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THE LEASING OF FEDERAL OIL AND GAS RIGHTS IN LANDS AFFECTED BY RIGHTS-OF-WAY GRANTED UNDER FEDERAL LAWS

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On January 15, 1953, the Department of the Interior rendered a decision in the case of *Phillips Petroleum Co.*,¹ affirming a previous dismissal by the Bureau of Land Management of a protest filed by Phillips against an application by the Chicago and North Western Railway Co., for an oil and gas lease of that part of the railroad's right-of-way which lies within the W $\frac{1}{2}$ NW $\frac{1}{4}$ (lots 3 and 4) of section 6, Township 33 North, Range 75 West, 6th P.M., Wyoming. Phillips questioned the propriety of the Department's decision in an action brought in the United States District Court for the District of Columbia,² but by an unreported decision granting defendant's motion for summary judgment, the Department's position was sustained.

Although the decision created a temporary interest among holders of federal oil and gas leases covering lands subject to rights-of-way granted under various federal laws, it is now seldom mentioned. However, the decision is of continuing importance, particularly to federal oil and gas lessees, and it is the purpose of this article to demonstrate its importance by pointing out some of the vexing questions which are present as a result of the decision.

I

THE *Phillips* CASE

The land involved in *Phillips* was patented in 1923 under a stockraising homestead entry, and consequently the patent reserved all mineral rights to the United States. The right-of-way of the Chicago and North Western Railway Co., which traverses the tract, was granted on November 29, 1886, to a predecessor company under the provisions of the general railroad right-of-way Act of March 3, 1875.³

On May 1, 1945, a noncompetitive oil and gas lease was issued under the provisions of section 17 of the Mineral Leasing Act of February 25, 1920,⁴ as

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1. 61 Interior Dec. 93 (1953).

2. *Phillips Petroleum Co. v. McKay*, Civil No. 5024-53, D. D.C., June 17, 1955.

3. 18 Stat. 482 (1875), as amended, 43 U.S.C. §§ 934-39 (1958).

4. Ch. 85, § 17, 41 Stat. 443 (1920), as amended, Pub. L. 86-705, § 2, 74 Stat. 781 (1960).

amended. The lease purportedly covered the oil and gas rights which had been reserved to the United States by the stockraising homestead patent in the entire $W\frac{1}{2}NW\frac{1}{4}$ of section 6, no exclusion being made of the part of the tract within the railroad right-of-way. The lease was acquired by Phillips Petroleum Company from the original lessee by assignment.

Upon the discovery of oil and gas in wells drilled on the parts of the $W\frac{1}{2}NW\frac{1}{4}$ of section 6 adjoining the right-of-way, the railroad company filed an application for an oil and gas lease of the land in the right-of-way. The application was filed under the provisions of the Act of May 21, 1930,⁵ which provides, so far as is pertinent here, that the Secretary of the Interior may, whenever he deems it to be consistent with the public interest, lease deposits of oil and gas "in or under lands embraced in railroad or other rights of way acquired under any law of the United States, whether the same be a base fee or mere easement"⁶

Inasmuch as the mineral rights in the $W\frac{1}{2}NW\frac{1}{4}$ of section 6 were reserved to the United States by the stockraising homestead patent, they remained subject to leasing as "public lands," at least as to the parts not affected by the right-of-way.

Phillips protested the granting of a lease to the railroad company, contending (1) that the oil and gas deposits under the right-of-way were not taken out of the category of "public lands" by reason of the granting of the mere easement of right-of-way, (2) that the Secretary had authority to lease such lands under the 1920 Act *or* the 1930 Act, and (3) that since the land was already included in Phillips' lease, it could not again be leased under the 1930 Act. The Department held that the oil and gas rights in and under rights-of-way granted under any federal law can be leased only under the 1930 Act, that the right-of-way was thus excluded from Phillips' lease by operation of law, and, by inference, that the Secretary could, if he wished, issue a lease to the railroad company.⁷

While the Department's decision has resulted in numerous legal complications, it is well-reasoned and now represents the law on the subject.

In arriving at its decision in *Phillips*, the Department cited its own prior decisions as well as certain decisions of the courts. It was pointed out that in the case of *Charles A. Son*,⁸ decided in 1931, less than a year after the approval of the 1930 Act, the Department had held that certain oil and gas leases held by Son and others and issued under the Mineral Leasing Act of 1920 did not cover a railroad right-of-way, although such leases did not specifically exclude

5. 46 Stat. 373 (1930), 30 U.S.C. §§ 301-06 (1958).

6. 46 Stat. 373 (1930), 30 U.S.C. § 301 (1958).

7. *Phillips Petroleum Co.*, 61 Interior Dec. 93 (1953).

8. 53 Interior Dec. 270 (1931).

the right-of-way. The Department quoted from *Great No. Ry. v. United States*,⁹ wherein the United States Supreme Court stated:

Since petitioner's right of way is but an easement, it has no right to the underlying oil and minerals. This result does not freeze the oil and minerals in place. Petitioner is free to develop them under a lease executed pursuant to the Act of May 21, 1930.¹⁰

The Department asserted that the legislative history of the 1930 Act shows that its enactment constituted on acceptance and confirmation by Congress of the Department's construction of the Mineral Leasing Act of 1920 as inapplicable to oil and gas deposits underlying railroad rights-of-way granted under the 1875 Act.

In order to understand fully the Department's decision in *Phillips* and the uncertainties created thereby, it is necessary to consider the history of the laws under which railroad and other rights-of-way were granted, the important decisions under those laws, and particularly the history of the 1930 Act. As the discussion unfolds, the reader will in all probability become as uncertain and confused as have been the Department of the Interior and the courts.

II

THE STATUS OF MINERALS UNDER RIGHTS-OF-WAY GRANTED BY THE FEDERAL GOVERNMENT PRIOR TO 1930

At the time when it was generally felt that the construction of railroads was of prime necessity to the nation's welfare, Congress instituted a policy of making lavish grants from the public domain to assist the railroad companies in defraying costs of construction and to encourage such construction. Typical of these grants was the one made in 1850 for the Illinois Central Railroad Co.,¹¹ and subsequent grants to the Union Pacific,¹² Central Pacific,¹³ Northern Pacific,¹⁴ Atlantic and Pacific and Southern Pacific,¹⁵ and Oregon and California railroads.¹⁶ However, this policy met with wide public disfavor, resulting in the adoption by the House of Representatives on March 11, 1872, of a resolution¹⁷ recommending the discontinuance of land grants to railroads and

9. 315 U.S. 262 (1942).

10. *Great No. Ry. v. United States*, 315 U.S. 262, 279 (1942).

11. Act of Sept. 20, 1850, ch. 61, 9 Stat. 466.

12. Act of July 1, 1862, ch. 120, 12 Stat. 489.

13. Act of July 2, 1864, ch. 216, 13 Stat. 356.

14. Act of July 2, 1864, ch. 217, 13 Stat. 365.

15. Act of July 27, 1866, ch. 278, 14 Stat. 292.

16. Act of July 25, 1866, ch. 242, 14 Stat. 239.

17. Cong. Globe, 42d Cong., 2d Sess., at 1585 (1872).

favoring the holding of the public lands for homesteads for settlers and for educational purposes. As a result, no grants were made to railroad companies out of the public lands after March 3, 1871, when by the Act of that date,¹⁸ the Texas Pacific Railroad Co. was given the benefit of the land grant provisions of the Atlantic and Pacific and Southern Pacific Act of July 27, 1866.¹⁹ Thenceforth the railroad companies were forced to obtain their necessary rights-of-way under the provisions of the general railroad right-of-way Act of March 3, 1875.²⁰

It may be noted in passing that all of the railroad granting acts which were passed prior to 1872 granted not only rights-of-way for the lines of road, but also granted large amounts of land along the rights-of-way, consisting of alternate sections within a certain number of miles along such rights-of-way.

In the first case wherein the United States Supreme Court was called upon to determine the nature of the estate which was granted to the railroad companies in their rights-of-way, it was held that the Act of July 23, 1866,²¹ which granted lands in aid of construction of a branch of the Northern Kansas Railroad and Telegraph Co., conveyed "a present absolute grant, subject to no condition except . . . that the road shall be constructed and used for the purposes designed."²² Later, the Court reached a like conclusion in dealing with the Act of July 26, 1866,²³ which granted lands and a right-of-way for a branch of the Union Pacific railroad.²⁴ Still later, in dealing with the Northern Pacific Act,²⁵ the Supreme Court held that the right-of-way was a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.²⁶

It should be noted here that all of the acts approved prior to 1872 used identical language in granting rights-of-way to the railroads, each providing "That the right of way through the public lands be, and the same is hereby granted" Thus all of the grants under those acts were in the nature of base or limited fees, although, as we shall see, they are no longer considered to carry title to the minerals in the rights-of-way.²⁷

The general railroad right-of-way Act of 1875²⁸ was interpreted by the Department of the Interior with some inconsistency. The first interpretation ap-

18. Act of March 3, 1871, ch. 122, 16 Stat. 573.

19. Ch. 278, 14 Stat. 292 (1866).

20. 18 Stat. 482 (1875), as amended, 43 U.S.C. §§ 934-39 (1958).

21. Ch. 212, 14 Stat. 210 (1866).

22. *Railroad Co. v. Baldwin*, 103 U.S. 426, 429-30 (1881).

23. Ch. 270, 14 Stat. 289 (1866).

24. *Missouri, K. & T. Ry. v. Roberts*, 152 U.S. 114 (1894).

25. Act of July 2, 1864, ch. 217, 13 Stat. 365.

26. *Northern Pac. Ry. v. Townsend*, 190 U.S. 267, 271-72 (1903); see also *New Mexico v. United States Trust Co.*, 172 U.S. 171 (1898).

27. See *United States v. Union Pac. R.R.*, 353 U.S. 112 (1957).

28. 18 Stat. 482 (1875), as amended, 43 U.S.C. §§ 934-39 (1958).

peared in the Department's circular of January 13, 1888,²⁹ containing the regulations under the 1875 Act. Ignoring the Supreme Court's opinion in the *Baldwin* case, the circular stated:

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.³⁰

An identical statement appears in the Department's circular of March 21, 1892,³¹ which contained the combined regulations under the 1875 Act and the regulations under the Act of March 3, 1891,³² which provided, among other things, for the granting of rights-of-way for canals and ditches. Later, in its circular of February 11, 1904, the Department described the right as a base or qualified fee, but at the same time stated that "The act of March 3, 1875, is not in the nature of a grant of lands"³³ Thus the Department attempted to create a unique interest intermediate between an easement and a base or limited fee. The United States Supreme Court has attributed this change in the Department's interpretation to the Court's statements in *Northern Pac. Ry. v. Townsend*,³⁴ to the effect that the right-of-way granted under the Act of July 2, 1864,³⁵ was a "limited fee, made on an implied condition of reverter."³⁶ In other words, it would appear that the Department, after noting that the 1875 Act contained words of grant essentially identical to those in the 1864 Act, felt obliged to bring its regulations into keeping with the views of the United States Supreme Court, and did so by construing grants under the 1875 Act as base or limited fees. Peculiarly, however, the Department reverted to its original interpretation in its regulation of May 21, 1909,³⁷ stating therein that:

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

29. 12 Interior Dec. 423 (1891).

30. *Id.* at 428.

31. 14 Interior Dec. 338, 342 (1892).

32. Ch. 561, 26 Stat. 1095 (1891).

33. 32 Interior Dec. 481, 482 (1904).

34. 190 U.S. 267 (1903).

35. Ch. 217, 13 Stat. 365 (1864).

36. *Northern Pac. Ry. v. Townsend*, 190 U.S. 267, 271 (1903).

37. 37 Interior Dec. 787 (1909).

located, and such patentee takes the fee, subject only to the railroad company's right of use and possession.³⁸

The question seemed settled for all time when, in 1915, the United States Supreme Court held, in *Rio Grande W. Ry. v. Stringham*,³⁹ that:

The right of way granted by this [the 1875 Act] 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.

As we shall see, this interpretation was reversed in the *Great Northern* case, but before coming to that point in the discussion it is at least interesting to consider one of the decisions of the Department of the Interior which relates to the question.

In *Windsor Reservoir & Canal Co. v. Miller*,⁴⁰ decided in 1925, the Department had before it the question of the nature of the estate conferred by the grant of a right-of-way for a reservoir site under the Act of March 3, 1891.⁴¹ In the *Stringham* case, the United States Supreme Court had held that rights-of-way granted by the 1875 Act "and similar acts" were limited fees.⁴² There can be no doubt that the 1891 Act, providing as it did "That the right of way through the public lands and reservations of the United States is hereby granted [for reservoirs and canals] . . ." ⁴³ was a "similar" Act, for it contained language of grant essentially identical to that in the 1875 Act. Accordingly, in construing the 1891 grant, the Department found, by analogy to the railroad cases, and in line with *Kern River Co. v. United States*,⁴⁴ that the reservoir right-of-way was a base or limited fee. However, the Department again attempted to impose an unwarranted restriction on the grant by stating:

A grant under said [1891] Act passes no right, title, or interest in or to any mineral deposits underlying the land, or any right to prospect for, mine, and remove oil or gas deposits, either directly by the grantee or any lessee thereof. *The title to such deposits remains in the United States, subject only to such disposition as may be authorized by law.*⁴⁵

38. *Id.* at 788.

39. 239 U.S. 44, 47 (1915).

40. 51 Interior Dec. 27 (1925).

41. Ch. 561, § 17, 26 Stat. 1101 (1891).

42. *Rio Grande W. Ry. v. Stringham*, 239 U.S. 44, 47 (1915).

43. Ch. 561, § 18, 26 Stat. 1101 (1891).

44. 257 U.S. 147 (1921).

45. *Windsor Reservoir & Canal Co. v. Miller*, 51 Interior Dec. 27, 34 (1925). (Emphasis added.)

Although, in an opinion rendered many years later (1957), the United States Supreme Court held that the railroad companies obtained no rights to the minerals in and under the rights-of-way granted by the acts approved prior to 1872,⁴⁶ at all times prior to that opinion and after the opinion in *Railroad Co. v. Baldwin*,⁴⁷ rights-of-way granted under the various railroad land grant laws were held to be outright fees or at least base or limited fees. Inasmuch as these fees were granted without mineral reservations and at a time when mineral reservations were unheard-of in the public land laws, the fees should have properly been considered to include the mineral title. Nevertheless, in the *Son* case⁴⁸ the Department held that the minerals in rights-of-way granted under an act "similar" to the 1875 railroad right-of-way Act did not pass to the grantees but remained in the United States. It is reasonable to suggest that the Department simply displayed its ignorance of the true nature of a base or limited fee and consequently its ignorance of the ownership of minerals in lands so granted.

A base or limited fee normally carries title to all minerals, unless, of course, the minerals are expressly excluded from the grant. It has all the incidents of a fee simple title except that it is terminable by abandonment or nonuse. Therefore, the statement in the *Son* case that the mineral estate does not pass to the grantee of a base or limited fee but remains vested in the United States was clearly erroneous, at least until the opinion in *United States v. Union Pac. R.R.*,⁴⁹ decided in 1957.

In all probability the Department was confused in its thinking and should have said that, although the mineral estate was vested in the grantee of the base or limited fee, the grantee could exercise no rights to the minerals for the reason that such exercise would diminish the value of the possible reversion in the event of abandonment or nonuse. Although the owner of a base or limited fee has all of the rights of an owner in fee simple, with the same rights of user and power to commit unlimited waste,⁵⁰ both equity and, to a lesser extent, law will grant relief against waste which lessens the value of any reversion that may occur.⁵¹ Thus, while the United States could have maintained a suit in equity to enjoin any railroad company from drilling for and producing oil, gas, or other minerals beneath a base or limited fee right-of-way, it is again pointed out that it was error for the Department to say, as it did in the *Son* case, that the mineral estate did not pass as an incident of the base or

46. *United States v. Union Pac. R.R.*, 353 U.S. 112 (1957).

47. 103 U.S. 426 (1881).

48. Charles A. Son, 53 Interior Dec. 270 (1931). See note 8 *supra* and accompanying text.

49. 353 U.S. 112 (1957).

50. 1 Cruise, Real Property tit. 1, § 76 (Greenleaf ed. 1856); Challis, Real Property 207 (1887); 1 Tiffany, Real Property § 195 (3d ed. 1939).

51. 2 Tiffany, Real Property § 645 (3d ed. 1939).

limited fee. As a matter of fact, it did pass, but the United States could enjoin the commission of equitable waste, and thus the railroad company could not exercise the mineral rights which it owned.

This misconception of the true legal situation surrounding the ownership of and rights to exercise the mineral rights was carried forward into the 1930 Act.

It should be borne in mind that, at least from the *Stringham* case⁵² (1915) to the *Great Northern* case⁵³ (1942), it was established that rights-of-way granted to railroad companies under either the individual granting acts or the 1875 Act were base or limited fees, and thus neither the United States nor the railroad companies could drill for or produce oil or gas or other minerals occurring beneath the rights-of-way. This is because the United States had only the possibility of a reversion and not the fee, and the railroad companies, although holding the fee, were prevented from drilling and producing by the doctrine of "equitable waste," plus the fact that drilling for and producing oil or gas would be outside the scope of the purpose for which the rights-of-way were granted.

Regardless of what appears to have been fallacious reasoning by the Department, it at least came to realize that railroad rights-of-way represented a "no man's land," so far as oil and gas development was concerned, in that neither the United States nor the railroad companies could develop the oil and gas deposits beneath the rights-of-way. In addition, it was well known that at many locations, wells on adjoining or nearby lands were draining oil and gas from beneath the rights-of-way, thus diminishing the value of the possible reversion. It was to correct this situation that the 1930 Act was enacted.

III

THE 1930 ACT

The 1930 Act⁵⁴ stemmed from legislation introduced in the House of Representatives⁵⁵ at the request of the Department. The debates on the floor of the House clearly showed that the bill was intended to apply only to railroad rights-of-way which at that time were all considered to be base fees, but the bill was amended in the Senate⁵⁶ to apply to all rights-of-way granted under federal laws. The Senate version was adopted by the House, and the House discussions of the bill demonstrated clearly that its sponsor's knowledge or recollection of real property law left something to be desired. For example,

52. *Rio Grande W. Ry. v. Stringham*, 239 U.S. 44 (1915).

53. *Great No. Ry. v. United States*, 315 U.S. 262 (1942).

54. 46 Stat. 373 (1930), 30 U.S.C. §§ 301-06 (1958).

55. H.R. 8154, 71st Cong., 2d Sess. (1930).

56. S. 3074, 71st Cong., 2d Sess. (1930).

at one point the principal sponsor stated that "[t]he minerals under the [right-of-way] lands are owned by the Government, but the owner of the right of way has a *limited fee in the lands, an easement.*"⁵⁷ In other words, he drew no distinction between base or limited fees and mere easements.

There was probably no valid reason why the 1930 Act should call for the leasing of lands subject to mere easements, for certainly public land does not cease to be public land simply because it is made subject to an easement, but remains public land and thus subject to oil and gas leasing under the 1920 Mineral Leasing Act.⁵⁸ Nevertheless, the 1930 Act as passed and approved gives the Secretary of the Interior authority to lease oil and gas deposits in or under lands "embraced in railroad or other rights of way acquired *under any law of the United States, whether the same be a base fee or mere easement . . .*"⁵⁹ If the 1930 Act had been restricted to base or limited fee rights-of-way, it would have served its purpose, but the inclusion of easements has given rise to the problems to be discussed later and, no doubt, to many others.

It may also be remarked that the 1930 Act represented a real distortion of real property law when it purported to give the Secretary authority to "lease" oil and gas deposits in base or limited fee rights-of-way. No doubt the Congress was entirely warranted in removing lands affected by easements from the operation of the 1920 Act and making them subject only to the 1930 Act (although this was not the intention of Congress and in fact served no purpose), but there certainly was no authority to support the grant to the Secretary of the authority to "lease" oil and gas deposits in base or limited fee rights-of-way; because at that time the law held that the minerals in *all* railroad rights-of-way belonged to the railroad companies as an incident of the base or limited fees, even though the companies were barred from developing or leasing the minerals by the doctrine of equitable waste. It is true that in *United States v. Union Pac. R.R.*⁶⁰ the United States Supreme Court upset precedent and held that the minerals in base or limited fee rights-of-way did not pass to the grantees, but in the meantime the 1930 Act had the amazing effect of attempting to make the United States the lessor of deposits in which it had only the remotest right of reversion. Even more amazing is the fact that, if a railroad company succeeded in obtaining a "lease" from the Secretary of the oil and gas deposits in its right-of-way, it became the lessee of its own oil and gas deposits. It should also be noted that the 1930 Act purports to give the Secretary authority under certain circumstances to lease such deposits to lessees or owners of adjoining lands, which would mean

57. 72 Cong. Rec. 3788 (1930). (Emphasis added.)

58. 41 Stat. 437 (1920), as amended, 30 U.S.C. § 181 (Supp. IV, 1963).

59. 46 Stat. 373 (1930), 30 U.S.C. § 301 (1958). (Emphasis added.)

60. 353 U.S. 112 (1957).

simply that the United States would be granting leases of deposits it does not own without consent of the real owner.

It is well to bear in mind that the 1930 Act was enacted at a time when the opinion of the United States Supreme Court in the *Stringham* case was still controlling and had not yet been overruled by the opinion in the *Great Northern* case. *Stringham* held that rights-of-way granted under the 1875 Act were base or limited fees, and, inasmuch as the various other federal right-of-way laws used language of grant which was essentially the same as that of the 1875 Act, none of the acts conveyed mere easements.⁶¹ Thus the 1930 Act would have created no great problems, for mere easements would not have entered into the picture.

The entire picture was changed by *Great Northern*, which overruled *Stringham* to the extent of holding that no base fee rights-of-way were granted to railroads by any acts enacted subsequent to 1871.⁶² Thus the 1875 Act which, since *Stringham*, had been interpreted as a base or limited fee grant, was reinterpreted to be only an easement grant. Not only did this change the nature of the estate which had been obtained by the various railroads under the 1875 Act from base fees to mere easements, but presumably it made like changes in the nature of other types of rights-of-way granted under federal laws employing granting language essentially identical to that of the 1875 Act. As a result, the decision of the Department in *Windsor Reservoir & Canal Co. v. Miller*⁶³ is no longer controlling, for the language of grant in the 1891 Act is almost identical to that of the 1875 Act, and thus rights-of-way for reservoirs and canals are mere easements—not base fees as held in the *Windsor* case.

IV

SOME PROBLEMS CREATED BY THE 1930 ACT

Regardless of the change in the concept of the estate granted by the 1875 Act made necessary by *Great Northern*, it appeared to all who were familiar with the situation that the 1930 Act was still essential for the protection of the interests of the United States; because since *Railroad Co. v. Baldwin*,⁶⁴ all concerned had assumed that (1) all railroad rights-of-way granted by acts earlier than 1875 constituted base or limited fees, and (2) the owners of these

61. *Rio Grande W. Ry. v. Stringham*, 239 U.S. 44, 48 (1915).

62. *Great No. Ry. v. United States*, 315 U.S. 262, 271 (1942).

This is no doubt a reference to the Act of March 3, 1871, ch. 122, 16 Stat. 573, which allowed the Texas Pacific Railroad to come under the provision of the Atlantic and Pacific and Southern Pacific Act of July 27, 1866, ch. 278, 14 Stat. 292. The Texas Pacific Act was the last of the railroad land grants.

63. 51 Interior Dec. 27 (1925).

64. 103 U.S. 426 (1881).

fees also owned the minerals in the rights-of-way, although they were without legal authority to mine or produce the minerals. This second assumption was abruptly vitiated by the United States Supreme Court in *United States v. Union Pac. R.R.*⁶⁵ The Court held that, although the railroads obtained base or limited fees under the land grant acts, the minerals did not pass with the grants.⁶⁶

Although *Union Pacific* now represents the law on the subject, it has been widely criticized. Mr. Justice Frankfurter spoke most eloquently for these critics in his dissenting opinion in *Union Pacific*, in which he was joined by Justices Burton and Harlan.⁶⁷ One peculiar facet of the case is the fact that the 1930 Act, which was enacted for the primary purpose of permitting development of oil and gas deposits concededly owned by the railroad companies, was cited in the arguments in the case to show that the oil and gas rights *were not* owned by the companies; the argument being that if the oil and gas rights had belonged to the companies, then the Secretary of the Interior could not have been given authority to lease such rights to others.

The situation thus can be epitomized as follows:

1. Until *Great Northern* in 1942, all railroads rights-of-way were treated as base or limited fees which carried title to the minerals.
2. After *Great Northern* only railroad rights-of-way granted under the so-called "land grant" railroad acts were considered to be base or limited fees which carried title to the minerals, and rights-of-way under the general railroad right-of-way Act of 1875 were mere easements carrying no mineral title but only a right of use.
3. After *Union Pacific* (1957), rights-of-way granted under the "land grant" railroad acts are still regarded as limited fees, but the minerals thereunder belong to the United States.

Some of the legal problems presented by the right-of-way situation are discussed as briefly as possible below. They are by no means all of the problems that are present, and it is probable that some of the problems have not yet been recognized. However, the few examples which follow are fairly indicative of the extent to which the 1930 Act has resulted in confusion in the field of federal oil and gas leasing.

Before discussing the specific problems, it should be pointed out that, while the 1930 Act was primarily for the purpose of permitting the Secretary to protect the interests of the United States in the minerals in base or limited fee railroad rights-of-way, the Act is by its terms applicable to all rights-of-way

65. 353 U.S. 112 (1957).

66. *United States v. Union Pac. R.R.*, 353 U.S. 112, 120 (1957).

67. *Id.* at 120-37 (dissenting opinion).

granted under federal laws, regardless of their type, *i.e.*, base fee or easement. Therefore, the *Phillips* decision applies to lands in all types of rights-of-way, including rights-of-way for pipelines, telephone lines, power lines, canals, ditches, reservoirs, public highways, tramways, electrical plants, and, of course, railroads.

A. Easements Claimed by the Bureau of Reclamation

The Act of December 5, 1924,⁶⁸ contains the following provision:

That where, in the opinion of the Secretary, a right of way or easement of any kind over public land is required in connection with a [reclamation] project the Secretary may reserve the same to the United States by filing . . . an instrument giving a description of the right of way or easement and notice that the same is reserved to the United States . . . under this section, in which event entry for such land and the patent issued therefor shall be subject to the right of way or easement so described in such instrument; and reference to each such instrument shall be made in the appropriate tract books and also in the patent.

In accordance with this provision, entries are regularly being made on the tract books of the Bureau of Land Management to the effect that lands in the various public land states are subject to easements of right-of-way granted to the Bureau of Reclamation. Most of the "easements" are for transmission line purposes.

Manifestly the United States cannot hold an easement in lands which it owns in fee, for the lesser estate would by operation of law merge into the fee. Thus the Bureau of Reclamation, which is merely a branch of the federal government, cannot hold an easement in federally-owned lands, and the so-called "easements" are merely reservations or withdrawals of lands for transmission line purposes. If so, the lands can be leased for oil and gas purposes under the Mineral Leasing Act of 1920.⁶⁹ Nevertheless, the Bureau of Land Management has taken the position, informally at least, that the use of public land by the Bureau of Reclamation for transmission lines or other purposes constitutes an easement and that such land can only be leased under the 1930 Act.

If this is so, then there is uncertainty as to the amount of land which is excluded from a lease since the 1924 Act, unlike other right-of-way acts, fails to specify the lateral extent of "easements" created thereunder.⁷⁰

68. 43 Stat. 704 (1924), as amended, 43 U.S.C. § 417 (1958).

69. Noel Teuscher, 62 Interior Dec. 210 (1955); James K. Tallman, 68 Interior Dec. 256 (1961).

70. 43 Stat. 704 (1924), as amended, 43 U.S.C. § 417 (1958).

B. The Effect of Dividing Leases by Easements

A lessee under a lease issued under the Mineral Leasing Act of 1920 has a right to lay gathering lines across the lands in the lease, but not across lands which the lease does not cover. Many leases that are outstanding today or are being issued are divided by strips of land which are affected by easements, and thus the laying of a gathering line from one part of a lease to another part may require crossing one or more of these strips. This means that the lessee is a trespasser unless he applies for and obtains an easement or easements of his own across the lands in the other easement or easements. The cost of obtaining such an easement or easements may be a serious burden on the lessee.

C. The Effect of Easements on the Extension of Noncompetitive Leases

All noncompetitive oil and gas leases issued prior to September 2, 1960, were issued for five-year terms and are subject to five-year extensions under certain conditions. If, at the time of issuance of a lease, the land is not subject to an easement, the lease covers all of the land described therein, and is not diminished by the granting of an easement during the initial five-year term. The question then is: Does the granting of an easement during the initial five-year term prevent the granting of an extension of the lease as to the lands affected by the easement?

Section 17 of the Mineral Leasing Act⁷¹ was amended by the Act of July 29, 1954,⁷² to provide that:

Upon the expiration of the initial five-year term of any noncompetitive lease maintained in accordance with applicable statutory requirements and regulations, the record titleholder thereof shall be entitled to a single [five-year] extension of the lease, unless then otherwise provided by law, for such lands covered by it as are not on the expiration date of the lease withdrawn from leasing under this section. . . . No withdrawal shall be effective within the meaning of this section until ninety days after notice thereof shall be sent by registered mail, to each lessee to be affected by such withdrawal.

Would the clause "unless then otherwise provided by law" exclude the land affected by an easement from the lease as extended, or does the clause only mean that Congress was reserving the right at any time to repeal the extension provisions? And does the granting of an easement after the issuance of a lease affect the other lease extensions provided for in the Mineral Leasing Act? These questions have never been answered by the Department or the courts, and until they are answered they will continue to plague lessees.

71. 41 Stat. 443 (1920), as amended, 30 U.S.C. § 226 (Supp. IV, 1963).

72. 68 Stat. 584 (1954), as amended, 30 U.S.C. § 226 (Supp. IV, 1963).

D. The Effect of Easements on Leases Covering Lands in Patented Stockraising Homesteads

Patents for lands entered under the Stockraising Homestead Act of December 29, 1916,⁷³ reserve all minerals in the lands to the United States. Such reserved minerals are subject to leasing under the public land provisions of the various leasing acts. The patents convey all rights in the lands except the mineral rights, and thus, if there are no minerals in or on the lands, the title of the patentee is absolute.

The tract books of the Bureau of Land Management carry many notations to the effect that easements of right-of-way have been granted on lands previously patented under the Stockraising Homestead Act. Generally these notations are disregarded on the assumption that the United States cannot grant an easement on lands to which it does not hold title, but the matter may not be so simple.

No one could obtain a valid easement on land previously patented under the Stockraising Homestead Act merely by making application to the Secretary of the Interior; such an easement would have to be obtained from the homestead patentee or owner. However, if the easement is merely obtained from the patentee or owner, the easement would be ineffective to prevent mining claimants or mineral lessees from entering the lands, and in a case where, for example, the land in the easement was underlain by valuable placer gravels, the mining claimant could carry on prospecting and mining on the easement because the right of the federal government to the minerals cannot be abridged by some act of the patentee or owner.

Thus it would seem that when the Secretary of the Interior approves the granting of an easement "as to all public lands traversed by the easement" (the language generally employed), he is in a sense taking the minerals in or under the lands in the easement out of the category of those which are open to prospecting and location under the mining laws and development under the mineral leasing laws, and agreeing that the lands shall be used only for the purpose of the easement. If this were not true, it would be impossible for anyone to obtain an indefeasible easement across patented stockraising lands because the easement could at any time be destroyed by the activities of mining or mineral prospectors or developers. Therefore, it would seem logical to hold that the approval of the easement removes the land in the easement from the operation of the mining and the mineral leasing laws, including the 1930 Act.

CONCLUSION

There are other questions which could be discussed, such as the effect of the 1930 Act on right-of-way lands in Indian Reservations, and the propriety of

73. 39 Stat. 862 (1916), as amended, 43 U.S.C. § 292 (1958).

permitting a lessee of a narrow strip of land under the 1930 Act to drill and produce oil and gas by draining adjoining lands. But the above discussion seems adequate to show that the 1930 Act is now important only as a trouble maker. At the time of its enactment, the purpose to be served was salutary. Now that purpose no longer exists, for inasmuch as it was decided in *Union Pacific* that the United States owns the minerals in base or limited fee rights-of-way, there is no longer any federal interest to be protected that cannot be fully protected by the Mineral Leasing Act of 1920.

It is significant to note that it is only the oil and gas rights in right-of-way lands that are affected by the 1930 Act. The Acting Solicitor of the Department of the Interior has held that all Leasing Act minerals except oil and gas may be leased under the Mineral Leasing Act.⁷⁴

In the interest of sound administration and in the interest of permitting lessees to lease and develop federal lands without the confusion occasioned by the 1930 Act, the Act should be repealed.

74. 67 Interior Dec. 225 (1960).