890, 26 Stat. 222, received:

\* \* \* sections numbered sixteen and thirty-six in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior \* \* \*. [Emphasis supplied.]

The indemnity lieu selection law, 43 U.S.C. § 851 (1970), provides in part:

Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections or either of them have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section 852 of this title, by said State where sections sixteen or thirty-six are, before title could pass to the State, included within

any Indian, military, or other reservation, or are, before title could pass to the State, otherwise disposed of by the United States: Provided, That the selection of any lands under this section in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. And other lands of equal acreage are also appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: Provided, however, That nothing in this section contained shall prevent any State from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein. [Emphasis supplied.]

A right-of-way for railroads under the pre-1871 laws granted to the railroads an estate greater than an easement but less than a fee simple absolute. United States v. Union Pacific R.R. Co., 353 U.S. 112 (1957); Great Northern Ry. Co. v. United States, 315 U.S. 262, 273 (1942); Rio Grande Western Railroad Co. v. Stringham, 239 U.S. 44, 47 (1915). In Northern Pacific Ry. Co. v. Townsend, 190 U.S. 267 (1903), the interest conveyed to the railroad in the right-of-way was dubbed a "limited fee estate." This term equates with a base, qualified or determinable fee.

[1, 2] At first blush, it might appear that lands conveyed to a railroad for a right-of-way under the pre-1871 statutes would constitute lands "otherwise disposed of" within the ambit of the Wyoming Statehood Act and the general indemnity statute.

But such a conclusion essentially must rest upon a superficial reading of those statutes without regard to what has transpired since the enactment of the Act of February 28, 1891, 26 Stat. 796, the general indemnity statute. Such a conclusion ignores the Department's virtually contemporaneous construction of the indemnity laws, its long-continued administrative practice, the regulations of the Department, the juxtaposition of the indemnity laws with later laws, and the history of other kinds of grants, the lands in which are affected by pre-1871 railroad rights-of-way.

In the very same year that the general indemnity statute 1/ was enacted, the Acting Secretary of the Department wrote to the Attorney General of North Dakota on October 26, 1891, 13 L.D. 454-55, as follows:

---

1/ The Act of February 28, 1891, supra, first uses the term "otherwise disposed of" in the general indemnity statutes. The Act amends REV. STAT. §§ 2275 and 2276 (1878), which provided:

"SEC. 2275. Where settlements, with a view to pre-emption, have been made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors; and other lands are also appropriated to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

"SEC. 2276. The lands appropriated by the preceding section shall be selected, within the same land-district, in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters, of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half, of a township, one-half section; and for a fractional township, containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one-quarter section of land."

It follows that the contemporaneous construction of the 1891 Act is a cogent element in our consideration of the meaning of the term mentioned above.

No provision is made by law for indemnifying the State in cases where the school section is crossed by railroads, claiming the right of way either under the act of March 3, 1875, or by a special grant from Congress, but, if the roads are not entitled to the right of way over such sections, recourse must be had by the State or its purchasers against the company in the courts.

This decision affecting all the public land states has prevailed for some 85 years. There are no cases to the contrary. Indeed, the cases at bar raise the issue for the first time since the 1891 decision. There has been, therefore, universal acceptance of it for over 8 decades by the knowledgeable state officials dealing with public lands.

States seeking patents to school sections in place have been required to regard a school section invaded by a pre-1871 railroad right-of-way as a full section and patents have issued reciting simply that the grant is "subject to" the rights of the railroad under the particular granting act.

Virtually all classes of public land grantees have been required to accept patents which, as to the area covered by a railroad right-of-way, provided that the grant was subject thereto, e.g. homestead, Oregon Short Line Ry. Co. v. Harkness, 27 L.D. 430 (1898); mining claims, Schirm-Carey and Other Placers, 37 L.D. 371 (1908).

The Department's practice of not excluding special act railroad rights-of-way from the area described in patents is described in W. S. Burch, 45 L.D. 473, 476-77 (1916), as follows:

In instructions of November 3, 1909 (38 L.D., 284), as amended January 19, 1910 (38 L.D., 399), the practice as indicated and the distinction between rights of way under general and special acts was preserved and reannounced. It will be borne in mind that the excepting or reservation clause involved was not an exclusion or elimination of an area of land but was a clause stating that the patent or conveyance was subject to the right of way of the specific company under the particular special act. The above-mentioned regulations are cited and explained in the instructions of February 2, 1912 (40 L.D., 398), and it was there said:

Applicants to enter public lands that are affected by a mere pending application for right of way should be verbally informed thereof and given all necessary information as to the character and extent of the project embraced by the right-of-way application; and, further, that they must take the land subject to whatever right may have attached thereto under the right-of-way application, and at the full area of the subdivisions entered, irrespective of the questions of priority or damages, these being questions for the courts to determine.

In the case of the Schirm-Carey and other placers (37 L.D., 371, 374), the grant of the Atlantic and Pacific Railroad Company was involved. The 200-foot right of way, covering about 107.33 acres, crossed the affected locations and had been excluded from the patent proceedings and the entry. The Department said:

The difficulties and perplexities involved in the various aspects of the case, in view of the practice with respect to the disposition of lands in a similar situation under other public land laws, as well as the serious question involved in the bisection of the claim by reason of the exclusion of the railroad right of way, is deemed by the Department to justify the conclusion reached by your office, that in no event can the entry as to any of the claims be passed to patent in the absence of supplemental patent proceedings including the previously excluded area constituting the railroad right of way.

In instructions of March 13, 1911 (39 L.D., 565), involving the Northern Pacific right of way across the tribal lands of the Fond du Lac Indian Reservation in Minnesota, where the company had paid \$ 10 per acre for the area of its right of way, it was said:

While the right of way granted the Northern Pacific Railway Company by the act of 1864 is a grant in fee, it is not

a fee simple but is subject to reversion in the event that the company should cease to use the land for railroad purposes. It is not the rule of the Department to except from patents issued to entrymen under the public land laws the area embraced in the right of way across the lands entered; nor has it been the practice to relieve purchasers under the public land laws from paying for the full area of the tract purchased, notwithstanding that such purchase is made subject to the company's right of way.

To except from a patent the tract of land included in the right of way would be to reserve a narrow strip of land which, if abandoned by the railroad company, would revert to the Government and would not inure to the benefit of the purchaser of the subdivisions traversed by such right of way.

It is believed that damages paid by the railway company in this case were merely damages resulting from the construction of the railroad across the reservation and in no sense represented a purchase of the land covered by the right of way. As above indicated, therefore, I must decline to approve the letter prepared by your office.

The Department in recent times has enunciated the view that "[n]o deduction in acreage or payments is allowed for land in entries traversed by railroad rights-of-way despite the fact that the right-of-way constitutes a base fee." Letter to Congressman Harold T. Johnson from Acting Legislative Counsel, Department of the Interior, dated May 5, 1964. Indeed, other disposals of land affected by rights-of-way have been made with no deduction in price therefor, e.g., small tract affected by a highway right-of-way, Joseph J. Miller, A-30681 (May 3, 1967), citing James A. Power, 50 L.D. 392 (1924).

The current regulation of the Department, 43 CFR 2801.1-2, provides:

All persons entering or otherwise appropriating a tract of public land, to part of which a right-of-way has attached under the regulations in this part, take the land subject to such right-of-way and without deduction of the area included in the right-of-way.

The consistent approach of the Department and of the affected public land states for some 85 years to the issues posed in these cases cannot be blithely relegated to oblivion. The Board reiterated in Robert L. Beery, 25 IBLA 287, 294, 83 I.D. 249, 252 (1976), Justice Holmes' observation that "A page of history is worth a volume of logic."

The history of consideration of the Congress of railroad bills shows that it was aware of the problem caused by railroad rights-of-way. Congress recognized that curative legislation was needed to vest in adjoining owners the lands in the rights-of-way upon forfeiture or abandonment by the railroad, e.g., the Act of June 26, 1906, 34 Stat. 482, the Act of February 25, 1909, 35 Stat. 647, 43 U.S.C. § 940 (1970), the Act of March 8, 1922, 42 Stat. 414, 43 U.S.C. § 912 (1970). See Union Pacific Railroad Company, 72 I.D. 76 (1965). These acts afforded a remedy, but that remedy was not indemnity.

The legislative history of the 1922 Act reflects Congressional awareness of the Department's practice of issuing patents for full legal subdivisions, making no diminution by reason of the prior rights-of-way. The House Report No. 217, 67th Cong., 1st Sess., relating to H.R. 244, culminating in the 1922 Act, reads in part as follows:

The object of this bill is to provide for disposition of lands embraced in forfeited or abandoned railroad rights of way on what was originally public lands. In some cases a right of way was granted by the Government and later forfeited, while in other cases change in the location of the railroad resulted in the abandonment of the old right of way. The act of March 3, 1875, under which most of the rights of way over public lands have been granted contains a provision for forfeiture of the grant for failure to construct the railroad within a specified time succeeding the date of the grant. Under the decision of the courts railroad companies receiving such grants take a qualified fee with an implied

condition of reverter in the event the companies cease to use the lands for the purposes for which they were granted. Upon abandonment or forfeiture, therefore, of any portions of such right of way the land reverts to and becomes the property of the United States.

It is, however, a fact that in making conveyances of subdivisions traversed by such rights of way the United States issues patents for the full area of the tracts or legal subdivisions, making no diminution by reason of the prior grant of the right of way.

It seemed to the committee that such abandoned or forfeited strips are of little or no value to the Government and that in case of lands in the rural communities they ought in justice to become the property of the person to whom the whole of the legal subdivision had been granted or his successor in interest. Granting such relief in reality gives him only the land covered by the original patent. The attention of the committee was called, however, to the fact that in some cases highways have been established on abandoned rights of ways or that it might be desirable to establish highways on such as may be abandoned in the future. Recognizing the public interest in the establishment of roads, your committee safeguarded such rights by suggesting the amendments above referred to protecting not only roads now established but giving the public authorities one year's time after a decree of forfeiture or abandonment to establish a public highway upon any part of such right of way.

Where the forfeited or abandoned right of way which would otherwise revert to the United States lies within the limits of a city or village, then the bill provides that title thereto shall vest in such municipality, subject of course to the same provisions as to roads applicable to rural lands.

There is attached to and made a part of this report the letter of E. C. Finney, Acting Secretary of the Interior, to the chairman of the committee, dated June 9, 1921.

---

DEPARTMENT OF THE INTERIOR,  
Washington, June 9, 1921.

Hon. N. J. SINNOTT,  
Chairman Committee on the Public Lands, House of  
Representatives.

MY DEAR MR. SINNOTT: Receipt is acknowledged of your letter dated May 28, 1921, requesting a report on House bill 244, with which you submit a copy of House Report No. 851, Sixty-sixth Congress, second session, concerning House bill 9899.

The bill submitted by you entitled "A bill to provide for the disposition of abandoned portions of rights of way granted to railroad companies" provides that where rights of way of the character referred to granted to railroad companies have ceased or shall thereafter cease to be used for the purposes granted whether by forfeiture or by abandonment declared or decreed by a court of competent jurisdiction or by act of Congress, such abandoned right of way shall then go to the owner of the subdivision which the same is located, except that in the municipalities the right of way shall go to such municipality.

This bill is similar in its object and provisions to said H.R. 9699, Sixty-sixth Congress, second session, upon which a report was made on December 4, 1919, in which the proposed legislation was favored, but certain changes and amendments were suggested in the proposed bill. This report is embodied in said House Report No. 851 submitted by you. The proposed legislation, H.R. 244, includes the amendments suggested in said departmental report.

Under the prevailing decisions of the courts the railroad companies to which grants

of rights of way have been made of the character under consideration take a base or qualified fee with an implied condition of reverter in the event that the companies cease to use the land for the purposes for which it is granted (Northern Pacific Railroad Co. v. Townsend, 190 U.S., 267, 271; Rio Grande Western Railroad Co. v. Stringham, 239 U.S., 44). In making conveyances of the subdivisions traversed by such rights of way, however, the United States issues patents for the full area of the tracts, no diminution of acreage being made by reason of the prior grant of the right of way. It follows as the result of the rulings above cited that upon the abandonment by any railroad company of any right of way or any portion of any right of way granted to it the legal title to the land included in such right of way reverts to and becomes the property of the United States and does not pass to any patentee or patentees to whom patents were issued for the full area of the subdivisions subject to the railroad company's prior right of use and possession.

The legislation proposed by this bill, therefore, would seem to be desirable, and I would recommend the enactment thereof.

The report submitted by you is herewith returned.

Respectfully,

E. C. FINNEY, Acting Secretary.

[Emphasis supplied.]

It is also noteworthy that the laws affecting vesting of school sections, 43 U.S.C. §§ 870-871 (1970), and those involving school indemnity selections, 43 U.S.C. §§ 851-852 (1970), were amended in 1932, 1954, 1956, 1958, 1960 and 1966, which amendments in the aggregate wrought major and significant changes. No change was made in the Department's practices of patenting school lands subject to a special grant railroad and of North Dakota, which precluded indemnity for such rights-of-way.

Congress must therefore be deemed to have acquiesced in North Dakota for some 85 years. The comments in Wyoming v. Udall, 379 F.2d 635 (10th Cir. 1967), cert. denied, 389 U.S. 985 (1967), are obiter dicta and the issues here were not present in that case.

To issue patent excluding the lands in the right-of-way would pose grave problems related to survey. The whole system of public land disposals is based upon the rectangular grid system. There is considerable question whether the school lands are "surveyed" to the extent that the right-of-way invaded any subdivision. If such subdivision be deemed unsurveyed, as indeed they would have to be, then title to that subdivision never vested in the State. Such a posture would cast a cloud upon the title of those individuals who acquired any interest therein from the State. In short, adoption of appellant's posture in this matter would probably create more problems than it would resolve.

Such a construction of the law would render regular subdivisions noncontiguous and thus militate against public land disposals. See Frank C. Churchill, 60 I.D. 447 (1950).

Similarly, the allowance of indemnity would frustrate the purpose of the 1922 Act, by leaving a narrow strip of land in federal ownership after the right-of-way was abandoned or forfeited.

We are not satisfied that a sufficient showing has been made by appellant to warrant a departure from universally accepted practice of some 8 decades. Justice Frankfurter stated in the dissenting opinion in United States v. Monia, 317 U.S. 424, 431-32 (1943), as follows:

This question cannot be answered by closing our eyes to everything except the naked words of the Act \* \* \*. The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage (see Plucknett, A Concise History of the Common Law, 2d ed., 294-300; Amos, The Interpretation of Statutes, 5 Camb. L. J. 163; Davies, The Interpretation of Statutes, 35 Col. L. Rev. 519), to which lip service has on occasion been give here, but which since the days of Marshall this Court has rejected, especially in practice. E.g., United States v. Fisher, 2 Cranch 358, 385-86; Boston Sand Co. v. United States, 278 U.S. 41, 48; United States v. American Trucking Assns., 310 U.S. 534, 542-44.

A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment -- that to which it gave rise as well as that which gave rise to it -- can yield its true meaning. \* \* \*

We hold that appellant is not entitled to a patent for school lands specifically excluding the lands covered by the right-of-way, but rather is entitled to a patent "subject to" such right-of-way. We further hold that the State is not entitled to indemnity for those portions of the school sections embraced in the right-of-way granted by the Act of July 1, 1862, 12 Stat. 489, as amended by the Act of July 2, 1864, 13 Stat. 356.

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

---

Frederick Fishman  
Administrative Judge

I concur:

---

Martin Ritvo  
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE FRISHBERG DISSENTING:

I respectfully dissent from the holdings of the majority. This Department has no discretion to curtail the rights of a grantee, or to substitute its judgment for the will of Congress as manifested in granting acts. West v. Standard Oil Co., 278 U.S. 200, 220 (1929); Payne v. Central Pacific Ry. Co., 255 U.S. 228, 236 (1921). We are invested only with the power, judicial in nature, to ascertain whether the specified conditions of the grant in issue have been met. Wyoming v. United States, 255 U.S. 489, 496 (1921); Payne v. New Mexico, 255 U.S. 367, 371 (1921); Lewis v. Hickel, 427 F.2d 673, 676 (9th Cir. 1970), cert. denied, 400 U.S. 992 (1971); Schraier v. Hickel, 419 F.2d 663, 666-67 (D.C. Cir. 1969); United States v. Arenas, 158 F.2d 730, 747-48 (9th Cir. 1946), cert. denied, 331 U.S. 842 (1947). The majority acts in derogation of these limitations by holding that (1) Wyoming should not receive indemnity for that portion of school land sections crossed by a railroad right-of-way granted under the Act of July 1, 1862, as amended by Act of July 2, 1864, and (2) a patent for school lands in place cannot exclude that right-of-way but must issue "subject to" it.

It is evident from judicial interpretation and legislative history that Wyoming [Illegible Word] its school land grant, § 4 of the Act of July 10, 1890, 26 Stat. 222, received no title to those lands within the right-of-way granted the Union Pacific Railroad by the 1862 Act, as amended in 1864, because those lands were specifically excluded from the school land grant as "otherwise disposed of." Even if that statutory exclusion had not been provided, the railroad's interest in the right-of-way was such an appropriation that those lands within the right-of-way were no longer public lands subject to sale or other disposition under the general land laws.

Both Wyoming's school land grant and the General Indemnity Act, 43 U.S.C. §§ 851, 852 (1970), provide for selection lieu lands as indemnity for lands "otherwise disposed of." In light of the legislative purpose of that provision and the interpretation placed on it by the courts and this Department, this Board should overrule State of North Dakota, 13 L.D. 454 (1891), and uphold Wyoming's indemnity selection application, if it is proper in all other respects.

SCHOOL LAND GRANTS

Congressional policy providing for grants of numbered sections in every township of the public lands of the United States has been traced to the Ordinance of May 20, 1785, the first enactment for the

sale of public lands within the western territories. It called for a rectangular survey system of the public lands prior to their sale and reserved section 16 in each township for the maintenance of the public schools in the respective township. Eliason, Land Exchanges and State In-lieu Selections as They Affect Mineral Resource Development, 21 Rocky Mt. Min. L. Inst. 635 (1975). By the Ordinance of 1787, a compact between the northwestern territories and the original states, reservation of the public lands for the maintenance of public schools became a fundamental principle. Cooper v. Roberts, 59 U.S. (18 How.) 338, 339 (1856). The compact declared that:

\* \* \* "religion, morality, and knowledge, [were] \* \* \* necessary for good government and the happiness of mankind;" and ordained that "schools, and the means of education, should be forever encouraged." \* \* \*

Id. Application of this principle was extended to the Mississippi Territory by Act of April 7, 1798, 1 Stat. § 6 at 550, and in 1802 was applied to the southwestern territory by compact between the United States and Georgia. Cooper v. Roberts, supra.

By Section 7 of the Statehood Act of Ohio, Act of April 30, 1802, 2 Stat. 175, the first "school land grant" was made, providing:

That the section, numbered sixteen, in every township, and where such section has been sold, granted or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township, for the use of the schools.

This grant provided the model for subsequent school land grants to the public-land states. State of Oregon, 18 L.D. 343, 345 (1894).

Starting with the school land grant to California by Act of March 3, 1853, 10 Stat. 244, section 36 in each township was added to the school grants. United States v. Morrison, 240 U.S. 192, 198 (1916); State of Oregon, supra. <sup>1/</sup> Under certain subsequent

---

<sup>1/</sup> Grants of section 16 made between 1802 and 1846 were:

"Ohio (2 Stat. 175); Louisiana (2 Stat. 394, 5 Stat. 600); Indiana (3 Stat. 290); Mississippi (2 Stat. 234, 10 Stat. 6); Illinois (3 Stat. 430); Alabama (3 Stat. 491); Missouri (3 Stat. 547); Arkansas (5 Stat. 58); Michigan (5 Stat. 59); Florida (5 Stat. 788); Iowa (5 Stat. 789); Wisconsin (9 Stat. 58).

Grants of sections 16 and 36, after 1846 include:

"California (10 Stat. 246); Minnesota (11 Stat. 167); Oregon (11 Stat. 383); Kansas (12 Stat. 127); Nevada (13 Stat. 32); Nebraska (13 Stat. 49); Colorado (18 Stat. 475); North Dakota,

Statehood Acts, further sections were granted. Utah, 2/ New Mexico, 3/ and Arizona 4/ received sections 2 and 32, as well as 16 and 36, since most of their public domain lands were desert areas. Oklahoma received additional sections 13 and 33 within certain boundaries, for specified purposes. 5/ Eliason, 21 Rocky Mt. Min. L. Inst., supra at 636.

As a result of this method of promoting education, over 78 million acres of the public domain were granted to the states for the support of their common schools. Id.

Wyoming, by section 4 of its Statehood Act of July 10, 1890, 26 Stat. 222, received:

\* \* \* sections numbered sixteen and thirty-six in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior \* \* \*.

Title to these school sections in place vested in Wyoming upon the date of statehood, July 10, 1890, or upon the completion and approval of survey of the particular sections, if the lands had not been surveyed prior to statehood. United States v. Wyoming, 331 U.S. 440, 443-44 (1947); United States v. Stearns Lumber Co., 245 U.S. 436 (1918); Wisconsin v. Lane, 245 U.S. 427 (1918); United States v. Morrison, supra; Minnesota v. Hitchcock, 185 U.S. 373 (1902); Heydenfeldt v. Daney Gold & Silver Mining Co., 93 U.S. 634 (1876); United States v. Wyoming, 195 F. Supp. 692, 697-98 (D. Wyo. 1961), aff'd, 310 F.2d 566 (10th Cir. 1962), cert. denied, 372 U.S. 953 (1963);

---

fn.1 (continued)

South Dakota, Montana, and Washington (25 Stat. 679), Idaho (26 Stat. 215); Wyoming (26 Stat. 222); Utah (28 Stat. 109); Oklahoma (34 Stat. 272); New Mexico (36 Stat. 561); Arizona (36 Stat. 572)."  
United States v. Morrison, 240 U.S. 192, 198 (fns. 1 and 2) (1916).

2/ Act of July 18, 1894, 28 Stat. 107, 109.

3/ Act of June 30, 1910, 36 Stat. 557, 561.

4/ Id. at 572.

5/ Act of June 15, 1906, 34 Stat. 267, 274.

43 CFR 2623.1; see also Wyoming v. United States, 255 U.S. 489, 500-01 (1921); Homer H. Harris, 53 I.D. 584, 585 (1932). All the townships containing the school sections applied for under Wyoming's patent application, W-24998, had been surveyed prior to the date of statehood. Therefore, title vested in the respective sections as of July 10, 1890. <sup>6/</sup>

Congress, by vesting the lands in the states in this manner, reserved absolute power over the school lands until their status was fixed by survey, the lands thereby being identified. United States v. Morrison, *supra*; Heydenfeldt v. Daney Gold & Silver Mining Co., *supra*. Prior to survey, those sections were a part of the public domain which could be disposed of by the Government in any manner and for any purpose consistent with applicable federal statutes. United States v. Wyoming, 331 U.S. at 443. Therefore, it was inevitable that upon the date title vested in a state, prior claims to the lands would be found in some instances.

The Department has a statutory duty to issue school land grant patents to the states. Navajo Tribe of Indians v. State of Utah, 12 IBLA 1, 12, 80 I.D. 441, 445 (1973). The Act of June 21, 1934, 43 U.S.C. § 871a (1970), directs the Secretary of the Interior, upon application by a state, to issue patents to school sections granted for the support of common schools by any Act of Congress, where title has vested or may thereafter vest in the grantee state. See generally 43 CFR Subpart 2624. Such a patent is documentary evidence of title which has previously vested in the state. It is not a new grant. 43 CFR 2624.0-1; Navajo Tribe of Indians v. State of Utah, *supra*. The issuance of such a patent imports a conclusive determination by the Department of all facts necessary to the vesting of such title in the state, thereby divesting the Department of any further jurisdiction over the land. West v. Standard Oil Co., 278 U.S. at 212-13; Margaret Scharf, 57 I.D. 348, 363 (1941).

Wyoming asserted in its application for patent that title vested to all the sections in place, except that area covered by the original main line right-of-way of the Union Pacific Railroad, granted by section 2, Act of July 1, 1862, 12 Stat. 489, as amended by Act of

---

<sup>6/</sup> The records of the Wyoming State Office, Bureau of Land Management, show the surveys of the townships were completed and approved as of the following dates: T. 14 N., R. 60 W. -- September 10, 1871; T. 13 N., R. 66 W. -- November 28, 1870; T. 14 N., R. 66 W. -- December 23, 1872; T. 13 N., R. 67 W. -- November 28, 1870; T. 13 N., R. 68 W. -- December 15, 1870; T. 13 N., R. 69 W. -- December 15, 1870; and T. 13 N., R. 70 W. -- November 15, 1872.

July 2, 1864, 13 Stat. 356. The record on appeal reveals that two of these school land sections, sec. 16, T. 13 N., R. 67 W., 6th P.M., and sec. 16, T. 13 N., R. 68 W., 6th P.M., are also traversed by additional rights-of-way for spur lines granted to the Union Pacific Railroad under the authority of the General Railroad Right-of-Way Act of March 3, 1875, 43 U.S.C. § 934 (1970).

Wyoming's school land grant, § 4, 26 Stat. 222, excludes lands which were "sold or otherwise disposed of by or under the authority of any act of Congress." Moreover, once land is legally appropriated to any purpose it becomes severed from the mass of public lands and thereafter cannot be embraced or operated upon by subsequent law. Wilcox v. Jackson, 38 U.S. (13 Pet.) 266 (1839); see, e.g., Scott v. Carew, 196 U.S. 100 (1905); Oregon & California R.R. Co. v. United States, 190 U.S. 186 (1903); Northern Pacific R.R. Co. v. Sanders, 166 U.S. 620 (1897); Wisconsin Central R.R. Co. v. Forsythe, 159 U.S. 46 (1895); Whitney v. Taylor, 158 U.S. 85 (1895); Bardon v. Northern Pacific R.R. Co., 145 U.S. 535 (1892); Wisconsin R.R. Co. v. Price Co., 133 U.S. 496 (1890); Hastings & Dakota R.R. Co. v. Whitney, 132 U.S. 357 (1889); Kansas Pacific Ry. Co. v. Dunmeyer, 113 U.S. 629 (1885); Newhall v. Sanger, 92 U.S. 761 (1875); Leavenworth, Lawrence & Galveston R.R. v. United States, 92 U.S. 733 (1875); A. W. Schunk, 16 IBLA 191, 81 I.D. 401 (1974); State of Alaska, Kenneth D. Makepeace, 6 IBLA 58, 79 I.D. 391 (1972); State of Utah (On Petition), 47 L.D. 359 (1920); Andrew J. Billan, 36 L.D. 334 (1906); but cf. Buttz v. Northern Pacific R.R., 119 U.S. 55 (1886). As a result, title to those portions of the school land sections in issue which were unencumbered July 10, 1890, vested in the State as of that date. However, the question before this Board is what title, if any, vested in the State to those lands within the Union Pacific's rights-of-way granted under either (1) the Special Grant of 1862, as amended in 1864, or (2) the General Railroad Right-of-Way Act of 1875.

The Acts granting the railroad rights-of-way in issue are products of their times. Great Northern Ry. Co. v. United States, 315 U.S. 262, 273 (1942); United States v. Union Pacific R.R. Co., 91 U.S. 72, 79 (1875). To understand the nature of these grants, it is necessary to review their creation and judicial interpretation.

#### RAILROAD RIGHTS-OF-WAY

In the first half of the nineteenth century, the United States acquired vast new lands in the South and West. Settlement and absorption of this sparsely populated territory into the older sections of the country became a national problem demanding a rapid and extensive means of transportation for both goods and people. Krug v. Santa Fe Pacific R.R. Co., 329 U.S. 591, 592 (1947). In the thirties and

forties, numerous suggestions were made in Congress of the possibility of future railroads being built to the Pacific. P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 363 (1968). (Hereinafter cited as GATES.)

Asa Whitney's plan for the building of a railroad from Milwaukee by way of South Pass to Puget Sound, first broached in 1844, brought the subject under consideration and from then until 1862 interest in the building of a Pacific railroad with Federal aid never subsided. \* \* \*

\* \* \* \* \*

Three steps seemed necessary before any actual route for a Pacific railroad could be adopted, a charter granted and a land donation made: first, a careful survey or at least reconnaissance of a possible route or routes through the Rocky Mountains and the Sierra Nevada and Cascade Ranges; second, the removal of the intruded Indians who had been concentrated along the eastern frontier of present Oklahoma, Kansas, and Nebraska; and third, the creation of one or more territories through which a railroad might be projected. All three steps were authorized by Congress in 1853 and 1854 and all three, particularly the creation of Kansas Territory, helped to bring about the sectional crisis that led directly to secession and the Civil War.

Id.

Beginning in 1850, Congress, to encourage a rapid railroad building program and to induce the construction of the much desired transcontinental route, embarked upon a policy of subsidizing railroad construction by lavish grants of the public domain. <sup>7/</sup> Great Northern Ry. Co. v. United States, 315 U.S. at 273. However, even after the South's secession, there was still a great deal of conflict in Congress over routes and termini of the proposed Pacific line. GATES, supra at 364. The issues were sufficiently resolved, though, to permit enactment of the Pacific Railroad Act, July 1, 1862, later liberalized by the Act of July 2, 1864. This grant made up, at least in part, for the Congressional delay in the

---

<sup>7/</sup> The first such grant was made to the Illinois Central and Mobile & Ohio Railroads by Act of September 20, 1850, 9 Stat. 466.

fifties by encouraging the construction of one or more transcontinental lines. Some 2,720 miles of rights-of-way and 34,560,000 acres of the public lands were granted for that purpose. *Id.* at 367.

By these Acts, the main line was authorized to be constructed by the Union Pacific Railroad Company west through Cheyenne to the western boundary of Nevada, and possibly farther to meet the Central Pacific Railroad, which had been authorized to build from the Pacific coast eastward. Stuart v. Union Pacific R.R. Co., 227 U.S. 342, 344-45 (1913); Southern Pacific Co. v. City of Reno, 257 F. 450, 455 (D. Nev. 1919), aff'd, 268 F. 751 (9th Cir. 1920). Five eastern branches of the Pacific railroad were to be built from Sioux City, Omaha, St. Joseph, Leavenworth, and Kansas City, to converge at some point on the 100th meridian. GATES, supra at 364. The obligation to converge with the main line on the 100th meridian was later eliminated when the Union Pacific, Eastern Division, was permitted to build from Kansas City due west to Denver. Then, the Denver Pacific line joined that branch with the Union Pacific line at Cheyenne. *Id.*

This grant was only the beginning, for the bars were down against such legislation. Seventy railroads received like grants, and 158,293,000 acres, an area almost equal in size to that of the New England states, New York and Pennsylvania, passed into the hands of western railroad promoters and builders. 8/ United States v. Union Pacific R.R. Co., 353 U.S. 112, 125 (1957) (dissenting opinion); Krug v. Santa Fe Pacific R.R. Co., 329 U.S. fn. 2 at 592. Congress legislated offers the companies could accept or reject. The grants provided the inducement for their acceptance. United States v. Union Pacific R.R. Co., 230 F.2d 690, 693 (10th Cir. 1956), rev'd on other grounds, 353 U.S. 112 (1957).

To ascertain the reasons for this congressional action, as well as the meaning of the particular provisions in the grants of this period, it is necessary to look to the circumstances existing at the time the acts were passed. Those circumstances have been aptly analyzed by the Supreme Court as follows:

The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. The loss of

---

8/ "Other sources put the figure of federal grants-in-aid at 134,303,668 acres, equivalent to 209,849 square miles or 6.93 per cent of the area of the continental United States." Krug v. Santa Fe Pacific R.R. Co., 329 U.S. 585, 592 (fn. 2) (1947).

them was feared in case those complications should result in an open rupture; but, even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and so strong and pervading was this opinion, that it is by no means certain that the people would not have justified Congress if it had departed from the then settled policy of the country regarding works of internal improvement, and charged the government itself with the direct execution of the enterprise.

This enterprise was viewed as a national undertaking for national purposes; and the public mind was directed to the end in view, rather than to the particular means of securing it. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of supplies for the army and the Indians.

It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable.

Although a free people, when resolved upon a course of action, can accomplish great results, the scheme for building a railroad two thousand miles in length, over deserts, across mountains, and through a country inhabited by Indians jealous of intrusion upon their rights, was universally regarded at the time as a bold and hazardous undertaking. It is nothing to the purpose that the apprehended difficulties in a great measure disappeared after trial, and that the road was constructed at less cost of time and money than had been considered possible. No argument can be drawn from the wisdom that comes after the fact. Congress acted with reference to a state of things believed at the time to exist; and, in interpreting its legislation, no aid can be derived from subsequent events. The project of building the road was not conceived for private ends; and the prevalent opinion was, that it could not be worked out by private capital alone. It was a national work, originating in national necessities, and requiring national assistance.

The policy of the country, to say nothing of the supposed want of constitutional power, stood in the way of the United States taking the work into its own hands. Even if this were not so, reasons of economy suggested that it were better to enlist private capital and enterprise in the project by offering the requisite inducements. Congress undertook to do this, in order to promote the construction and operation of a work deemed essential to the security of great public interests.

United States v. Union Pacific R.R. Co., 91 U.S. at 79-81.

The lavish granting policy reaped results, for in 1869 the Union Pacific and Central Pacific Railroads together completed the first transcontinental route. GATES, *supra* at 374. With the realization of this goal, however, the public's mood of uncritical enthusiasm toward the railroads began to change. United States v. Union Pacific R.R. Co., 353 U.S. at 126-27.

The West wanted internal improvements almost as much as it wanted free land and was nearly unanimous in supporting land grants for roads, canals, and railroads. Yet it had a phobia against "land monopoly." When it saw evidence that railroads were not prompt in bringing their lands on the market and putting them into the hands of farm makers, the West turned from warm friendship to outright hostility to the railroads.

It began to demand, first, an end to the practice of making land grants and, later, the forfeiture of unearned grants, partially earned grants, and finally, unsold grants. By the late sixties the same forces that had worked to end the treaty-making policy to obtain Indian lands were striving to halt the policy of making land grants to railroads. Reform-minded representatives from Illinois, Indiana, and other older public land states reflected anti-railroad feelings, raised to white heat by the Grangers' fight for railroad regulation and for the retention of the remaining public lands for actual settlers. Organized labor, speaking through its journal, the Workingman's Advocate, and the larger group of citizens who were coming to feel that the railroads had demanded too much of the government and had been arrogant towards the public, favored ending the practice of making railroad land grants. They were partly supported by Joseph S. Wilson, Commissioner of the General Land Office, and by President U.S. Grant himself, who expressed doubts about further donations.

After much heated argument in state capitals, in Washington, and in the press, and the presentation of petitions from the Legislatures of California, Wisconsin, Indiana, Missouri, Ohio, and Pennsylvania to the effect that land grants were a "violation of the spirit and interest of the national Homestead Law and manifestly in bad faith toward the landless," Congress acted. First, settlers' clauses were added to a number of railroad land grants requiring that the lands being granted be sold to settlers at no more than \$ 2.50 an acre. \* \* \*

GATES, supra at 380. Then on March 11, 1872, public disfavor crystallized in the following declaration of policy by the House of Representatives:

Resolved, 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 whole people requires 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. Cong. Globe, 42d Cong., 2d Sess., 1585 (1872).

Great Northern Ry. Co. v. United States, 315 U.S. at 273-74.

The last lavish railroad grant was made to the Texas Pacific Railroad Company in 1871. Thereafter, outright granting of the public lands to private railroads was discontinued. Id. at 273; GATES, supra at 380.

Congress, though, still wishing to encourage development of the West, passed special acts granting only rights-of-way through the public lands to certain railroads. Between 1871 and 1875 at least 15 such acts were passed. Great Northern Ry. Co. v. United States, supra, fn. 9 at 274. It was because of the legislative burden caused by these special acts that Congress adopted a General Right of Way Statute, March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939 (1970).

The General Right of Way statute was significantly different from the Union Pacific Act of 1862 and its companion acts. It granted neither alternate sections of the public land nor direct financial subsidy. However, the language of the Acts regarding the rights-of-way was identical in all important aspects. Wyoming v. Udall, 379 F.2d 635 (10th Cir.), cert. denied, 389 U.S. 985 (1967). But it is the nature of the railroads' estate in those rights-of-way that has been found to differ.

#### I. Union Pacific Grant of 1862 and 1864.

The grant of July 1, 1862, 12 Stat. 489, 491, gave a right-of-way 400 feet wide, "\* \* \* including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracts, turntables, and water stations," to the Union Pacific for construction of a railroad and telegraph line. The right, power, and authority was given to take earth, stone, timber, and other materials necessary for the roads' construction from lands adjacent to the right-of-way. The Act contained a further grant of 10 (20 under the Act of July 2, 1864, 13 Stat. § 4 at 358) odd-numbered sections of public land on each side of the railroad line for each mile of railroad constructed. This was to aid "in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, \* \* \*." Id. § 3 at 492. In addition, Congress authorized loans of \$ 16,000, \$ 32,000 and \$ 48,000 in 6 percent, 30-year bonds for each mile constructed by the railroads under this grant, in exchange for a first mortgage on their lines. Id. § 5 at 492-93. The 1864 Act changed this to a second mortgage, enabling the railroads to sell their first mortgage bonds as well as the government bonds to finance construction. 13 Stat. §§ 10, 11 at 360-61; GATES, supra at 364.

The grant of alternate sections was a grant in praesenti, subject to the condition that if any of the sections had been sold, reserved, or otherwise disposed of by the United States, or to which a pre-emption or homestead claim had attached when the line of the road was definitely fixed, those sections did not vest in the railroad. 12 Stat. § 3 at 492; Northern Lumber Co. v. O'Brian, 204 U.S. 190 (1907); Kansas Pacific Ry. Co. v. Dunmeyer, 113 U.S. 629 (1885). It was congressional policy to keep the public lands open to occupation and pre-emption, and appropriation to public uses until those lands granted had been identified. In this way, settlement of the public domain was encouraged. Railroad Co. v. Baldwin, 103 U.S. 426, 429 (1880).

The estate in the right-of-way also vested in praesenti. However, it was not subject to any express conditions, only those necessarily implied, that the road be constructed and used for railroad purposes. Id. at 429-30. The right granted did not attach to any particular portion of the ground until the route was definitely located. In this respect the grant floated. However, when the route was definitely fixed, the railroad's title cut off all claims initiated subsequent to the date of the 1862 Act. Southern Pacific Co. v. City of Reno, 257 F. at 454. As a result, the public lands traversed by the right-of-way were not left open to appropriation before the line of the road was definitely fixed. All parties thereafter acquiring public lands took those lands subject to that right-of-way conferred for the proposed road. Nadeau v. Union Pacific R.R. Co., 253 U.S. 442 (1920); Bybee v. Oregon & California R.R. Co., 139 U.S. 663 (1891); Railroad Co. v. Baldwin, *supra*; Churchill v. Choctaw Ry. Co., 46 P. 503 (Okla. 1896); State of Wyoming, 58 I.D. 128 (1942). The reason for this was that:

The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given; but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route.

Railroad Co. v. Baldwin, 103 U.S. at 430.

Where loss of the lands within the right-of-way occurred before the grant, condemnation of that way was provided for by the amendatory Act of July 2, 1864. Union Pacific R.R. Co. v. Harris, 215 U.S. 386, 390 (1910).

All mineral lands were excepted from the operation of the 1862 Act grant of the alternate sections. 12 Stat. § 3 at 492. This exception was found applicable by the Supreme Court to § 2 of the same Act, implying a reservation of the minerals underlying the right-of-way in the United States. United States v. Union Pacific R.R. Co., 353 U.S. 112 (1957). However, the Act of July 2, 1864, 13 Stat. 356, 358, provided that the term "mineral lands" used in either the 1862 or 1864 Acts did not include coal and iron land. This exception has been interpreted by the courts as applying to both the right-of-way and alternate section grants, giving the railroad the right to explore, develop, and mine any coal and iron lying therein. Wyoming v. Udall, 379 F.2d 635, 640 (10th Cir.), cert. denied, 389 U.S. 985 (1967).

A. Estate in the Right-of-Way.

It is not surprising, in view of the lavish granting policy during the 1850-1871 period, that the grant of alternate sections of the public lands has been regarded as an outright grant to the railroad, and that the rights-of-way grant has been deemed as vesting the railroad with more than an easement yet less than a fee simple absolute. Great Northern Ry. Co. v. United States, 315 U.S. fn. 6 at 273; Rice v. United States, 348 F. Supp. 254, 256 (D.N.D. 1972), aff'd, 479 F.2d 58 (8th Cir.), cert. denied, 414 U.S. 858 (1973); Brown W. Cannon, Jr., 24 IBLA 166, 83 I.D. 80 (1976).

In a line of decisions dating back to Railroad Co. v. Baldwin, 103 U.S. 426 (1880), the Supreme Court consistently recognized that the Act of 1862 and its companion acts vested the railroads with the entire present interest in the right-of-way, covering both possession and fee. Missouri Kansas & Texas Ry. Co. v. Roberts, 152 U.S. 114 (1894). The term "right-of-way" was recognized as having two distinct meanings: (1) a mere right of passage (an easement), and (2) that strip of land taken by the railroad to construct its roadbed, that is, the land itself, not the right of passage over it. New Mexico v. United States Trust Co., 172 U.S. 171, 182 (1898). The rights-of-way grants of the 1850-1871 period fell into the latter category. Id. The Court in New Mexico v. United States Trust Co. observed that if the railroad's interest in the right-of-way was an easement, it was "one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property." Id. at 183. However, regardless of what they were called, the rights-of-way grants of the 1850-1871 period were found to be "'in substance, an interest in the land, special and exclusive in its nature.' \* \* \*" Western Union Telegraph Co. v. Pennsylvania R.R. Co., 195 U.S. 540, 570 (1904). It was in Northern Pacific Ry. Co. v. Townsend, 190 U.S. 267 (1903), that the railroad's interest was labeled as being, in effect, a

"limited fee estate," (also known as a base, qualified, or determinable fee), made on an implied condition of reverter in the event that the company ceased to use or retain the land for railroad purposes.

In general usage, the limited fee estate is a fee simple created with a special limitation. L. M. SIMES, LAW OF FUTURE INTERESTS 28-29 (2d ed. 1966). Upon the happening of the event named in that special limitation, the estate automatically terminates, and the property reverts to the grantor or his successors in interest, without the necessity for reentry. Id.; 1 TIFFANY REAL PROPERTY § 220 (3d ed. 1939). In granting such an estate the grantor is left with a future interest, called a possibility of reverter. Therefore, upon cessation of the use of the right-of-way for railroad purposes, the railroad's title automatically terminates, and the United States, holder of the possibility of reverter, becomes vested with the title.

Townsend involved the question of whether third parties could establish valid homesteads on a right-of-way acquired pursuant to the Act of July 2, 1864, 13 Stat. 356, after that road had been located and the tracks laid. The Court found that the land forming the right-of-way, being a limited fee in the railroad, had been taken out of the category of public lands subject to preemption and sale, and the land department was without authority to convey any rights within such right-of-way to subsequent parties. Therefore, even though the homestead grant "was of the full legal subdivisions," it did not convey any interest or estate in the right-of-way granted to and possessed by the railroad pursuant to the 1864 Act. Accord, E. A. Crandall, 43 L.D. 556 (1915). Contra, Crandall v. Goss, 30 Idaho 661, 167 P. 1025 (1917); Annot., 136 A.L.R. 296, 315-16 (1942).

The limited fee theory was later examined in United States v. Union Pacific R.R. Co., 353 U.S. 112 (1957), a suit brought by the United States to enjoin the railroad from drilling for oil and gas on a right-of-way granted by § 2 of the 1862 Act. The Court observed that Townsend was not "an adjudication concerning the ownership of mineral resources underlying the right of way in a contest between the United States and the railroad." Id. at 118. The earlier limited fee cases were regarded as deciding at most " \* \* \* that the railroads received all surface rights to the right-of-way and all rights incident to a use for railroad purposes." Id. at 119; accord, Solicitor's Opinion, 58 I.D. 160 (1942). This decision, however, did not overrule Townsend or change its effect on a holder of a patent issued after the land had been traversed by a railroad under such a right-of-way grant. Rice v. United States, supra; Wyoming v. Udall, 379 F.2d 635 (10th Cir.), cert. denied, 389 U.S. 985 (1967); Kunzman v. Union Pacific R.R. Co.,

169 Colo. 374, 456 P.2d 743 (1969), cert. denied, 396 U.S. 1039 (1970); Brown W. Cannon, Jr., 24 IBLA 166, 83 I.D. 80 (1976).

The limited fee label came under scrutiny again in Wyoming v. Udall, supra, <sup>9/</sup> a suit involving the question whether the Secretary of the Interior had the authority under the Right-of-Way Leasing Act of May 21, 1930, 30 U.S.C. § 301 et seq. (1970), to dispose of oil and gas deposits underlying an 1862 Act railroad right-of-way, where the lands traversed by the right-of-way had been granted to Wyoming as school lands. The court observed that:

For the purposes of this case, we are not impressed with the labels applied to the title of the railroads in their rights-of-way across the public lands of the United States. The concept of "limited fee" was no doubt applied in Townsend because under the common law an easement was an incorporeal hereditament which did not give an exclusive right of possession. With the expansion of the meaning of easement to include, so far as railroads are concerned, a right in perpetuity to exclusive use and possession \* \* \* the need for the "limited fee" label disappeared. [10/]

379 F.2d at 640.

The court, in analyzing the railroad's easement, observed that it was in a different category from that of a "surface easement." The 1864 amendment to the 1862 Act provided that the term "mineral lands" did not include coal and iron lands. As a result, the railroad not only received the right-of-way with perpetual and exclusive use of the surface, but also received a grant of coal and iron with the incidental rights of exploration and development. It was this latter grant that the court found excluded the right-of-way lands from the subsequent school land grant to the State.

Wyoming's Enabling Act, as previously noted, granted sections 16 and 36 in each township. Where those sections, or any part thereof, had been "sold or otherwise disposed of by or under the

---

<sup>9/</sup> Dismissed appeal taken from the departmental decision Union Pacific R.R. Co., 72 I.D. 76 (1965).

<sup>10/</sup> Such an easement is an interest in land conferring upon the holder thereof the lawful use of or over the estate of another. 7 THOMPSON ON REAL PROPERTY § 3183 (Repl. 1962). The estate encumbered by that easement is referred to as the servient tenement or servient estate.

authority of any act of Congress," indemnity lands could be selected. 26 Stat. § 4 at 223. The railroad's interest in the right-of-way was such that the land in and under the way fell into the category of "otherwise disposed of by or under the authority of any act of Congress." Wyoming v. Udall, *supra*; accord, Union Pacific Ry. Co. v. Karges, 169 F. 459 (D. Neb. 1909); State of Wyoming, 58 I.D. 128 (1942); cf. Sherman v. Buick, 93 U.S. 209 (1876); State of Utah (On Petition), 47 L.D. 359 (1920); Andrew J. Billan, 36 L.D. 334 (1906). Therefore, when the United States, holder of the servient estate under the right-of-way, granted the school sections to the State, the title to that servient estate did not pass. Instead, it remained in the United States, which retained the rights not granted to the railroad, specifically, ownership of the underlying oil and gas deposits. Wyoming v. Udall, *supra*; accord, Brown W. Cannon, Jr., *supra*; Solicitor's Opinion, 58 I.D. 160 (1942).

In Rice v. United States, 348 F. Supp. 254 (D.N.D. 1972), *aff'd*, 479 F.2d 58 (8th Cir.), *cert. denied*, 414 U.S. 858 (1973), <sup>11/</sup> the controversy arose whether the servient estate under a railroad right-of-way granted by § 2 of the Act of July 2, 1864, 13 Stat. 365, passed to a subsequent patentee, when no exception was made of that tract in the patent issued. The issue again involved ownership of oil and gas underlying the right-of-way.

The court refrained from definitely labeling the railroad's interest in the right-of-way, saying that it got either a limited fee or an easement, but "[i]n any event, it got something less than a fee simple by the filing and approval of a right of way plat, and a construction of the railway." 348 F. Supp. at 256. However, the court found that, regardless of the label applied, this was an appropriation within the rule originated in Wilcox v. Jackson, 38 U.S. (13 Pet.) 266 (1839). The tracts had been lawfully appropriated to a purpose that severed them from the mass of public lands, so that no subsequent law or proclamation could embrace them or operate on them. Even though no exception had been made of it in the patent, title to the servient estate remained in the United States, leaving the oil and gas interests subject to leasing under the 1930 Right-of-Way Leasing Act. Accord, Brown W. Cannon, Jr., *supra*.

---

<sup>11/</sup> Affirmed departmental decision, George W. Zarak, 4 IBLA 82 (1971).

B. Effect of 1862 and 1864 Acts Right-of-Way on Subsequent School Land Grant; Patents.

In the case presently under consideration, Wyoming's title to the sections in issue, attaching in 1890, vested subsequent to the Union Pacific's title, which vested in 1862. In light of the foregoing decisions, Wyoming, under that school land grant, received no title to the lands within that 1862 right-of-way grant. Even if its school land grant had not specifically excluded those lands as "otherwise disposed of," the grant was of "public lands," and the lands within the right-of-way were no longer such lands. The term "public lands" has been habitually used by Congress to describe lands subject to sale or other disposal under the general laws, and not reserved or held back for any special governmental or public purpose. Borax Ltd. v. Los Angeles, 296 U.S. 10, 17 (1935); Union Pacific R.R. Co. v. Harris, 215 U.S. at 388; Barker v. Harvey, 181 U.S. 481, 490; Newhall v. Sanger, 92 U.S. 761, 763 (1875); Ben J. Boschetta, 21 IBLA 193 (1975). <sup>12/</sup> The railroad's interest, regardless of its label, was such an appropriation that the lands in the right-of-way were not subject to sale or other disposition under the general land laws. Rice v. United States, supra. Therefore, the subsequent school land grant to Wyoming did not operate upon them. <sup>13/</sup>

---

<sup>12/</sup> The term public land is sometimes used in a sense which includes certain lands where the United States has retained the title, for example, Indian lands. Larkin v. Paugh, 276 U.S. 431, 438 (1928); Nadeau v. Union Pacific R.R. Co., 253 U.S. 442, 444 (1920); Kindred v. Union Pacific R.R. Co., 225 U.S. 582, 596 (1912).

<sup>13/</sup> Examples of other interests which have segregated the public lands from disposition under subsequent school land grants: (1) A railroad indemnity selection, made in accordance with the law, segregated the public lands during its pendency. Minnesota v. Immigration Land Co., 46 L.D. 7 (1916). A railroad selection application filed to exchange lands excluded those lands selected from a subsequent school land grant. Santa Fe Pacific R.R. Co., 41 L.D. 96 (1912). (2) Existing homestead entries or valid settlements at the date of survey severed the land from the public domain so that the lands were not subject to school land grants. State of Utah (On Petition), 47 L.D. 359 (1920); Fannie Lipscomb, 44 L.D. 414 (1915); Andrew J. Billan, 36 L.D. 334 (1906); see Circular Instructions of November 7, 1879, 2 Copp's Land Law 715 (1882). The filing of a declaratory statement for purposes of a homestead entry was sufficient to segregate the lands. John F. Butler, 38 L.D. 172 (1909). However, a settler's mere occupancy of the lands generally did not segregate them from subsequent disposition. Gonzales v. French, 164 U.S. 338 (1896). An exception is found in regard to settlements in California, where under its

The Act of June 21, 1934, 43 U.S.C. § 871a (1970), directs the Secretary to issue patents, upon the application of a state, where title has vested or may thereafter vest in the grantee state. Wyoming applied for patent excluding only those portions of the school land sections covered by the Union Pacific's 1862 Act right-of-way. The Bureau, in rejecting this application, relied on the following two reasons: (1) patents must issue for lands described by full legal subdivisions in accordance with an official government survey; and (2) the State took title to the lands in place subject to the right-of-way, citing State of Wyoming, 58 I.D. 128 (1942). Neither reason is proper for rejection of this patent application. It is true Wyoming took title to the school sections in place subject to or subordinate to the railroad's estate in the right-of-way. Railroad Co. v. Baldwin, 103 U.S. 426 (1880); State of Wyoming, supra. However, this "subject to" language is not indicative of any title or estate vesting in the State to the lands within the right-of-way. See State of Wyoming, supra. It establishes only the railroad's priority of interest over subsequent grantees. Railroad Co. v. Baldwin, supra.

---

fn. 13 (continued)

Enabling Act, occupancy by erection of a dwelling house or by cultivation prior to survey was sufficient to segregate the lands. Ivanhoe Mining Co. v. Keystone Consol. Mining Co., 102 U.S. 167 (1880). (3) Lands set aside for Indian Reservations prior to survey, with the Indians remaining in occupancy, excluded such lands from subsequent school land grants. United States v. Stearns Lumber Co., 245 U.S. 436 (1918); Wisconsin v. Lane, 245 U.S. 427 (1918); Minnesota v. Hitchcock, 185 U.S. 373 (1902); Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U.S. 114 (1894); State of Colorado, 6 L.D. 412 (1887). Where Indians have a right of occupancy until required to leave by Presidential order, that right was sufficient to segregate the lands from subsequent disposition. Wisconsin v. Hitchcock, 201 U.S. 202 (1906); Henry Sherry, 12 L.D. 176 (1890). However, if the lands were abandoned before survey, they were within the public domain subject to the school land grant. Beecher v. Wetherby, 95 U.S. 517 (1877). (4) A reservation of lands under governmental authority, such as for petroleum, forest or military purposes, occurring before survey of the lands had been formally approved, excluded those lands from subsequent disposition. United States v. Wyoming, 331 U.S. 440 (1947); United States v. Morrison, 240 U.S. 192 (1916); Gregg v. State of Colorado, 15 L.D. 151 (1892). (5) Lands within the limits of a confirmed Spanish land grant were disposed of and were not subject to the school land grant to the state. State of Florida, 30 L.D. 187 (1900). (6) Lands patented to a mining claimant, whose claim was initiated prior to survey, vested in the claimant, giving him better title than the state under its school land grant. Heydenfeldt v. Daney Gold & Silver Mining Co., 93 U.S. 634 (1876).

It has been the practice of the Department, where Congress has not specifically provided otherwise, to conform all disposals of the public lands to subdivisions established by government survey, and to treat minor subdivisions as indivisible for all administrative purposes. 14/ Southern Pacific R.R. Co. v. Fall, 257 U.S. 460, 462 (1922); Martin J. Plutt, 61 I.D. 185, 187 (1953); James A. Power, 50 L.D. 392, 394-95 (1924); Elisha B. Martin, 16 L.D. 424 (1892).

The public lands are surveyed and platted, as nearly as may be, into rectangular tracts, known as sections, half sections, quarter sections, half-quarter sections, and quarter-quarter sections; and, where the lines of the survey are interrupted by lakes, public reservations, Spanish or Mexican grants, state or territorial lines, etc., the irregular tracts at the point of interruption are platted and known as fractional sections, etc., or as lots having particular numbers. After the survey the land officers dispose of the lands only according to these legal subdivisions -- that is, as sections, half sections, etc. -- and regard the minor subdivisions -- quarter-quarter sections and lots -- as not subject to further division, save in exceptional instances where Congress has specially provided otherwise. Under this practice a right to purchase or enter 40 acres may be exercised by taking a full quarter-quarter section, but not by taking a part only of each of two or more minor subdivisions. And the same rule is applied to relinquishments and lieu selections; that is to say, a right to relinquish land to which title has been acquired and to take other land in its stead may not be exercised by exchanging less than a legal subdivision at a time. \* \* \*

\* \* \* \* \*

---

14/ However, in special circumstances, a segregative survey will be ordered where adherence to this general rule would not serve any public interest and the disposal of less than a legal subdivision of public land allowed. Thomas Owen Westbrook, 60 I.D. 296 (1949); Rubert Ray Spencer, 60 I.D. 198 (1948); State of Arizona, 53 I.D. 149 (1930); Lewis A. Gould, 51 L.D. 131 (1925); Chambers v. Hall, 49 L.D. 203 (1922); cf. James A. Power, 50 L.D. 392 (1924).

The manner of keeping the land office records -- which is according to a system of "tract books," -- and the mode of checking up and tracing the various land transactions, have long been adjusted to this practice; and in the judgment of the land officers adherence to it is of much importance.

Southern Pacific R.R. Co. v. Fall, 257 U.S. at 462-63. However, this administrative practice applies only to disposals of the public lands, that is to say, to regulation of the granting of title. Work v. Central Pacific Ry. Co., 12 F.2d 834 (D.C. Cir. 1926); see Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Wayne N. Mason, 61 I.D. 25, 27 (1952); Martin J. Plutt, *supra*; State of Arizona, 53 I.D. 149, 150 (1930); James A. Power, *supra*; Instructions, 39 L.D. 565 (1911); James H. Harte, 33 L.D. 53 (1904); Melder v. White, 28 L.D. 412 (1899). It is not applicable to lands to which a grantee acquired previous title by an express statutory contract. Work v. Central Pacific Ry. Co., *supra*; Clinton C. Reed, 45 L.D. 646 (1917). It is one thing to regulate the granting of title, and another to regulate title which has already vested, for the Department can neither enlarge nor curtail the rights of a grantee. West v. Standard Oil Co., 278 U.S. at 220; Payne v. New Mexico, 255 U.S. at 236; Work v. Central Pacific Ry. Co., *supra* at 836.

Had Wyoming applied for patent for whole school land sections, such application might have been proper where title to the lands within the right-of-way "may hereafter vest" in the State. 43 U.S.C. § 871a (1970). Such a possibility might have occurred pursuant to the Act of March 8, 1922, 42 Stat. 414, 43 U.S.C. § 912 (1970), which provides that upon extinguishment of such railroad rights-of-way, whether by forfeiture or abandonment, "declared or decreed by a court of competent jurisdiction or by Act of Congress," title thereto vests in:

\* \* \* any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad, \* \* \* except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any

other or further conveyance or assurance of any kind or nature whatsoever \* \* \*.  
15/

However, Wyoming did not seek such a patent, and no power lies in the Department pursuant to § 4 of Wyoming's Statehood Act, 26 Stat. 222, or the Act of June 21, 1934, 43 U.S.C. § 871a, to compel the issuance of a patent including the right-of-way area, or to refuse the issuance of the patent requested, simply because it contravenes the administrative practice of the Department. Work v. Central Pacific Ry. Co., supra at 834. 16/

Therefore, I would hold that patent should issue to Wyoming for those sections requested, excluding that area traversed by

---

15/ It is questionable whether this Act applies to a state, since its operation is expressly limited to "any person, firm, or corporation \* \* \*." 16/ The Department, in response to Work v. Central Pacific Ry. Co., 12 F.2d 834 (D.C. Cir. 1926), issued Instructions, 51 L.D. 487 (1926), regarding the right of land-grant railroad companies to list less than a legal subdivision, insofar as related to the odd numbered sections within the primary limits of the railroad grant. Thereafter, those lists submitted for less than a legal subdivision were to be accepted where no other objection appeared. Further recommended was the listing of such lands by aliquot parts of a subdivision, "such as the NE 1/4 of NE 1/4 of NE 1/4 (10 acres), or S 1/2 of NE 1/4 of NE 1/4 (20 acres)," unless a survey to segregate the tract chosen could not be avoided. See generally BLM MANUAL OF SURVEYING INSTRUCTIONS 159 (1973).

The provision regarding the assignment of cost for the survey in the Instructions, supra, was modified by Central Pacific Ry. Co. (On Petition), 52 L.D. 235 (1927). See generally 43 U.S.C. § 757 (1970).

The identity of land included within a patent is ascertained by giving a reasonable construction to the entire description in the patent. Boardman v. Reed, 31 U.S. (6 Pet.) 325, 344 (1832). I see no legal imperative for a segregative survey in the issuance of a school land grant patent for sections traversed by an 1850-1871 period railroad right-of-way. A clause generally excluding those lands included within such a right-of-way would appear to provide sufficient description for identity of the State's title in the sections granted. It would therefore seem that there is no impediment to an alteration of present departmental policy regarding exclusions in patents, thus avoiding the expense and administrative delay which would be incurred in the accomplishment of segregative surveys solely for the purpose of the form of the patent.

the 1862 Act right-of-way of the Union Pacific Railroad, where the specific conditions of the grant have been met.

## II. General Right-of-Way Statute of 1875.

As mentioned before, the General Right-of-Way Statute of March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939 (1970), replaced the earlier practice of granting rights-of-way, additional public lands and direct financial aid to individually named railroad companies. This statute granted only:

The right of way through the public lands of the United States \* \* \* to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same \* \* \*.

43 U.S.C. § 934. The public lands adjacent to such rights-of-way were granted for station buildings, depots, etc., not in excess of 20 acres per station, and the right to take material, earth, stone, and timber necessary for the construction of the road from the public lands adjacent to the line was given. Id.

This grant of the rights-of-way and station grounds through the public domain was an in praesenti grant of land to be thereafter identified. Stalker v. Oregon Short Line, 225 U.S. 142, 146 (1912); Jamestown & Northern R.R. Co. v. Jones, 177 U.S. 125, 131 (1900). The specific grant was secured to the railroad as against subsequent grantees upon definite location of the line and permanent appropriation of the right-of-way. This could be accomplished by actual construction, which has been described as such construction as manifested that the railroad had exercised its judgment as to the location of its line and had done sufficient work to fix the position of the route and to consummate the purpose for which the grant was given. Barlow v. Northern Pacific Ry. Co., 240 U.S. 484, 488 (1916); Stalker v. Oregon Short Line, supra at 150. The degree of construction which satisfied this definition ranged from the beginning of construction by grading the roadbed to the completion of the line. Barlow v. Northern Pacific Ry. Co., supra; Jamestown & Northern R.R. Co. v. Jones, supra. However, in Minneapolis, St. Paul & c. Ry. Co. v. Doughty, 208 U.S. 251 (1908), a preliminary survey for the line was found insufficient, since it was only "a mere location movable at the will of the company" and not actual construction necessarily fixing the road's position.

Where the railroad desired to secure the grant in advance of construction, it had to do three specific things: (1) make a definite location of its route, (2) file a profile map of its line with the register of the local land office, and (3) obtain the approval of that map by the Secretary of the Interior. Act of March 3, 1875, 18 Stat. § 4 at 483; Minneapolis, St. Paul &c. Ry. Co. v. Doughty, *supra*; Jamestown & Northern R.R. Co. v. Jones, *supra*. The approved map was intended by the Act to be the equivalent of a patent defining the grant. Great Northern Ry. v. Steinke, 261 U.S. 119, 125 (1923). However, the title related back, as against intervening claims, to the date when the profile map was filed in the local land office. *Id.*; Stalker v. Oregon Short Line, *supra*. Therefore, claims raised subsequent to such filing were subordinate to the railroad's right-of-way. Stalker v. Oregon Short Line, *supra*.

#### A. Estate in the Right-of-Way

Initially, the Department construed the Act of 1875 as creating an easement which did not sever the lands from the public domain. The first such interpretation was in the general right-of-way circular of January 13, 1888, which stated, in part, that:

The act of March 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee, either in the "right of way" or the grounds selected for depot purposes. It is a right of use only, the title still remaining in the United States.

12 L.D. 423, 428 (1888). The same position was taken by later departmental regulations of March 21, 1892, 14 L.D. 338 and November 4, 1898, 27 L.D. 663. Great Northern Ry. Co. v. United States, 315 U.S. at 275. <sup>17/</sup> However, apparently in response to Northern Pacific Ry. Co. v. Townsend, 190 U.S. 267 (1903), a shift in departmental interpretation was reflected in the circular of February 11, 1904, 32 L.D. 481. Therein, the railroad's interest in an 1875 Act right-of-way was described as a base or qualified fee. But the Department returned to the easement theory in Grand Canyon Ry. Co. v. Cameron, 35 L.D. 495, 497 (1907), relying on the earlier departmental decision of John W.

---

<sup>17/</sup> Congressional approval of this administrative interpretation was indirectly given when the language of the 1875 Act was repeated in the grant of rights-of-way to canal and reservoir companies, Act of March 3, 1891, 26 Stat. 1101, and when the 1875 Act was made partially applicable to the Colville Indian Reservation by Act of March 6, 1896, 29 Stat. 44. Great Northern Ry. Co. v. United States, 315 U.S. 262, 275-76 (1942).

Wehn, 32 L.D. 33 (1903). This reassertion was reflected in departmental regulations of May 21, 1909, 37 L.D. 787. However, the interpretation was again changed pursuant to the Supreme Court's decision in Rio Grande Western Ry. Co. v. Stringham, 239 U.S. 44 (1915).

The Stringham case involved a suit brought by the railroad company to quiet title to lands under an 1875 Act right-of-way, where the defendants asserted title thereto under a patent issued for a placer mining claim. The Court, in affirming judgment in favor of the railroad, relied on the limited fee analysis of Townsend, finding that:

The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee. \* \* \*

Id. at 47.

The Department responded accordingly, and after 1915 administrative construction bowed to the Stringham analysis. Contra, 43 CFR 243.2 (1938). 18/ Instructions, 46 L.D. 429 (1918), issued stating that homestead entrymen were no longer considered to have any interest in lands traversed by such a right-of-way. Mining claims embracing tracts traversed by an 1875 Act right-of-way, carried neither title to the land within the way nor any interest in the mineral deposits thereunder. A. Otis Birch (On Rehearing), 53 I.D. 340 (1931); United States v. Bullington (On Rehearing), 51 L.D. 604 (1926); Lewis A. Gould, 51 L.D. 131 (1925). When conflict arose between the United States and a railroad company as to the title to oil and gas deposits underlying an 1875 Act right-of-way, the railroad's interest, construed as a limited fee, did not include the right or title to the oil and gas deposits thereunder. Solicitor's Opinion, 56 I.D. 206 (1937).

In 1942 the Supreme Court effectively overruled Stringham in Great Northern Ry. Co. v. United States, 315 U.S. 262 (1942), a suit instituted by the United States to enjoin Great Northern from drilling for or removing the oil and gas underlying its right-of-way, granted pursuant to the 1875 Act.

---

18/ The regulations, 43 CFR 243.2 (1938), reasserted the easement language of the May 21, 1909, regulations, 37 L.D. 787, 788.

The Court, in analyzing Stringham, noted that:

The conclusion that the railroad was the owner of a "limited fee" was based on cases arising under the land grant acts passed prior to 1871, and it does not appear that Congress' change of policy after 1871 was brought to the Court's attention. \* \* \*

Id. at 279. The language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation were all found to be inconsistent with such a limited fee analysis. The Court, when discussing the language of the 1875 Right-of-Way Act, found § 4 thereof particularly illustrative. That section required notation of the location of each right-of-way on the plats in the local land office. Thereafter, "all such lands over which such right of way shall pass shall be disposed of subject to such right of way." 18 Stat. § 4 at 483. (Emphasis added.) The Court observed that:

This reserved right to dispose of the lands subject to the right of way is wholly inconsistent with the grant of the fee. As the court below pointed out, "Apter words to indicate the intent to convey an easement would be difficult to find." That this was the precise intent of § 4 is clear from its legislative history. \* \* \*

Great Northern Ry. Co. v. United States, supra at 271.

The fact that the 1875 Act was designed to permit the construction of the railroads through the public domain to enhance their value and hasten their settlement did not compel a construction of such a right-of-way grant as conveying a fee in the land and underlying minerals. Id. at 272. The Court recognized that the railroad could be operated, though its right-of-way was but an easement, and Great Northern's interest was construed as being clearly only an easement, conferring no right to the oil and minerals underlying the right-of-way. The title to the mineral estate remained in the United States, with the railroad free to apply for a lease on the oil and gas deposits pursuant to the Right-of-Way Leasing Act of May 21, 1930.

In 1958 the Court of Appeals for the Tenth Circuit found Great Northern's easement analysis was not limited to contests involving the Government. Chicago & North Western Ry. Co. v. Continental Oil Co., 253 F.2d 468 (10th Cir. 1958). In this dispute the railway company and its oil and gas lessee had sought reversal of a lower court's decision in favor of Continental Oil Company,

148 F. Supp. 411 (D. Wyo. 1957). Continental Oil had originally filed the suit to enjoin them from trespassing on the servient estate. Continental was the assignee of non-federal oil and gas leases on two 40-acre tracts traversed by the right-of-way. One tract had been patented by the United States to the state as part of a university land grant, and the other had been patented by the United States into private ownership. The lower court, in granting the injunction requested, found the railroad had acquired only an easement. Therefore, it had no right to the oil and gas or other minerals underlying its way. The Tenth Circuit, in affirming that judgment, found that:

Upon the filing of the location map, the railroad acquired an easement for railroad purposes. The fee or servient estate, including the minerals, remained in the United States. See *Himonas v. Denver & R. G. W. R. Co.*, supra [179 F.2d 171 (10th Cir. 1949)]. A severance of the minerals from the surface or dominant estate in the right of way was thereupon effected \* \* \*.

253 F.2d at 472.

This Board, in *Amerada Hess Corp.*, 24 IBLA 360, 83 I.D. 194 (1976), recognizing the easement theory of *Great Northern*, looked to the legal effect of such an estate on a subsequent patentee. The conflict involved title to the mineral estate underlying an 1875 Act right-of-way, where patent had issued containing no reservation of the minerals in the United States. Amerada Hess Corporation, the assignee of an oil and gas lease issued by the successor-in-interest of the original patentee, had filed a protest against the issuance of an oil and gas lease by the United States pursuant to the Right-of-Way Leasing Act of 1930. We found that in such a situation title to the servient mineral estate passed with the grant of the patent. The United States no longer had any mineral interest under the right-of-way, and, therefore, the Secretary of the Interior had no authority under the Leasing Act to dispose of the oil and gas lying therein. *Id.* at 378.

Present departmental regulations reflect this easement theory, describing the nature of the 1875 Act as follows:

A railroad company to which a right-of-way is granted does not secure a full and complete title to the land on 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 purpose, and may hold such possession, if it is necessary to that use, as

long and 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. \* \* \*

43 CFR 2842.1(a).

In the present conflict before the Department the question has been raised by Wyoming's patent application whether title vested in it, under its school land grant, to the lands within the two sections covered by the 1875 Act rights-of-way, sec. 16, T. 13 N., R. 67 W., 6th P.M., and sec. 16, T. 13 N., R. 68 W., 6th P.M. The answer to this depends on whether the school land grant of those sections vested in the State prior to or subsequent to the date the railroad's interest attached.

If the school land grant vested prior to the railroad's easement, then the rule of Wilcox v. Jackson, 38 U.S. (13 Pet.) 266 (1839), applies, and the lands were not subject to subsequent disposition by the United States. Cf. Minneapolis, St. Paul &c. Ry. Co. v. Doughty, 208 U.S. 251 (1908). However, present departmental regulations provide that:

Whenever any right-of-way shall pass over private land or possessory claims on lands of the United States, condemnation of the right-of-way across the same may be made in accordance with the provisions of section 3 of the act of March 3, 1875 (18 Stat. 482; 43 U.S.C. § 936), or the right can be purchased as provided by section 2288 of the Revised Statutes, as amended by section 3 of the act of March 3, 1891 (26 Stat. 1097; 43 U.S.C. § 174).

43 CFR 2842.1(b); see Missouri-Kansas-Texas R. Co. v. Ray, 177 F.2d 454 (10th Cir. 1949), cert. denied, 338 U.S. 955 (1950). 19/

If the school land grant was subsequent, then it must be determined whether the lands within the way were subject to subsequent disposition.

---

19/ In Missouri-Kansas-Texas R. Co. v. Ray, 177 F.2d 454 (10th Cir. 1949), cert. denied, 338 U.S. 955 (1950), the Tenth Circuit, relying on Great Northern, found that where a railroad acquired its 1875 Act right-of-way across school lands through condemnation proceedings, it acquired no greater interest in that way than an easement, notwithstanding the fact that the railroad had paid compensation for a fee.

In light of Great Northern Ry. Co. v. United States, *supra*, it is settled that the railroad received only an easement under the General Right-of-Way Act of 1875. This easement, however, must be contrasted with the interest created by the 1850-1871 period right-of-way grants. The latter interest, whether called a limited fee or an easement, severed the lands within the rights-of-way from the mass of public lands, so that no subsequent law or proclamation could operate on them. Rice v. United States, *supra*; Wyoming v. Udall, *supra*. As a result, a subsequent grant by the United States of the encumbered tract could not include its title to the servient estate, even though no exception is made of it in the patent issued. This, however, is not the case with an 1875 Act grant. Upon the filing of the map of location, the railroad received its easement for railroad purposes, with the servient estate remaining in the United States. Chicago & North Western Ry. Co. v. Continental Oil Co., *supra*. The railroad's easement in the right-of-way, however, does not sever the lands from the public domain; therefore, title to the servient estate can pass in a subsequent grant by the United States of the traversed tract. Wyoming v. Udall, 379 F.2d at 639-40; Amerada Hess Corp., supra at 372-79, 83 I.D. at 200; Union Pacific R.R. Co., 72 I.D. 76, 80 (1965); United States v. Dawson, 58 I.D. 670, 677 (1944); Grand Canyon Ry. Co. v. Cameron, 35 L.D. 495 (1907); 43 CFR 2842.1(a); see Chicago & North Western Ry. Co. v. Continental Oil Co., *supra*; 20/ cf. Beecher v. Wetherby, 95 U.S. 517 (1877).

Since the lands within an 1875 Act right-of-way were subject to subsequent disposition by the United States, the question arises whether such a subsequent disposition could occur pursuant to Wyoming's school land grant.

In Wyoming v. Udall, *supra*, the Circuit Court addressed the nature of an 1850-1871 period right-of-way grant, and its effect on the subsequent school land grant to Wyoming. The railroad's interest was labeled an easement in perpetuity, but was distinguished from a surface easement because coal and iron rights were included in the right-of-way grant. It was this additional grant that the court found caused the right-of-way to fall within the "otherwise disposed of" language of the school land grant.

There is no such additional grant within the General Right-of-Way Statute of 1875, nor is there any other grant therein which is analogous. The 1875 Act granted only a surface easement to the

---

20/ In Chicago & North Western Ry. Co. v. Continental Oil Co., 253 F.2d 468 (10th Cir. 1958), Continental would have had no standing to bring the suit as assignee of non-federal oil and gas leases if its lessors did not hold the title to the servient estate.

railroad, and this, by itself, is not a disposition which would exclude the right-of-way from the grant of the school sections made in Wyoming's Enabling Act. See Wyoming v. Udall, 379 F.2d at 640; Amerada Hess Corp., supra; cf. Beecher v. Wetherby, supra.

Wyoming's title to the two sections in issue vested as of July 10, 1890, as the townships involved were surveyed prior to the date of statehood. However, it is not clear from the record on appeal when the Union Pacific Railroad's interest attached in the 1875 Act rights-of-way traversing those sections. 21/ Nevertheless, patents may issue including the lands within those two rights-of-way.

The Act of June 21, 1934, 43 U.S.C. § 871a (1970), provides that patents shall issue upon application by the state, where title has vested or may thereafter vest in the grantee state. If the school land grant vested prior to the railroad's interest, the state received full title to the sections. If the rights-of-way were condemned after title vested in the state or were granted prior to the school land grant's vesting, the state has title to the servient estate underlying the railroad's easement. See Rice v. United States, supra; Wyoming v. Udall, supra; Missouri-Kansas-Texas R. Co. v. Ray, 177 F.2d 454 (10th Cir. 1949), cert. denied, 338 U.S. 955 (1950). Therefore, since title has vested, patents should issue including the rights-of-way area. 22/ Note, however, patent for title held in the servient estate should show "the extent to which the lands are

---

21/ The plats and historical indices regarding the two sections reveal that the Union Pacific's 1875 Act right-of-way traversing sec. 16, T. 13 N., R. 68 W., 6th P.M., was approved by the Secretary of the Interior on October 19, 1903 (proof of construction made September 18, 1926), and the other 1875 Act right-of-way traversing sec. 16, T. 13 N., R. 67 W., 6th P.M., was approved on July 11, 1908 (no proof of construction noted). However, the record does not reveal when the profile maps were filed in the local land office.

22/ Where a state is vested with the title in the servient estate, title to the railroad's easement will thereafter vest in the state if and when the railroad ceases to use the rights-of-way for railroad purposes. The easement automatically terminates and attaches the fee in the state, without the necessity of a further grant. Wyoming v. Udall, 379 F.2d 634, 639 (10th Cir.), cert. denied, 389 U.S. 985 (1967); Annot., 136 A.L.R. 296, 297 (1942); cf. Beecher v. Wetherby, supra, n. 16. After the decision in Great Northern Ry. Co. v. United States, supra, n. 17, the Abandoned Railroad Right-of-Way Act of March 8, 1922, 43 U.S.C. § 912 (1970), applied only to pre-1871 right-of-way grants. Wyoming v. Udall, supra. But see Allard Cattle Co. v. Colorado & Southern Ry. Co., 530 P.2d 503 (Colo. 1974).

subject to prior conditions, limitations, easements, or rights, if any." (Emphasis added.) 43 U.S.C. § 871a; see United States v. Dawson, 58 I.D. 670 (1944). 23/

#### INDEMNITY FOR SCHOOL LANDS LOST IN PLACE

Wyoming filed an indemnity selection application pursuant to 43 U.S.C. §§ 851, 852 (1970), seeking lieu selection as indemnity for acreage included within the limits of the Union Pacific's 1862 grant right-of-way. That application was found defective by the Bureau for the following reasons: (1) the base offered was improper because the State took title to the school sections in place subject to the right-of-way granted by the Act of July 1, 1862, citing State of Wyoming, 58 I.D. 128 (1942); and (2) there was no provision in law made for indemnifying states for school sections traversed by railroads, granted either under special grants from Congress, like the 1862 grant, or under the General Right-of-Way Statute of 1875, citing State of North Dakota, 13 L.D. 454 (1891).

It is settled that Wyoming received no title or interest to the lands within this 1862 Act right-of-way granted the Union Pacific, and that those lands were "otherwise disposed of" within the meaning of its Statehood Act. Wyoming v. Udall, supra. The only question remaining is whether State of North Dakota, supra, correctly reflects the law on school indemnity for sections traversed by such a right-of-way.

General provisions governing the selection of school indemnity lands for loss of school land sections in place date back to the Act

---

23/ Volume V of the BLM Manual, Part 5, Final Certificates & Patents, § 5.1, does not reflect this requirement of notation of an 1875 Act right-of-way (easement) under 43 U.S.C. § 871a (1970), either in discussion of Reservation of Rights-of-Way or in Illustration 3. However, should a patent issue without reference to an established railroad right-of-way, that will neither enlarge the interest of the patentee nor diminish that of the railroad. Stalker v. Oregon Short Line, 225 U.S. 142, 154 (1912); George W. Zarak, 4 IBLA 82 (1971), aff'd sub nom. Rice v. United States, 479 F.2d 58 (8th Cir.), cert. denied, 414 U.S. 858 (1973). In Congressional legislation a patent has a double operation. It is a deed of the United States which operates like a quitclaim, conveying such interest as the United States possesses in the land. Where it issues upon the confirmation of a claim of previous existing title, it is documentary evidence of the existence of that title as justifies its recognition. Wilson Cypress Co. v. Del Pozo y Marcos, 236 U.S. 635, 648 (1915); Beard v. Federy, 70 U.S. (3 Wall.) 478, 491 (1865).

of May 20, 1826, 4 Stat. 179. That Act reserved lands for the use of schools in all townships, and fractional townships, for which no land had been previously appropriated in the school land grant states. By Act of February 26, 1859, 11 Stat. 385, incorporated into Revised Statutes §§ 2275 and 2276, "other lands of like quantity" were appropriated to compensate for deficiencies caused either by preemption claims of settlers, or where the sections were fractional in quantity or were wanting because the township was fractional. However, a variety of conditions arose in the administration of the school land grants to the various states whereby the states or territories suffered losses without adequate indemnity provision. S.R. Rep. No. 502, 51st Cong., 1st Sess. 1 (1890); State of Florida, 30 L.D. 187, 188 (1900). Special laws were enacted curing some defects respecting particular states or territories, but, as the school land grant was "intended to have equal operation and equal benefit in all the public land States and Territories," Revised Statute §§ 2275 and 2276 were amended by Act of February 28, 1891, 26 Stat. 796, providing a uniform rule for the selection of indemnity school lands. S.R. Rep. No. 502, supra; accord, United States v. Wyoming, 331 U.S. at 452; Fannie Lipscomb, 44 L.D. 414 (1915); State of Florida, supra; State of Wyoming, 27 L.D. 35, 38 (1898); State of California, 23 L.D. 423, 426 (1896). Equal acreage was appropriated and granted thereby for lands lost prior to survey by settlement, and, in addition, for lands lost where the sections were mineral lands, were included in any Indian, military or other reservation, or were otherwise disposed of. State of Oregon, 18 L.D. 343, 344-45 (1894). The 1891 Act has subsequently been amended, 24/ 43 U.S.C. §§ 851, 852 (1970), and presently provides:

Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections or either of them have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section 852 of this title, by

---

24/ Act of August 27, 1958, 72 Stat. 928; Act of June 24, 1966, 80 Stat. 220.

said State where sections sixteen or thirty-six are, before title could pass to the State, included within any Indian, military, or other reservation, or are, before title could pass to the State, otherwise disposed of by the United States: Provided, That the selection of any lands under this section in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. And other lands of equal acreage are also appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: Provided, however, That nothing in this section contained shall prevent any State from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein.

43 U.S.C. § 851. (Emphasis added.)

Wyoming, pursuant to § 4 of its Statehood Act, 26 Stat. 222, which was enacted only 7 months before the Act of February 28, 1891, received school land grant sections 16 and 36 in every township, unless those sections or any portion thereof had been "sold or otherwise disposed of by or under the authority of any act of Congress." Where such loss occurred, the State was entitled to select equivalent lands.

The Act of February 28, 1891, and Wyoming's Statehood Act are in pari materia, and should be construed together. State of California, 31 L.D. 335, 340 (1902). Congress, by such legislation, devoted a fixed portion of the public lands to school purposes without warranting that the designated sections would

exist in every township, or that if they did exist, that the State should in all events receive title thereto. United States v. Morrison, 240 U.S. at 201-02. In this manner, Congress assured the State the equivalent of the school grant sections when and if those had been "sold or otherwise disposed of." Id. at 202. "The intent of Congress has always been to give every school section or its equivalent area." S.R. Rep. No. 502, supra; accord, Johanson v. Washington, 190 U.S. 179, 184-85 (1903).

Prior to the General Indemnity Act of February 28, 1891, the Department was faced with the issue of the nature and effect of school land grants and their exclusion of lands generally grouped as "otherwise disposed of." Justice Lamar, while Secretary of the Interior, made the following analysis:

That where the fee is in the United States at the date of survey and the land is so encumbered that full and complete title and right of possession can not then vest in the State, the State may, if it so desires, elect to take equivalent lands in fulfillment of the compact, or it may wait until the title and right of possession unite in the government, and then satisfy its grant by taking the lands specifically granted.

State of Colorado, 6 L.D. 412, 418 (1887); see Minnesota v. Hitchcock, 185 U.S. 373, 392-93 (1902); United States v. Thomas, 151 U.S. 577, 583 (1894); Gregg v. Colorado, 15 L.D. 151, 152 (1892); Henry Sherry, 12 L.D. 176, 180 (1890). The particular interests which conflicted with the school land grant in State of Colorado and the other cases cited were either Indian, military or other Government reservations. The Act of February 28, 1891, provided specifically for those instances and others which had arisen in the administration of the school land grants. However, the catch-all language of "otherwise disposed of" remained a specific part of the school land grants.

From the beginning, governmental policy has been liberal in the appropriation of lands for school purposes. Johanson v. Washington, supra; Minnesota v. Hitchcock, supra; Cooper v. Roberts, 59 U.S. (18 How.) 173 (1855). In response to that policy the Supreme Court has regarded as justified any fair construction of such legislation as would secure to a state its full quota of lands for aid in the development of its public school system. Minnesota v. Hitchcock, 185 U.S. at 401.

In the present case Wyoming's title to the area within the 1862 Act right-of-way will never vest pursuant to its school land

grant alone; the railroad's title reverts to the United States when the way is no longer used for railroad purposes. State of Wyoming, 58 I.D. at 134; cf. State of Utah (On Petition), 47 L.D. 359 (1920); Andrew J. Billan, 36 L.D. 334 (1906). Only a possibility of vesting may arise pursuant to the Act of March 8, 1922, 43 U.S.C. § 912 (1970), which grants that area to the owner or purported owner of the "whole of the legal subdivision" traversed by the right-of-way, upon abandonment or forfeiture "declared or decreed by a court of competent jurisdiction or by Act of Congress," provided that "the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas and other minerals in the land so transferred and conveyed \* \* \*." However, if the right-of-way is never abandoned or forfeited, or if it is located within a municipality, the State could never acquire title.

The Act of 1922, therefore, if remedial, and if applicable, 25/ is as a bandaid where major surgery is required. Not only is it highly conditional as to the vesting of the surface covered by the right-of-way, but it prevents the State from ever enjoying what in many cases is the most valuable component of western land, the oil, gas and other minerals thereunder. See 43 U.S.C. § 870 (1970).

Because of the vast scope of the railroad grants during the 1850-1871 period, the school land grant would be materially diminished unless indemnity for those portions lost is allowed. Both Wyoming's Statehood Act and 43 U.S.C. § 851 provide for such a situation by granting other lands equivalent to those lost. Neither Act limits how such section might be lost by their general usage of "otherwise disposed of." Therefore, it must be presumed that Congress intended the State to have its full grant of lands for school purposes, without specific reference to the causes which brought about the loss. State of Florida, 30 L.D. 187 (1900).

State of North Dakota, supra, is in conflict with the law as interpreted by the courts and this Department, and results in a situation contrary to the legislative purpose of Congress. See Wyoming v. Udall, 379 F.2d at 640. Therefore, its finding affecting school land indemnity for 1850-1871 period right-of-way grants should be overruled, and, Wyoming's indemnity application,

---

25/ See note 15 supra.

proper in all other respects, should be accepted and the appropriate departmental steps taken in response.  
26/

---

Newton Frishberg  
Chief Administrative Judge

26/ 43 CFR 2621.2(d)(3), regulating school indemnity selection applications, states in part that:

"A portion of a smallest actual or probable legal subdivision may be assigned as base but such assignment is an election to take indemnity for the entire subdivision and is a waiver of the State's rights to such subdivision, except that any remaining balance may be used as base for future selections."

This provision does not require the state to waive its already vested title to the rest of the lands within the smallest legal subdivision traversed by the right-of-way. Its application is limited to those subdivisions not vested in the state which might vest at a later date. Cf. Work v. Central Pac. Ry. Co., 12 F.2d 834, 836 (D.C. Cir. 1926). The right to acquire title is subject to reasonable regulation by the Department, and, as lieu selections are disposals of the public lands, they are subject to reasonable regulation. Id.

