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FEDERAL OIL AND GAS LEASING ISSUES UNDER THE 1930 RIGHT-OF-WAY LEASING ACT--THE IMPACT OF HORIZONTAL DRILLING

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[§ 23.01 Overview](#) * **

The 1930 Right-of-Way Leasing Act (1930 Act)¹ was enacted to address a narrow problem: a perceived lack of statutory authority for the U.S. Department of the Interior (DOI) to issue oil and gas leases covering lands within railroad and reservoir rights-of-way. The Mineral Leasing Act of 1920 (MLA)² authorized DOI to lease deposits of oil and gas in lands owned by the United States, subject to certain enumerated exceptions.³ In interpreting the Pacific Railroad Acts⁴ in which Congress generally granted a "right of way" across public lands, the U.S. Supreme Court had concluded the right-of-way was in effect the grant of a limited fee and, as such, the lands within the limits of the right-of-way were removed from the category of public lands that were available for sale or preemption under the homestead and other laws. DOI therefore believed that it could not offer those right-of-way lands for lease under the MLA and requested Congress remedy that perceived lack of authority. The 1930 Act was the result.

There are very few decisions from DOI and even fewer from the courts involving the 1930 Act. Yet with the increasing prevalence of horizontal drilling, this anachronistic relic of the railroad grant era has become perhaps more important now than ever in its 90-year history. Oil and gas development using long lateral horizontal wells is now occurring in areas

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[1]30 U.S.C. §§ 301 -306.

[2]*Id.* §§ 181-263.

[3]*Id.* § 181; *see generally* 1 *Law of Fed. Oil & Gas Leases* § 3.02 (2018).

[4]References in this chapter to the Pacific Railroad Acts mean the Union Pacific Railroad Act of July 1, 1862, ch. 120, 12 Stat. 489, as amended by the Act of July 2, 1864, ch. 216, 13 Stat. 356, the Act of July 3, 1866, ch. 159, 14 Stat. 79, and the Act of March 3, 1869, ch. 127, 15 Stat. 324; the Northern Pacific Railroad Act of July 2, 1864, ch. 217, 13 Stat. 365; and the Atlantic & Pacific and Southern Pacific Railroad Act of July 27, 1866, ch. 278, 14 Stat. 292. Additional statutes granting land to railroads were adopted during the pre-1871 era, but time and space constraints prevent us from addressing all of them.

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crossed by some of the railroads. Because of the linear nature of railroad rights-of-way, it is almost impossible to drill such long laterals in a spacing unit crossed by a railroad without having the wellbore penetrate the right-of-way. Thus, it is necessary for operators to understand the 1930 Act and, if it applies, to ensure that a lease under its authority is obtained. Unfortunately, determining exactly where the 1930 Act applies can be more difficult than one would imagine.

In preparing this chapter, the authors relied heavily on a 1985 chapter in these *Proceedings* by David G. Ebner.⁵ Rather than repeat the analysis contained in that chapter and because of space limitations, this chapter summarizes very briefly the statutes and case law pertaining to railroad

and reservoir rights-of-way, discusses the few applicable decisions rendered subsequent to Ebner's chapter, and addresses some of the unique issues that have arisen in the context of horizontal drilling, which was not commonplace in 1985.

[§ 23.02 History of the Right-of-Way Grants](#)

[\[1\] Pacific Railroad Acts](#)

In the Pacific Railroad Acts, Congress granted not only a "right of way through the public lands,"⁶ but also alternate, odd-numbered sections⁷ of public lands that were conveyed in fee to the railroad to finance the construction of the road, resulting in a checkerboard pattern of ownership.⁸ After completion of the transcontinental railroads, public resentment arose against the generous grants of land to the railroads and thus no further land grants were made to railroads after 1871. Additional rights-of-way across the public lands were still required for railroads in some areas, which led to the enactment of the Railroad Right of Way Act of 1875 (1875

^[5]See David G. Ebner, "Mineral Ownership Beneath Railroad Rights-of-Way," [31 Rocky Mt. Min. L. Inst. 17-1 \(1985\)](#). The authors have elected to follow Ebner's convention of using hyphens when referring to rights-of-way. The 1930 Act does not use hyphens and the courts are inconsistent in usage of hyphens. When this chapter is quoting from source documents, the form contained in the relevant document is used.

^[6]This portion of the grant was in section 2 of the statutes. See, e.g., Act of July 2, 1864, ch. 217, § 2, 13 Stat. 365. Under the Union Pacific Railroad Act of July 1, 1862, and the Northern Pacific Railroad Act of July 2, 1864, see *supra* note 4, the right-of-way was 400 feet in width, 200 feet on either side of the railroad. The grant was only effective as to the unappropriated public domain; obviously, if the lands had been patented into private ownership before the railroad laid out its line, the railroad would have had to have obtained a right-of-way from the then owner of the surface.

^[7]Referring to government survey sections of approximately 640 acres.

^[8]See *Leo Sheep Co. v. United States*, [440 U.S. 668, 672, 678](#) (1979).

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Act).⁹ That Act granted a 200-foot-wide right-of-way through the public lands of the United States. The location of the right-of-way was to be noted on the land office plats "and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way."¹⁰ The regulations adopted by DOI to implement the 1875 Act treated this right-of-way as conveying only an easement, with "title still remaining in the United States."¹¹

In *Northern Pacific Railway Co. v. Townsend*,¹² the U.S. Supreme Court interpreted the right-of-way grant under section 2 of one of the Pacific Railroad Acts as granting to the railroad "a limited fee, made on an implied condition of reverter."¹³ Without citing any cases, the Court stated that the land contained in the right-of-way "was taken out of the category of public lands subject to pre-emption and sale, and the Land Department was therefore without authority to convey rights therein."¹⁴ That rationale was presumably based on the appropriation doctrine, first attributed to the *Wilcox v. Jackson* decision in which the Court held that once a tract of land has been legally appropriated for any purpose, "the land thus appropriated becomes severed from the mass of public lands" and no subsequent transfer can be made of it.¹⁵

Because the *Townsend* case did not address rights-of-way under the 1875 Act, DOI continued to treat such rights-of-way as easements rather than limited fees.¹⁶ That position changed, at least temporarily, after the Supreme Court's decision in *Rio Grande Western Railway Co. v. Stringham*

^[9]Ch. 152, 18 Stat. 482 (codified at [43 U.S.C. §§ 934 -939](#)). The 1875 Act, along with many other public lands disposal statutes, was repealed insofar as applicable to the issuance of rights-of-way on public lands and National Forest System lands by the Federal Land Policy and Management Act of 1976 (FLPMA), subject to valid existing rights. See [43 U.S.C. § 934](#) note.

^[10]1875 Act § 4, 18 Stat. 482.

^[11]Circular, "Right of Way-Railroads-Act of March 3, 1875," 12 Pub. Lands Dec. 423, 428 (Jan. 13, 1888).

^[12]190 U.S. 267 (1903).

^[13]*Id.* at 271.

^[14]*Id.* at 270.

^[15]38 U.S. 498, 513 (1839). For a thorough discussion of the appropriation doctrine, see *Home on the Range v. AT&T Corp.*, 386 F.Supp2d 999, 1003-07 (S.D. Ind. 2005). After *Townsend*, DOI consistently treated rights-of-way granted under the Pacific Railroad Acts as appropriations of the public lands that prevented any subsequent entry, see, e.g., Lewis A. Gould, 51 Pub. Lands Dec. 131 (1925); and after *Stringham*, DOI took the same position with respect to rights-of-way under the 1875 Act, see, e.g., United States v. Bullington, 51 Pub. Lands Dec. 604 (1926).

^[16]See Ebner, *supra* note 5, at 17-8.

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in 1915.¹⁷ With virtually no analysis, the *Stringham* Court cited cases interpreting the Pacific Railroad Acts (though not the 1875 Act) and concluded that "[t]he 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 . . . and carries with it the incidents and remedies usually attending the fee."¹⁸ Of course, the 1875 Act is dissimilar to the Pacific Railroad Acts with their "lavish"¹⁹ grants of lands to the railroads. DOI revised its interpretation of the 1875 Act after the *Stringham* decision,²⁰ until *Stringham* was effectively overruled in 1942. In *Great Northern Railway Co. v. United States*, the Court clarified that the 1875 Act granted only an easement, and also held that, as a result, the railroad had no interest in the oil and minerals in place.²¹

The next significant development was the Supreme Court's rather surprising decision in *United States v. Union Pacific Railroad Co.*²² After dismissing the earlier limited fee cases as irrelevant (because, "for the most part," the United States was not a party to those cases²³), Justice Douglas, writing for the majority, held that the Pacific Railroad Acts actually reserved minerals to the United States in the lands beneath rights-of-way granted under section 2 of those statutes.²⁴ But, as the dissent noted, the first general statute providing for a mineral reservation to the United States was not adopted until 1909.²⁵ In contrast, the Pacific Railroad Acts "excepted" from their operation all "mineral lands" other than coal and iron lands.²⁶ This provision, and similar provisions in other public lands disposal statutes, had always been interpreted as excluding completely from disposal under the statute any lands that were mineral in character at the time; however, once the patent was issued to the railroad, it constituted a final determination

^[17]239 U.S. 44 (1915).

^[18]*Id.* at 47.

^[19]*Great Northern Ry. Co. v. United States*, 315 U.S. 262, 273 (1942).

^[20]Instructions, 46 Pub. Lands Dec. 429 (1918).

^[21]315 U.S. at 279.

^[22]353 U.S. 112 (1957).

^[23]*Id.* at 118.

^[24]*Id.* at 120.

^[25]*Id.* at 134-37 (Frankfurter, J., dissenting); see Coal Lands Act of March 3, 1909, ch. 270, 35 Stat. 844 (codified at 30 U.S.C. § 81). Justice Douglas acknowledged that the mineral lands exception in the Pacific Railroad Acts "may have been an inept way of reserving mineral rights," and that "[i]t would have been better draftsmanship, if, in referring to s 2, Congress had used the words 'mineral rights' instead of 'mineral lands.'" *Union Pac.*, 353 U.S. at 114, 117-18.

^[26] See, e.g., Union Pacific Railroad Act of July 1, 1862, ch. 120, § 3, 12 Stat. 489.

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by DOI that the lands were non-mineral in character.²⁷ The *Union Pacific* decision changed that longstanding interpretation and treated the Pacific Railroad Acts as actually reserving to the United States all minerals under rights-of-way granted to the railroads under section 2 of those statutes.²⁸

[2] Reservoir Right-of-Way Act of 1891

The Reservoir Right-of-Way Act of 1891 (1891 Reservoir Act)²⁹ grants "[t]he right of way through the public lands" to any canal ditch company or irrigation or drainage district "to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof"³⁰ DOI and the courts have interpreted right-of-way grants under the 1891 Reservoir Act as being similar in scope to railroad rights-of-way granted under the 1875 Act.³¹ After the MLA was adopted, DOI concluded, based on the *Stringham* decision, that the reservoir right-of-way passed such title that an oil and gas prospecting permit under the MLA could not be granted for the lands.³² The rationale was based on the appropriation doctrine discussed in § 23.02[1], above. Thus, although the right-of-way holder could not develop the minerals, neither could DOI authorize leasing of the oil and gas under the MLA.³³

§ 23.03 Recent Supreme Court Decision

In *Marvin M. Brandt Revocable Trust v. United States (Brandt Trust)*,³⁴ the Supreme Court again addressed issues pertaining to the interpretation of the 1875 Act. In *Brandt Trust*, the United States claimed title to a railroad

^[27] See *Burke v. S. Pac. R.R. Co.*, [234 U.S. 669](#) (1914).

^[28] See Patricia T. Zebal, 65 Interior Dec. 293 (1958).

^[29] Act of March 3, 1891, ch. 561, §§ 18-21, 26 Stat. 1095 (codified as amended at [43 U.S.C. §§ 946 -949](#)). This Act was repealed insofar as applicable to the issuance of rights-of-way on public lands and National Forest System lands by FLPMA. See [43 U.S.C. § 946](#) note.

^[30] [43 U.S.C. § 946](#).

^[31] See T. A. Sullivan, 38 Pub. Lands Dec. 493 (1910); *Kern River Co. v. United States*, [257 U.S. 147, 152](#) (1921).

^[32] *Windsor Reservoir & Canal Co. v. Miller*, 51 Pub. Lands Dec. 27 (1925), *aff'd on reh'g*, 51 Pub. Lands Dec. 305 (1925). Several courts have held that *Great Northern* undermined the legal authority for the holding in *Kern River*, [257 U.S. at 152](#), that a right-of-way granted under the 1891 Reservoir Act was a limited fee. See *Rapp v. United States*, No. 2:14-cv-00148, 2014 WL 12641979, at *3 (D. Ariz. Aug. 13, 2014) (citing cases).

^[33] See *Windsor Reservoir & Canal Co. v. Miller (On Rehearing)*, 51 Pub. Lands Dec. 305, 307 (1925). There are many reservoirs remaining on the public lands that were authorized under the 1891 Reservoir Act. See, e.g., *Republic Oil & Mining Co.*, 35 IBLA 212, GFS(O&G) 89(1978); *R. C. Beveridge*, 50 IBLA 173, GFS(O&G) 171(1980) (holding the 1930 Act only applies to lands within the boundaries of the right-of-way, not to the entire legal subdivision in which any of the waters are located); *Curtis Wheeler*, 62 IBLA 384, GFS(O&G) 98(1982); *Bijou Irrigation Dist. v. Empire Club*, [804 P.2d 175](#) (Colo. 1991).

^[34] [134 S. Ct. 1257](#) (2014).

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right-of-way granted under the 1875 Act on patented lands in southern Wyoming after the railroad was abandoned in 2004, on the theory that it held an implied reversionary interest that gave it some continuing interest in the lands after abandonment of the right-of-way.³⁵ The Supreme Court rejected that argument "in large part because [the government] won when it argued the opposite before this Court more than 70 years ago" in *Great Northern*, where the government had

contended that the railroad acquired only an easement in an 1875 Act right-of-way.³⁶

The government also argued that the Abandonment Act of 1922³⁷ and section 3 of the National Trails System Improvements Act of 1988³⁸ provide evidence that Congress intended to retain a reversionary interest in 1875 Act rights-of-way.³⁹ The Court explained that these statutes only apply to whatever interest, if any, may be owned by the United States; they do not redefine what interest was conveyed to the railroad or retained by the United States under the earlier laws.⁴⁰ While the abandonment laws "might make a difference in what happens to a forfeited or abandoned right of way" that had been granted under pre-1871 statutes,⁴¹ they do not change the nature of the interest (i.e., an easement) granted under the 1875 Act. The Court's conclusions are consistent with those reached by the Interior Board of Land Appeals (IBLA) in *Amerada Hess Corp.*⁴² In that case, the IBLA held that a patent of the lands through which the 1875 Act easement passed, with no reservation of minerals, was effective to convey the minerals in the servient estate burdened by the easement and thus the United States owned no interest in the oil and gas that could be leased under the 1930 Act.

[35] *Id.* at 1264; see generally Brian T. Hodges, "When the Common Law Runs into the Constitution: The Train Wreck Avoided in *Marvin M. Brandt Revocable Trust v. United States*," 39 *Vt. L. Rev.* 673, 678 (2015).

[36] *Brandt Trust*, 134 S. Ct. at 1264.

[37] Act of March 8, 1922, ch. 94, § 3, 42 Stat. 414 (codified at 43 U.S.C. § 912). Under this law, upon abandonment of any railroad right-of-way, "all right, title, interest, and estate of the United States" in the lands vests in either the municipality in which the lands are located or in the owner of the lands traversed by the right-of-way.

[38] Pub. L. No. 100-470, 102 Stat. 2281 (codified at 16 U.S.C. § 1248(c)) (similar language to 1922 Abandonment Act, except that the United States retains title).

[39] *Brandt Trust*, 134 S. Ct. at 1267-68.

[40] *Id.* at 1268.

[41] *Id.* (emphasis added). The courts in *Beres v. United States*, 64 Fed. Cl. 403 (2005) and *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) reached the same conclusion as did the Supreme Court in *Brandt Trust*. The cases cited by the government and discussed in *Beres* and *Hash* seem to have been overruled by *Brandt Trust*.

[42] 24 IBLA 360, GFS(O&G) 48(1976).

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Brandt Trust is important for another reason: it relied on basic common law principles to determine ownership following abandonment of an 1875 Act right-of-way, which the *Great Northern* Court had classified as an easement.⁴³ The United States argued that it retained a reversionary interest in the right-of-way that would revert to it upon abandonment. The Court's willingness to rely on real property law principles in interpreting the Pacific Railroad Acts could be important if a case were to come before it raising the issues discussed in § 23.04, below.

§ 23.04 Summary of Mineral Ownership in Rights-of-Way

Based on the cases discussed above and in Ebner, the law as to ownership of the minerals beneath railroad and reservoir rights-of-way can be summarized as follows:

- (1) The oil and gas under an 1875 Act right-of-way is owned by the United States, but when the lands crossed by the right-of-way are patented in fee with no mineral reservation, the patentee acquires all U.S. interest, including the mineral rights. The same result would apply to lands within a reservoir right-of-way obtained under the 1891 Reservoir Act.
- (2) Unless title to the lands crossed by the right-of-way has been patented into private ownership, the oil and gas deposits in lands subject to an 1875 Act or 1891 Reservoir Act right-

of-way are leasable only under the 1930 Act.

(3) The United States reserved all minerals beneath rights-of-way (crossing both even- and odd-numbered sections)⁴⁴ granted under the Pacific Railroad Acts. The oil and gas deposits in such lands are leasable only under the 1930 Act.

(4) Although there is no Supreme Court case on this question, the clear position of DOI,⁴⁵ and the holdings of the U.S. Courts of Appeals for the Eighth and Tenth Circuits,⁴⁶ are that minerals are reserved by the United States in rights-of-way granted under the Pacific Railroad Acts and do not pass to the patentee of the lands crossed by the right-of-way, even if the minerals are not reserved in such a patent. However, the reasoning of the cases is unclear. The oil and gas deposits in such lands are leasable only under the 1930 Act.

^[43][Brandt Trust](#), [134 S. Ct. at 1266](#).

^[44]See [Brown W. Cannon, Jr.](#), 24 IBLA 166, GFS(O&G) 32(1976).

^[45]*Id.*

^[46]See [Rice v. United States](#), [348 F. Supp. 254](#) (D.N.D. 1972), *aff'd per curiam*, [479 F.2d 58](#) (8th Cir. 1973); [Wyoming v. Udall](#), [379 F.2d 635](#) (10th Cir. 1967).

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[1] Rationales for U.S. Mineral Ownership in Pacific Railroad Act Rights-of-Way After Patent of the Lands Crossed by the Right-of-Way

As noted above, the cases cite differing rationales for their conclusions that the federal minerals beneath railroad rights-of-way granted under the Pacific Railroad Acts are not conveyed when the United States later patents the lands crossed by such rights-of-way, even though the patent reserves no minerals. This issue was first addressed in the Tenth Circuit in *Wyoming v. Udall*,⁴⁷ a case involving the grant of school land sections under the Wyoming Enabling Act (Enabling Act).⁴⁸ The school lands sections in question were crossed by the Union Pacific Railroad. The State claimed that it acquired the minerals beneath the right-of-way when it acquired the school sections. The Tenth Circuit stated that it was not impressed with the limited fee label used by the *Townsend* Court and that the need for that label had disappeared.⁴⁹ Then, referencing the holding in *Union Pacific*,⁵⁰ it interpreted the 1864 amendment⁵¹ to the Union Pacific Railroad Act of July 1, 1862, that provided that the term "mineral lands" does not include coal and iron lands as meaning that the railroad acquired a right-of-way to use the surface, as well as the right to mine coal and iron underlying the right-of-way.⁵² This right to develop coal and iron was, according to the court, "in a different category from a surface easement," and thus the lands within the right-of-way had been "disposed of" within the meaning of the Enabling Act and therefore could not pass to the State.⁵³ The court concluded that "title to the servient estate did not pass with the conveyance of the encumbered tract,"⁵⁴ so that the United States retained ownership of the oil and gas beneath the right-of-way. The Tenth Circuit's rationale therefore seems to rely on a version of the appropriation doctrine because the lands within the right-of-way had been disposed of so that they did not pass under the Enabling Act. Yet the court also appears to treat the right-of-way under section 2 of the Pacific Railroad Acts as conveying a

^[47][379 F.2d 635](#) (10th Cir. 1967).

^[48]Act of July 10, 1890, ch. 664, 26 Stat. 222.

^[49]*Wyoming v. Udall*, [379 F.2d at 640](#).

^[50][353 U.S. 112](#), [116](#) (1957).

^[51] Act of July 2, 1864, ch. 216, 13 Stat. 356.

^[52] *Wyoming v. Udall*, [379 F.2d at 640](#).

^[53] *Id.*

^[54] *Id.*

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sort of easement.⁵⁵ However, as we learned in *Brandt Trust*, the servient estate would pass with the patent of the lands burdened by the easement.

The holding in *Wyoming v. Udall* was further obscured by a later decision of the Tenth Circuit in *Wyoming v. Andrus*,⁵⁶ where DOI had denied the State indemnity lands for the right-of-way lands lost in *Udall*. This time, the Tenth Circuit said that its earlier conclusion that the right-of-way lands had been disposed of was "an observation which was unnecessary to the decision and hence cannot be considered binding here."⁵⁷ Instead, the court relied on an early decision of the Secretary that the State of North Dakota was entitled to no indemnity for railroad rights-of-way crossing school sections.⁵⁸ After *Wyoming v. Andrus*, the rationale for the holding in *Wyoming v. Udall* is not at all clear.

The case in the Eighth Circuit involved review of a decision of the IBLA that relied on *Wyoming v. Udall* to conclude that the United States owned the minerals beneath a Northern Pacific Railway right-of-way even after the lands crossed by the right-of-way were patented to homesteaders with no mineral reservation.⁵⁹ In responding to the appellants' claim that *Wyoming v. Udall* was distinguishable, the IBLA stated that, although the *Wyoming v. Udall* court relied on provisions in the Enabling Act "to buttress its conclusion, it did not reject [DOI's] position that the land in the right-of-way was taken out of the category of public lands."⁶⁰ Of course, a few years later, in *Wyoming v. Andrus*, the Tenth Circuit in effect dismissed that basis for the *Wyoming v. Udall* decision as dictum.⁶¹ A concurring opinion by one of the IBLA judges argued that the law *should* be that the homestead patents of the lands burdened by the railroad right-of-way, which contained no mineral reservation or exception of the railroad strip, conveyed all interest of the United States, including the minerals beneath the right-of-way.⁶² Nonetheless, that judge felt bound by stare decisis to follow *Wyoming v.*

^[55] A "servient estate" is an estate burdened with an easement. *Black's Law Dictionary* (10th ed. 2014).

^[56] [602 F.2d 1379](#) (10th Cir. 1979).

^[57] *Id.* at 1384.

^[58] See State of North Dakota, 13 Pub. Lands Dec. 454 (1891). That opinion references the 1875 Act four separate times, though it once refers to grants by a special grant from Congress without discussion as to whether the decision also applies to rights-of-way granted under the Pacific Railroad Acts. Arguably, the 1891 decision is not applicable to rights-of-way granted under the Pacific Railroad Acts.

^[59] See George W. Zarak, 4 IBLA 82, GFS(O&G) 41(1971), *aff'd sub nom.* Rice v. United States, [348 F. Supp. 254](#) (D.N.D. 1972), *aff'd per curiam*, [479 F.2d 58](#) (8th Cir. 1973).

^[60] *Id.* at 87.

^[61] *Wyoming v. Andrus*, [602 F.2d at 1384](#).

^[62] *Zarak*, 4 IBLA at 89 (Stuebing, concurring).

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Udall and so concurred reluctantly.⁶³ The U.S. District Court for the District of North Dakota affirmed based on the appropriation doctrine and on *Wyoming v. Udall*; the Eighth Circuit affirmed

in a per curiam opinion that simply referenced the district court decision. Therefore, the Eighth Circuit cases do not shed much light on the rationale for the holding that a patent of lands crossed by a Pacific Railroad Act right-of-way does not convey the minerals beneath the right-of-way that were owned by the United States.

[\[2\] Subsurface Versus Mineral Ownership](#)

There are several cases that consider the rights of the railroad versus the rights of patentees of the lands crossed by the railroad in the context of pipelines or fiber optic cables buried in the right-of-way lands.⁶⁴ In the most recent of these cases, the U.S. Court of Appeals for the Ninth Circuit reviewed certified questions from the U.S. District Court for the Central District of California in a class action alleging that Union Pacific could not grant pipeline easements in its right-of-way.⁶⁵ What is interesting for purposes of this chapter is that the Ninth Circuit drew a distinction between mineral rights and subsurface rights in interpreting *Union Pacific*, explaining that the terms are not synonymous.⁶⁶ Instead, the relevant distinction is between the surface estate, which includes the subsurface, and the mineral estate.⁶⁷ *Union Pacific* involved the right to oil and gas under a Union Pacific Railroad Act of July 1, 1862, right-of-way; therefore, the Supreme Court's statement that the Act conveyed "'all surface rights to the right of way' . . . should not be understood to mean that the railroads received no rights in the subsurface."⁶⁸ The Ninth Circuit distinguished the Eighth and Tenth Circuit decisions⁶⁹ on the railroad's right to authorize fiber optic easements in the right-of-way because those cases did not acknowledge the difference between the mineral estate at issue in *Union Pacific* and the subsurface rights involved in the Eighth and Tenth Circuit cases.⁷⁰ That confusion may explain some of the offhand references to the servient estate in cases involving mineral ownership.

^[63] *Id.* at 93.

^[64] See *Energy Transp. Sys., Inc. v. Union Pac. R.R. Co.*, [606 F.2d 934](#) (10th Cir. 1979); *Energy Transp. Sys., Inc. v. Union Pac. R.R. Co.*, [619 F.2d 696](#) (8th Cir. 1980); see also *Home on the Range v. AT&T Corp.*, [386 F.Supp2d 999](#) (S.D. Ind. 2005).

^[65] *Barahona v. Union Pac. R.R. Co.*, [881 F.3d 1122](#) (9th Cir. 2018), *rev'g In re SFPP Right-of-Way Claims*, No. 8:15-cv-00718, 2016 WL 3456985 (C.D. Cal. June 7, 2016).

^[66] *Id.* at 1132.

^[67] *Id.*

^[68] *Id.* at 1133 (quoting *Union Pac.*, [353 U.S. at 119](#)).

^[69] See cases cited *supra* note 64.

^[70] *Barahona*, [881 F.3d at 1133](#).

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Ultimately, despite their different rationales, the few cases that have addressed the issue have all determined that patentees of lands crossed by a Pacific Railroad Act right-of-way did not acquire any interest in the minerals beneath the right-of-way. However, the fact that the rationales for these decisions are unclear may make that authority vulnerable if the issue is ever presented to the Supreme Court.

[§ 23.05 Operation of the 1930 Right-of-Way Leasing Act \(1930 Act\)](#)

The MLA authorizes the Secretary of the Interior to lease deposits of oil and gas "owned by the United States."⁷¹ Because DOI had concluded that the United States did not retain a sufficient interest in lands to which it had conveyed a limited fee to allow it to treat the lands as being owned by the United States, such lands could not be leased under the MLA.⁷² Therefore, DOI drafted a

bill to authorize the leasing of right-of-way lands, which was introduced on January 7, 1930. A little over four months later, the 1930 Act was signed by the President.⁷³ The statute appears to have been hastily drafted (as compared to the MLA, for example) and, as discussed below, is ambiguous on several points.

[1] Rights-of-Way, Whether "Base Fee or Mere Easement"

The 1930 Act authorizes DOI to "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."⁷⁴ Remember that in 1930 the most recent Supreme Court decisions had interpreted not only the Pacific Railroad Acts as granting a limited fee, but also the 1875 Act. Therefore, it is unclear exactly why the phrase "whether the same be a base fee⁷⁵ or mere easement" was included. Nonetheless, the language is clear that the statute applies to land within railroad or other rights-of-way, regardless of whether the particular right-of-way is characterized as a limited fee or an easement. Thus, for years, title examiners required operators to obtain assignments of the preference right to a lease

^[71]30 U.S.C. § 181.

^[72]H.R. Rep. No. 263, 71st Cong., 2d Sess. (Jan. 17, 1930) ("This legislation is necessary because the United States has no disposable interest in the surface of lands across which easements and rights of way have been acquired under the public land laws.").

^[73]See 30 U.S.C. §§ 301 -306.

^[74]*Id.* § 301.

^[75]"Base fee" is an old common law term for "[a] fee that has some qualification connected to it and that terminates whenever the qualification terminates." *Black's Law Dictionary* (10th ed. 2014).

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under the 1930 Act from the holders of pre-federal lease rights-of-way, not only for railroads, but also for rights-of-way granted under other statutes that had always been interpreted as conveying only an easement.⁷⁶

In 1983, the Bureau of Land Management (BLM) amended its regulations to provide that the authority to lease rights-of-way under the 1930 Act would only be exercised with respect to railroad rights-of-way and easements issued pursuant to either the 1875 Act or earlier railroad right-of-way statutes, and with respect to rights-of-way issued pursuant to the 1891 Reservoir Act.⁷⁷ The preamble to the amended regulation explained that no statutes other than those described had been construed as requiring the special leasing authority contained in the 1930 Act and therefore DOI was limiting leasing under the 1930 Act to rights-of-way that were, in 1930, considered to be a base or limited fee.⁷⁸ While BLM's position is logical, it fails to acknowledge that the statute authorizes leasing "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."⁷⁹ Just a year before the amendment to the regulations, in the case of *Champlin Petroleum Co.*, the IBLA relied on the quoted language from the 1930 Act to reject the very rationale offered by BLM to support the amendment of the regulations.⁸⁰ *Champlin* involved a railroad right-of-way granted under the 1875 Act, and the IBLA held that the 1930 Act "is the exclusive authority for issuance of oil and gas leases for lands underlying railroad rights-of-way issued under the 1875 Act."⁸¹ The 1983 amendment to the 1930 Act regulations honors that holding by including 1875 Act rights-of-way among the rights-of-way for which BLM will grant 1930 Act leases. However, the policy adopted in the 1983 regulations is inconsistent with the "base fee or mere easement" language of the statute and with the many prior decisions of DOI that the 1930 Act is the exclusive means of leasing right-of-way lands.

[76] See 1 *Law of Fed. Oil & Gas Leases* § 8.06 (2018); William G. Odell, "Solving Mineral Leasing Problems Created by Mineral Rights Located Under Easements and Rights of Way," *19 Rocky Mt. Min. L. Inst.* 483, 493 (1974).

[77] See Revision of the Regulations Covering Oil & Gas Leasing on Federal Lands, 48 Fed. Reg. 33,648, 33,674 (July 22, 1983) (codified at [43 C.F.R. § 3109.1-1](#)).

[78] *Id.* at 33,655.

[79] [30 U.S.C. § 301](#).

[80] 68 IBLA 142, GFS(O&G) 276(1982); see also Phillips Petroleum Co., 61 Interior Dec. 93, GFS(O&G) SO-16(1953), *aff'd*, Phillips Petroleum Co. v. McKay, Civ. No. 5024-53 (D.D.C. June 17, 1955), GFS(O&G) SO-49(1955).

[81] *Champlin*, 68 IBLA at 160.

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The possibility that the 1983 amendment to BLM's 1930 Act regulations is ultra vires has been noted by others.⁸² The authors are unaware of any attempt, during the 35 years since the regulation was amended, by an owner of an easement granted under statutes other than the 1875 Act and earlier railroad right-of-way statutes or the 1891 Reservoir Act to assert that it is entitled to a 1930 Act lease on the lands within its right-of-way. Ebner recommended that cautious operators consider obtaining an assignment of the right to apply for a 1930 Act lease from owners of such rights-of-way so that no third party could claim leasehold ownership of the affected lands.⁸³ However, that tactic would not protect against a claim that the lands were unleased, with the wellbore in trespass, if a horizontal well was producing from the lands beneath the right-of-way. Further, it seems implausible that the United States could successfully assert that a well was in trespass when BLM's own longstanding regulations provide that a 1930 Act lease will not be issued for the lands beneath such rights-of-way.⁸⁴

[2] A Unique Leasing System

The leasing scheme established under the 1930 Act is unlike any other leasing system for federal lands. Its most unique provision is that no lease may be granted except to the party that owns the applicable right-of-way, whether that party is the original grantee of the right-of-way or the transferee of the holder's right to a lease.⁸⁵ Yet nothing in the legislative history of the statute explains why the holder of the right-of-way or its transferee should be the only party entitled to a lease of the right-of-way. One can speculate that the railroads contended they held an interest in the property sufficient for them to prevent production of the minerals from it, just as the United States, with its possibility of reverter, held a sufficient interest to enable it to block production of minerals by the railroad. Therefore, the bill giving the right-of-way holder or its transferee the right to a lease of the lands could be viewed as a compromise. But DOI may also have been concerned that the railroad's interest in the right-of-way was sufficient for a unilateral attempt to produce minerals from it by the United States to be

[82] See 1 *Law of Fed. Oil & Gas Leases* § 8.04[1] (2018); Ebner, *supra* note 5, at 17-21 n.79; see also Neil F. Stull, "The Leasing of Federal Oil and Gas Rights in Lands Affected by Rights-of-Way Granted Under Federal Laws," 3 *Nat. Resources J.* 300, 311 (1963) (1930 Act applies to lands in all types of rights-of-way).

[83] Ebner, *supra* note 5, at 17-21 n.79.

[84] Certainly, under these facts, any "trespass" would be at most a good faith trespass. See § 23.07, *infra*.

[85] [30 U.S.C. §§ 301, 302](#); [43 C.F.R. § 3109.1-1](#).

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deemed a taking of the railroad's property.⁸⁶ And, of course, there must have been concerns about possible interference by oil and gas operations with the railroads' operations. However, the

scant legislative history that exists does not directly address the rationale for that leasing scheme. A memorandum recommending enactment of the bill from the Commissioner of Public Lands to the Secretary of the Interior suggests that DOI recognized the standoff that existed:

The owner of the right of way has, under the law, no authority to mine any minerals in the land, nor has the owner of the possible reversion; but the owner of the adjacent land may drill wells so close to the right of way as to drain therefrom any oil or gas deposits. These reasons appear to be sufficient to warrant legislation by which the interests of the United States in the deposits may be taken care of, and the bill seems to propose a practicable method for that purpose.⁸⁷

The floor debates on the bill, though not extensive, reveal the House members' confusion as to what the railroads owned and what the government owned. For example, in debate on the House floor, Representative Cramton of Michigan stated "[i]t seems to me that the ownership of those minerals under that easement is in either the railroad or the Federal Government."⁸⁸ By way of explanation, the bill's sponsor, Representative Colton, managed to further conflate the issues by equating a limited fee with an easement: "The minerals under the lands are owned by the Government, but the owner of the right of way has a limited fee in the lands, an easement."⁸⁹ Several of the commenters during this debate questioned why the right to a lease should be given to the railroad, instead of allowing competition among oil and gas producers,⁹⁰ but no direct explanation appears in the debates. It appears that drainage of oil from beneath the rights-of-way (the impetus for the legislation) was the most pressing concern so that clarity on real property law concepts became an unimportant detail. One can almost hear the desperation in Representative Colton's statement:

You are faced with this situation: Oil-producing wells have been drilled within 300 feet of these rights of way, and they are heavy producing wells. All the rights of the Government will soon be gone if we do not act upon this bill. There is no

^[86]The Supreme Court's subsequent decision that the United States reserved minerals under rights-of-way granted under the Union Pacific Railroad Act of July 1, 1862, mooted that argument. See *United States v. Union Pac. R.R. Co.*, [353 U.S. 112](#) (1957).

^[87]Memorandum from C. C. Moore, Comm'r, Gen. Land Office, to Ray Lyman Wilbur, Sec'y of the Interior (Jan. 11, 1930), reprinted in H.R. Rep. No. 263, 71st Cong., 2d Sess. (Jan. 17, 1930).

^[88]72 Cong. Rec. H3788 (daily ed. Feb. 17, 1930) (statement of Rep. Cramton).

^[89]72 Cong. Rec. H3788 (daily ed. Feb. 17, 1930) (statement of Rep. Colton).

^[90]See, e.g., 72 Cong. Rec. H3789 (daily ed. Feb. 17, 1930) (statement of Rep. Schafer).

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other way by which the Government can protect itself but by getting this royalty from these wells on the right of way. If we do not pass some legislation we will lose everything.⁹¹

The regulations implementing the 1930 Act--adopted a few months after the statute was enacted--provided that 1930 Act leases would be issued only for rights-of-way through the geologic structure of known producing oil or gas fields.⁹² No such restriction appears in the statute. Given that the impetus for the legislation was drainage of oil and gas from right-of-way lands, perhaps DOI considered it appropriate to focus on potential drainage situations. There were thousands of miles of railroad rights-of-way, together with untold acres of reservoir rights-of-way, so DOI likely anticipated a barrage of applications for 1930 Act leases following enactment of the legislation. This prohibition on issuing 1930 Act leases outside of producing oil and gas fields was removed from the regulations in 1947.⁹³

The 1930 Act applies only to deposits of oil and gas. DOI has held that, after *Union Pacific*, other leasable minerals (such as coal or sodium) under rights-of-way may be leased under the MLA.⁹⁴

[3] Award to Most Advantageous Offer

The statute directs the Secretary to simultaneously solicit offers or bids from the adjacent owner of the amount or percentage of compensatory royalty that it will agree to pay and from the right-of-way holder or its transferee of the amount or percentage of royalty it will pay if a lease of the right-of-way is awarded to it.⁹⁵ If competing offers are made, "the Secretary shall award the right to extract the oil and gas to the bidder, duly qualified, making the offer in his opinion most advantageous to the United States."⁹⁶ The statute does not provide any guidance as to how the Secretary will compare an offer for royalty under a lease to an offer for compensatory royalty on oil and gas drained from the right-of-way. The current regulations state only that the lease or compensatory royalty agreement will be

^[91]72 Cong. Rec. H3789 (daily ed. Feb. 17, 1930) (statement of Rep. Colton).

^[92]Circular No. 1224, 53 Interior Dec. 137 (1930).

^[93]See Oil & Gas Leasing in Lands Under Rights of Way, [12 Fed. Reg. 6810](#) (Oct. 17, 1947) (previously codified at [43 C.F.R. §§ 200.80 - .87](#)); see also Elsie M. Scott, GFS(O&G) BLM-81(1952) (1930 Act lease offer rejected because the lands were not in a known geologic structure of a producing oil and gas field). Oddly, this decision was rendered after the regulations had been revised to remove that provision.

^[94]Solicitor's Opinion M-36597, "Applicability of the Mineral Leasing Act to Minerals in Rights-of-Way," 67 Interior Dec. 225 (1960).

^[95][30 U.S.C. § 303](#); [43 C.F.R. § 3109.1-3](#).

^[96][30 U.S.C. § 303](#).

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made to the bidder whose offer is determined to be "to the best advantage of the United States, considering the amount of royalty to be received and the better development under the respective means of production and operations."⁹⁷ This provision is virtually identical to that contained in the regulations adopted by DOI in 1930.⁹⁸

The legislative history of the 1930 Act contains no discussion of how the compensatory royalty bid by the owner of adjacent lands is to be calculated. Recall that in 1930 there was no state spacing or pooling regulation⁹⁹ and communitization (i.e., pooling) authority for federal lands was not added to the MLA until 1946.¹⁰⁰ Therefore, Congress could not have been relying on a communitization agreement as the mechanism for allocating volumes of production from a well to the railroad strip. The regulations adopted by DOI in 1930 contain a form of lease that provides for payment of a royalty "of the value of oil or gas produced from the land leased herein."¹⁰¹ The lease also requires the lessee to commence drilling a well on the lease (that is, on the right-of-way) within 30 days from delivery of the executed lease and to drill only such wells as are necessary to offset drainage from the leasehold through wells on adjoining land unless the Secretary authorizes additional wells.¹⁰² Thus, the lessee of the right-of-way would pay royalty based on 100% of the production from its well on (or presumably into, if directional drilling was possible) the right-of-way. Those early regulations also contained a form of compensatory royalty agreement that required the operator of the adjacent lands to pay a specified royalty "of the amount or value of _____ of all oil and gas produced and taken from the said described tracts of land adjoining the said right of way."¹⁰³ Presumably, the blank would contain a percentage of the volume of production from the adjoining lands that would have been included in the bid by the adjacent owner, although that factor is not mentioned in the regulations.

^[97][43 C.F.R. § 3109.1-4.](#)

^[98]Circular No. 1224, § 3, 53 Interior Dec. 137 (1930).

^[99]The first state compulsory pooling statutes were adopted in New Mexico and Oklahoma in 1935. See 1 Bruce M. Kramer & Patrick H. Martin, *The Law of Pooling and Unitization* § 3.02[1] (2016).

^[100]Act of August 8, 1946, ch. 916, 60 Stat. 950.

^[101]Circular No. 1224, § 2(c), 53 Interior Dec. 137 (1930).

^[102]*Id.* § 4. The original regulations provided that leases would be issued for rights-of-way through the geologic structure of known producing oil or gas fields only if the Secretary has determined that development of the right-of-way is necessary to offset or prevent drainage from the right-of-way. In that context, the requirement to immediately commence drilling a well is more logical.

^[103]*Id.* § 5.

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[\[4\] Difference Between a Lease and a Compensatory Royalty Agreement](#)

How the rights of an adjoining owner differ from the rights of a lessee is a significant question for operators of horizontal wells that will drill into and produce from lands beneath a railroad or reservoir right-of-way. The 1930 Act very clearly states that no lease shall be issued under its authority except to the owner of the right-of-way or its transferee.¹⁰⁴ Thus, the owner or lessee of adjoining lands is not qualified to obtain a lease under the 1930 Act and can, at most, enter into a compensatory royalty agreement with BLM. Given the nature of rights granted under a lease (the exclusive right and privilege to drill for, remove, and dispose of the oil and gas deposits in the described land¹⁰⁵), and the fact that the adjoining owner obtains only a compensatory royalty agreement and not a lease, we must assume that Congress intended for the adjoining owner to have different rights from the lessee under a 1930 Act lease. If a compensatory royalty agreement was equivalent to a lease, there would have been no reason for Congress to include separate provisions in the 1930 Act, one for a lease to the right-of-way holder and one for a compensatory royalty agreement with the adjacent owner.¹⁰⁶

This question of what rights are acquired by an adjoining owner is significant to operators of horizontal wells that will drill into and produce from lands beneath the right-of-way. The authors are aware of at least one instance in which BLM initially believed that the owner of lands adjoining a right-of-way could, if it was awarded a compensatory royalty agreement under the 1930 Act bid process, produce oil and gas through a lateral drilled beneath the right-of-way.¹⁰⁷ Although no formal solicitor's opinion was issued, BLM eventually acknowledged that "a Compensatory Royalty Agreement does not allow adjacent mineral owners direct access to penetrate and produce from federal minerals under the [right-of-way]."¹⁰⁸ Consequently, a party to a compensatory royalty agreement issued under the 1930 Act could not drill a horizontal well under the right-of-way that was intended to produce from (as opposed to drain) the lands beneath

^[104][30 U.S.C. § 301.](#)

^[105]Circular No. 1224, § 4, 53 Interior Dec. 137 (1930).

^[106]See *Conn. Nat'l Bank v. Germain*, [503 U.S. 249](#), [253-54](#) (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

^[107]1930 Act Oil and Gas Lease COC-76444 covering lands in Weld County, Colorado under a reservoir right-of-way granted under the 1891 Reservoir Act.

^[108]Letter from Lonny Bagley, Deputy State Dir., BLM Colo. State Office, to Robert C. Mathes, Davis Graham & Stubbs LLP (Mar. 22, 2016) (in lease file for COC-76444).

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the right-of-way.¹⁰⁹ Doing so would constitute a trespass on unleased minerals.¹¹⁰

"Compensatory royalty" is not defined in the 1930 Act. As discussed above, it is clear from the legislative history of the 1930 Act that DOI and Congress were concerned with drainage of federal oil and gas from the right-of-way lands. Horizontal drilling under the right-of-way would not have been contemplated in 1930. In 1930, an adjoining owner would have had an incentive to bid for a compensatory royalty agreement because it would not then be faced with counter-drainage from its lands by a well drilled on the right-of-way lands.¹¹¹ Today, if the goal is to drill a horizontal well that would produce from the several tracts intersected by the wellbore, including the lands beneath the right-of-way, then a compensatory royalty agreement would not accomplish that goal.

[5] Mechanics of Obtaining a 1930 Act Lease

[a] Applications

No particular form is required to apply for an oil and gas lease under the 1930 Act,¹¹² although the *BLM Handbook* encourages the use of the MLA form of offer to lease.¹¹³ The current processing fee must be included with the application.¹¹⁴ In addition, the application must detail "the facts as to . . . the development of oil or gas in adjacent or nearby lands, the location and depth of the wells, the production and the probability of drainage of the deposits in the right-of-way."¹¹⁵ This requirement is nearly identical

[109] For a discussion of the law related to drilling through federal minerals compared to drilling into and producing from federal minerals, see Kathleen C. Schroder & William Lambert, "Permitting and Trespass Issues Associated with Horizontal Development on Federal Lands and Minerals," *62 Rocky Mt. Min. L. Inst.* 12-1, 12-11 (2016).

[110] In the context of a future interest owned by the United States in oil and gas in acquired lands following termination of a fee term mineral interest, DOI's Solicitor has held that there was no authority to allow production of that interest under a compensatory royalty agreement. See Solicitor's Opinion M-36580 (1959), GFS(O&G) SO-6(1960).

[111] The statute does not plainly state that no oil and gas lease would be issued to the right-of-way holder if a compensatory royalty agreement was entered into with the adjoining owner. However, that result seems implicit in the fact that the statute directs the Secretary to award the right to extract the oil and gas to the bidder (either the right-of-way owner or the adjoining owner) whose offer is deemed to be most advantageous to the United States. See [30 U.S.C. § 303](#).

[112] [43 C.F.R. § 3109.1-2](#).

[113] *BLM Handbook H-3109-1* § I.B.

[114] *Id.* The fee for fiscal year 2017 is \$415. [43 C.F.R. § 3000.12](#). No update of that fee for fiscal year 2018 had been published as of August 2018.

[115] [43 C.F.R. § 3109.1-2](#).

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to the one contained in the original regulations published in 1930,¹¹⁶ and made more sense in the context of those regulations, which also provided that no lease would be authorized until the Secretary has determined that development of the right-of-way was necessary to offset or prevent drainage. Nonetheless, the provision remains in the regulations and so must be satisfied. BLM may use that information in making its analysis as to whether the bid for a lease or a bid for a compensatory royalty agreement is most advantageous to the United States.

The regulations do not require a metes and bounds description of the right-of-way but the application must describe each legal subdivision of land through which any portion of the right-of-way passes and for which a lease is desired.

[b] Owner of Right-of-Way or Transferee

The 1930 Act provides that the right to a lease conferred by the statute may be assigned or sublet by the owner to any corporation, firm, association, or individual, subject to approval of the Secretary.¹¹⁷ BLM has never adopted rules governing transfers of a right-of-way holder's right to apply for a 1930 Act lease. There is a sample form of "Transfer of Right to Apply for a Federal Oil and Gas Lease Under the Authority of the Act of May 21, 1930" in the *BLM Handbook*,¹¹⁸ but its use is not required. Regardless, any such instrument should clearly assign or transfer to the transferee all rights of the right-of-way owner under the 1930 Act.

The use of the phrase "assigned or sublet" in the statute raises the question whether Congress viewed the right-of-way holder's right to apply for a 1930 Act lease as an interest in real property. As with so many other aspects of the 1930 Act, the statute and the regulations are silent on that point. It is difficult to conceive of what kind of property interest could be said to have been created in favor of the right-of-way owner by the statute. That right could be compared to the mere expectancy that a first priority application for a lease under the MLA creates.¹¹⁹ Once issued, a 1930 Act lease may be assigned.¹²⁰

^[116]Circular No. 1224, § 2, 53 Interior Dec. 137 (1930).

^[117]30 U.S.C. § 302. If the right-of-way is owned by more than one party, all must join in the application for the 1930 Act lease. Jay P. Nielson, GFS(O&G) SO-82(1960). Presumably, all owners must similarly join in any transfer of the right to acquire a 1930 Act lease.

^[118]*BLM Handbook H-3109-1*.

^[119]See *McDonald v. Clark*, 771 F.2d 460, 463 (10th Cir. 1985).

^[120]*BLM Handbook H-3109-1* § I.D.11. The *BLM Handbook* states that a 1930 Act lease may be assigned or transferred to a party other than one originally eligible to be issued a 1930 Act lease, meaning that a party other than the right-of-way holder or its transferee may hold an interest in a 1930 Act lease.

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[c] Bidding Process

If an application is filed for a 1930 Act lease,¹²¹ then after BLM has confirmed that the applicant is either the holder of the right-of-way or the transferee of the holder's rights under the 1930 Act, BLM will send an invitation to bid to the applicant and the owners or lessees of the oil and gas in the adjoining lands. Although the regulations do not require it, it is advisable to provide BLM with a list of the owners or lessees of the oil and gas in the adjoining lands so that there is no delay by BLM in sending the invitation to bid to such owners; BLM does not have the capacity to check title to the adjoining lands so it will request that information from the applicant. The *BLM Handbook* defines "adjoining owners" as the holder of the oil and gas rights (i.e., the lessee if the lands are leased or the mineral owner if they are unleased).¹²² It also defines adjoining to mean the landowners on the sidelines of the railroad right-of-way, presumably limited to that portion of the right-of-way for which the applicant is seeking a lease.¹²³ A unit operator does not qualify as the owner or lessee of adjoining lands unless it is also the lessee of such lands.¹²⁴

The regulations do not prescribe the time period in which a response to the bid invitation must be filed but BLM generally provides 30 days. The royalty bid, whether for a lease or a compensatory royalty agreement, cannot be less than 12½%.¹²⁵ After evaluating the bids, BLM will forward a decision to all bidders, awarding a lease to the applicant, if its bid is determined to be most advantageous to the United States, or awarding a compensatory royalty agreement to an adjoining owner, and the other bids will be rejected. Another unusual feature of the 1930 Act leasing system is that there is no bonus bidding. Rather, the only competition is between the royalty bid by the

right-of-way holder and the royalty bid by an adjoining owner for a compensatory royalty agreement. BLM's decision, however, is not based entirely on a comparison of the two royalty rates bid. BLM must also consider "the better development under the respective means of

[121] BLM can also initiate a 1930 Act leasing process by sending a bid invitation to the holder of the right-of-way and the adjoining owners. [43 C.F.R. § 3109.1-3](#).

[122] *BLM Handbook H-3109-1* § I.C.

[123] *Id.*

[124] Gulf Oil Corp., GFS(O&G) BLM-75(1964).

[125] [30 U.S.C. § 305](#); [43 C.F.R. § 3109.1-5\(b\)](#).

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production and operation."¹²⁶ There are no published cases of DOI or the courts involving a dispute over BLM's decision on which bid is to the best advantage of the United States.

[\[d\] Terms of 1930 Act Lease](#)

BLM adapts its lease form used for MLA and Mineral Leasing Act for Acquired Lands (MLAAL)¹²⁷ leases when it issues a 1930 Act lease.¹²⁸ The statute contains a strangely worded provision regarding the term of a lease or compensatory royalty agreement:

The royalty to be paid to the United States under any lease to be issued, or agreement made pursuant to this chapter, shall be determined by the Secretary of the Interior, in no case to be less than 12 ½ per centum in amount or value of the production, nor for more than twenty years.¹²⁹

This sentence was included in the original bill drafted by DOI but there is no discussion of its meaning in the House or Senate reports on the bill or in the floor debates. It does not state that a 1930 Act lease is limited to a term of 20 years, but instead states that the royalty shall be determined by the Secretary but in no case for more than 20 years, suggesting, perhaps, that the royalty would be renegotiated at the end of 20 years. The original regulations implementing the 1930 Act include a form of lease that provides for a fixed term of 20 years.¹³⁰ The current regulations implement this provision by providing that the term of a lease shall be for a period of not more than 20 years;¹³¹ however, the regulations do not address the term of a compensatory royalty agreement.

Unlike the MLAAL, which incorporates the terms of the MLA, the 1930 Act does not incorporate the MLA. Thus, a 1930 Act lease cannot, for example, be extended by drilling over its expiration date.¹³² By policy guidance, BLM has determined that a 1930 Act lease or compensatory royalty agreement that is committed to a unit or communitization agreement will

[126] [43 C.F.R. § 3109.1-4](#). Unlike a railroad's fairly narrow linear right-of-way, it is likely not possible to drain the oil and gas from an entire reservoir right-of-way by wells drilled off the reservoir. In that case, it will be difficult for an adjoining owner to show that its means of production (under a compensatory royalty agreement) is more advantageous than that of a 1930 Act lessee who can actually drill into the right-of-way. The same might also be true of a railroad right-of-way where the target formation is not easily drained.

[127] [30 U.S.C. §§ 351 -360](#).

[128] See *BLM Handbook H-3109-1* § I.D.4 (referencing Form 3100-11).

[129] [30 U.S.C. § 305](#).

^[130][Circular No. 1224, 53 Interior Dec. 137 \(1930\).](#)

^[131][43 C.F.R. § 3109.1-5\(c\).](#)

^[132][30 U.S.C. § 226\(e\); 43 C.F.R. § 3107.1.](#)

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be extended for the life of such agreement.¹³³ However, there is no extension of the lease or agreement upon elimination from or termination of a unit or communitization agreement, as there would be for an MLA lease. In addition, by policy, a 1930 Act lease or compensatory royalty agreement will be extended for as long as it is capable of producing oil or gas in paying quantities by actual or allocated production.¹³⁴

Although the 1930 Act does not provide for rentals, the *BLM Handbook* states that rentals will be payable at the rate of \$1.50 per acre or fraction thereof per year for the first five years of the lease term and at \$2.00 per acre or fraction thereof per year for all subsequent lease years.¹³⁵ This rental thus appears to be payable throughout the term of the lease, in addition to any royalty. However, the 1930 Act lease will not automatically terminate for failure to timely pay rental in the correct amount.¹³⁶

[§ 23.06 Identifying Lands Subject to the 1930 Act](#)

In addition to the legal uncertainties described above, identifying those lands that may be subject to the 1930 Act can also prove challenging. When reviewing title in a state where federal lands were granted for railroad or reservoir purposes, numerous sources should be referenced, careful attention must be paid to a variety of historical dates, and a factual determination should be made about the construction, location, and operation of the railroad.

[\[1\] Records to Examine](#)¹³⁷

As an initial matter, we should note that a landman or title examiner reviewing only the county records may have no notice that such a right-of-way exists. At times a patent may except or refer to a railroad or reservoir right-of-way, or a parcel may later be divided by reference to the right-of-way (e.g., that part of the N/2 lying south of the railroad). In many instances, however, the county records contain no reference to any such rights-of-way to indicate that additional investigation may be necessary.

^[133]See BLM Washington Office, Instruction Memorandum No. 93-317 (Aug. 12, 1993) (on file with authors); *BLM Handbook H-3109-1* § I.D.9a.

^[134]*BLM Handbook H-3109* § I.D.9a.

^[135]*Id.* § I.D.4a.

^[136]*Id.* Although the *BLM Handbook* instructs BLM to strike out the automatic termination provisions of the lease, the authors have seen a 1930 Act lease where that was not done. Presumably, the policy guidance in the *BLM Handbook* would control over inconsistent provisions in a lease.

^[137]See generally Peter M. Neidhardt, "An Overview of Courthouse Records," [Nuts & Bolts of Mineral Title Examination 3-1](#) (Rocky Mt. Min. L. Fdn. 2015).

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The 1891 Reservoir Act directs the Secretary, after approval of the map of the reservoir and canals, to note their locations on the land office plats,¹³⁸ so reservoir and ditch rights-of-way can usually be found on the master title plat. To determine *conclusively* whether a given parcel may contain a railroad right-of-way, one would have to examine the original right-of-way surveys filed

with the General Land Office in Washington, D.C.¹³⁹ That said, long-standing industry practice has been to rely on more readily available information--namely the master title plat, historical indices, and the oil and gas plat (if any) covering the subject township--as well as a surface inspection to make that determination.¹⁴⁰ Railroad rights-of-way are often delineated on the master title plat, typically accompanied by a serial number, the width of the right-of-way, and occasionally a date. The width can be an indication of which Act the right-of-way was granted under--400 feet (200 feet on each side of the centerline) would indicate the earlier Union Pacific Railroad Act of July 1, 1862, or the Northern Pacific Railroad Act of July 2, 1864,¹⁴¹ whereas 200 feet (100 feet on each side of the centerline) would indicate the later Atlantic & Pacific and Southern Pacific Railroad Act of July 27, 1866, or the 1875 Act,¹⁴²--though these widths are not always accurately described on the master title plat. If a railroad or reservoir is noted, the serial register page and case file for the right-of-way should be referenced to determine the date of the granting act, the original applicant, and any subsequent changes to the right-of-way such as lands being relinquished or withdrawn.

^[138][43 U.S.C. § 947.](#)

^[139]See 1 *Law of Fed. Oil & Gas Leases* § 8.01 (2018); see also Ebner, *supra* note 5, at 17-19 ("The final profiles of the [rail]road [route] were delivered to [DOI] in Washington and, in many cases, subsequently transferred to the appropriate BLM State Offices. Only if such maps were transferred to the State Offices, however, could they be posted to the master title (MT) plat.").

^[140]In many western states these are available online through BLM's General Land Office Records Automation website. See BLM, "General Land Office Records," <https://glorerecords.blm.gov>.

^[141]See *supra* note 6 and accompanying text. We note that there seems to be some confusion among academics and jurists regarding when the width of the railroad right-of-way was narrowed from 200 feet on either side of the centerline to 100 feet on either side of the centerline. For example, in *Wyoming v. Andrus*, the Tenth Circuit, in examining a right-of-way granted under the Union Pacific Railroad Act of July 1, 1862, noted that "in 1864, the right-of-way granted was reduced from 200 feet to 100 feet." [602 F.2d 1379](#), [1382](#) (10th Cir. 1979) (citing Act of July 2, 1864, ch. 216, §§ 3, 4, 13 Stat. 356). The authors believe this to be based on a flawed interpretation of section 3 of that Act, which did not amend section 2 of the Union Pacific Railroad Act of July 1, 1862, but which empowered the railroads to purchase or condemn lands as "may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of its centre line . . ." Act of July 2, 1864, ch. 216, § 3, 13 Stat. 356.

^[142]See *supra* notes 6, 9-10 and accompanying text.

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A surface inspection and/or discussion with the landowners may turn up evidence of a railroad or reservoir right-of-way not uncovered by reference to the sources described above. Additionally, the authors are aware of several instances where the location of the right-of-way as depicted on the master title plat was incorrect. A surface inspection could help to identify such issues from the outset. Finally, as to railroad rights-of-way, as described by Ebner:

If a known railroad does not appear on the [master title] plat, it may be possible to obtain an indication as to its origin and current ownership by examining the patents to surrounding odd-numbered sections; if all such sections were granted to the Union Pacific, it is likely (though not certain) that the right-of-way minerals are owned by the federal government, since the key distinction between limited fee and easement rights-of-way appears to lie in the grant of place lands or other subsidies to the railroad.¹⁴³

[2] Relation Back of the Statutes as to the Right-of-Way

In examining the sources described above, the most critical date for railroad right-of-way leasing purposes is the date of the granting Act under which the railroad received its interest. Grants under section 2 of the Pacific Railroad Acts have been described as *in praesenti* grants "effective from the date of the passage of the act."¹⁴⁴ This vesting was subject to several conditions

subsequent. Under the Pacific Railroad Acts, railroad companies were required to definitively locate (construct) the route and to inform the Secretary of the Interior of route locations.¹⁴⁵ Further, it has been held that the statute also implicitly requires that the line be continuously operated for those purposes designated in the statute.¹⁴⁶ Yet, regardless of when such requirements are met, the right-of-way vests effective as of the earlier date of the passage of the granting Act. Specifically, "[a]s to the right of way, parties who, after the passage of the act and before the map of definite location was filed, acquired any of the public lands by purchase, pre-emption or homestead entry, took the same subject to the right

[143]Ebner, *supra* note 5, at 17-20.

[144]Union Pac. R.R. Co. v. City of Greeley, [189 F. 1, 4](#) (8th Cir. 1911); see also Union Pac. R.R. Co. v. Harris, [215 U.S. 386, 389](#) (1910) (holding that "the grant of the right of way is absolute, and taking effect as of the date of the grant"); St. Joseph & Denver City R.R. Co. v. Baldwin, [103 U.S. 426](#) (1880). We note that the dissent in *Greeley* argues that the controlling date should be March 3, 1869, the date of the amendment to the Act of July 2, 1864, ch. 216, 13 Stat. 356, which specifically authorized the line at issue. *Greeley*, [189 F. at 17](#) (Reed, J., concurring in part, dissenting in part) (citing Act of March 3, 1869, ch. 127, 15 Stat. 324). That view was not adopted by the majority, which viewed the later 1869 Act as a mere amendment to the 1864 Act. *Id.* at 5-6 (majority op.).

[145]See *supra* note 4.

[146]See, e.g., N. Pac. Ry. Co. v. Townsend, [190 U.S. 267, 271](#) (1903) (citing *Baldwin*, [103 U.S. at 429-30](#)).

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of way being definitely located thereon."¹⁴⁷ Under the 1891 Reservoir Act, after the land office plats have been noted with the locations of reservoirs and canals, "all such lands over which such rights of way shall pass shall be disposed of subject to such right of way."¹⁴⁸

Because the right-of-way grant is subject to the conditions subsequent discussed above, an examiner should further investigate to ensure that the railroad was in fact constructed and, for leasing purposes, whether it has been operated continuously since that time. The Pacific Railroad Acts all required that the railroad actually be constructed for the railroad company to take title to the strip of land, such that where a contemplated railroad was not constructed, those lands would revert to the United States.¹⁴⁹ Railroads that are constructed, but later abandoned, present a different issue. By the Act of March 8, 1922, title to abandoned railroad rights-of-way shall vest in the owners of the adjoining tracts, subject to the reservation to the United States of all oil, gas, and other minerals.¹⁵⁰ As discussed in § 23.03, above, this statute does not apply to 1875 Act railroads but may apply to Pacific Railroad Act rights-of-way where the lands traversed by the right-of-way have been patented without mineral reservation.

Abandonment of a railroad or a reservoir affects the leasability of those minerals. If a railroad is abandoned, or a reservoir right-of-way is terminated, there is no longer a right-of-way to which the 1930 Act would apply. Federal minerals underlying an abandoned railroad right-of-way or a terminated reservoir right-of-way that were previously leasable under the 1930 Act will be leasable under the MLA once the right-of-way extinguishment has been noted on the tract book.¹⁵¹

[3] Effect of Prior Entries

Section 3 of the Pacific Railroad Acts (which granted the so-called place lands) applied only to those lands "not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely

[147]*Greeley*, [189 F. at 4](#) (citing *Baldwin*, [103 U.S. 426](#)).

[148] [43 U.S.C. § 947](#).

[149] See *Greeley*, [189 F. at 4](#); *Baldwin*, [103 U.S. at 429-30](#).

[150] Act of March 6, 1922, ch. 94, § 3, 42 Stat. 414 (codified at [43 U.S.C. § 912](#)).

[151] See Frank M. Gallivan, GFS(O&G) BLM-122(1958); United Technical Indus., Inc., GFS(O&G) SO-39(1963). The notation rule does not have much continuing relevance since the enactment of the Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. No. 100-203, tit. V, subtit. B, 101 Stat. 1330 (amending [16 U.S.C. § 3148](#), [30 U.S.C. §§ 187a](#), [187b](#), [188](#), [191](#), [226](#); enacting [30 U.S.C. §§ 195](#), [226-3](#)), which requires that all lands to be leased under the MLA first be offered for competitive lease. See 1 *Law of Fed. Oil & Gas Leases* § 3.08 (2018) for a discussion of the notation rule.

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fixed."¹⁵² Section 2 of those Acts, which granted the right-of-way, made no such exception for lands with a prior claim, though of course if such lands had already been patented, the government would have retained no interest to convey to the railroad. Nonetheless, simultaneous development by railroads and settlers inevitably led to instances of conflicting claims where a settler had entered into the lands prior to the date of the railroad right-of-way grant, but did not receive a patent until after said date.

A detailed discussion of the different types of dispositions made to settlers prior to and during the railroad era is beyond the scope of this chapter, but the most common dispositions during this time were under the cash entry,¹⁵³ preemption,¹⁵⁴ or homestead¹⁵⁵ statutes. The dates on which title vested in each of these respective entrymen varies and is highly fact-specific, but in many cases title vests prior to the date of the patent.¹⁵⁶

Notwithstanding the passage of time since such entries and the construction of these railroads, conflicting claims of ownership are still being litigated. In one recent (though unpublished) case, *Union Pacific Railroad Co. v. Williams Production RMT Co.*, Union Pacific claimed ownership of minerals underlying its right-of-way based on deeds in fee it had obtained from numerous entrymen.¹⁵⁷ Congress, in a further effort to encourage construction of transcontinental railroads, had authorized settlers, *prior to receiving their patent*, "to transfer, by warranty against his own acts, any portion of his claim for . . . the right of way of railroads" ¹⁵⁸ This law is referred to as "§ 2288." Before § 2288 was adopted, an entryman under the homestead or preemption laws was prohibited by law from alienating any interest in the land in his entry.¹⁵⁹ Under § 2288, numerous parcels had been conveyed to Union Pacific's predecessor by entrymen who had not yet received their patents and, in some cases, whose entries never ripened into a patent. Running counter to the traditional real property rule that

[152] Union Pacific Railroad Act of July 1, 1862, ch. 120, § 3, 12 Stat. 489; see also Northern Pacific Railroad Act of July 2, 1864, ch. 217, § 3, 13 Stat. 365 (similar language); Atlantic & Pacific and Southern Pacific Railroad Act of July 27, 1866, ch. 278, § 3, 14 Stat. 292 (same).

[153] Act of April 24, 1820, ch. 51, 3 Stat. 566 (repealed by FLPMA § 703(a)).

[154] See 1 *Law of Fed. Oil & Gas Leases* § 2.03[1][c] (2018) for a discussion of the numerous preemption statutes enacted in the 1800s.

[155] Homestead Act of 1862, ch. 75, 12 Stat. 392 (repealed by FLPMA § 702).

[156] See 73B C.J.S. *Public Lands* § 64 (2018).

[157] No. 10CV371 (Colo. Dist. Ct. June 3, 2013) (order on cross motions for determination of questions of law).

[158] Act of March 3, 1873, ch. 266, 17 Stat. 602 (Rev. Stat. § 2288, U.S. Comp. Stat. 1901, p. 1385) (as amended by Act of March 3, 1905, ch. 1424, 33 Stat. 991).

[159] See *Minidoka & Sw. R.R. Co. v. United States*, [235 U.S. 211](#), [216](#) (1914) (citing Rev. Stat. § 2291, U.S. Comp. Stat. 1901, p. 1390).

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a grantor can convey no more than he owns (here, an inchoate right to receive fee title at a later date), a Colorado district court held that "right of way" as used in § 2288 could include a fee interest in the strip of land conveyed, thus including the minerals thereunder.¹⁶⁰ Relying on *Pierce v. Chicago, Milwaukee & Puget Sound Railway Co.*,¹⁶¹ the court was persuaded that § 2288 "authorized an entryman to convey title to the grantee as an agent of the federal government."¹⁶²

We believe this holding to be based on a flawed analysis of *Pierce*. That case involved a quitclaim deed issued to the railroad under § 2288 by a homestead entryman whose entry was later contested and invalidated. When a new patent was issued to a third party, that patentee brought a case in trespass against the railroad that had constructed its line across the disputed parcel after the quitclaim from the original entryman, but prior to the patent to the second entryman. In discussing § 2288, the *Pierce* court noted that on the one hand, it can be viewed as evidencing Congress' intent to "enable the settler to make a pro tanto relinquishment of his claim, without forfeiting his right to patent, leaving the grantee to secure title under other provisions of the land laws" ¹⁶³ Under that analysis, the railroad would have perfected its title under the 1875 Act, and "the effect of the [entryman's] relinquishment was to restore the granted land pro tanto to the public domain, and at the same time to give the grantee a preference right to acquire it." ¹⁶⁴ On the other hand, the court noted, § 2288 can be viewed as allowing the entryman to act as "the agent of the United States to convey the title to the grantee, as fully as if he had a patent." ¹⁶⁵ The *Williams* court seized on this language in holding that § 2288 should be viewed under the second analysis, and therefore that the conveyance by such "agent" served to convey minerals as well. ¹⁶⁶

In the authors' view, the language quoted from *Pierce* is mere dicta, because it is immediately followed by the statement that "[i]t is not important, however, which view is adopted," ¹⁶⁷ because the railroad in that case had also filed an application for a right-of-way under the 1875 Act. Thus, the railroad in *Pierce* acquired the right-of-way either by grant from the entryman or under the 1875 Act, making it unnecessary to base the holding on the effect of the § 2288 deed.

^[160] *Williams*, No. 10CV371, slip op. at 11.

^[161] [156 P. 127](#) (Mont. 1916).

^[162] *Williams*, No. 10CV371, slip op. at 10.

^[163] *Pierce*, [156 P. at 129](#).

^[164] *Id.*

^[165] *Id.*

^[166] *Williams*, No. 10CV371, slip op. at 10.

^[167] *Pierce*, [156 P. at 129](#).

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The *Williams* court did not address what right a railroad would receive when it obtained a grant from an entryman who did not perfect his entry and thus failed to receive a patent. If the railroad had also obtained an 1875 Act right-of-way then, upon termination of the entry, the right-of-way would revert to the then unappropriated public lands. The *Pierce* court stated that "it cannot be presumed that Congress overlooked the possibility that the entry of the settler might be cancelled after contest or be abandoned, and the grantee left without protection from subsequent claimants." ¹⁶⁸ Further, in *Minidoka & Southwestern Railroad Co. v. United States*, the U.S. Supreme Court, in discussing the argument that entrymen who fail to acquire patents may convey rights-of-way burdening subsequent homesteaders, noted that such considerations "have not induced Congress to change its policy of encouraging the construction of railroads along routes designated by

charters and over land in the possession of settlers."¹⁶⁹ Nonetheless, the authors see little reason why the language of § 2288 should be interpreted to allow an entryman whose entry never ripens into a patent to, in essence, alienate the federal minerals by conveying a fee interest to the grantee railroad when the railroad's interest would be sufficiently protected by the grant of an 1875 Act right-of-way on the strip that became unappropriated public lands upon relinquishment or abandonment of the homestead entry.

[§ 23.07 Liability for Trespass](#)

The increasing use of horizontal drilling and the ever-increasing length of laterals are bringing more railroad and reservoir right-of-way lands into spacing units and causing more conflicts over the ownership of the minerals thereunder. Though the amount of right-of-way acreage may constitute only a small share of a proposed unit, operators should be cautioned to familiarize themselves with the issues surrounding these rights-of-way and the 1930 Act leasing process to ensure adequate time to coordinate with BLM and, if necessary, obtain a 1930 Act lease so that they are not trespassing on unleased federal minerals.

Federal regulations state that "[t]he extraction, severance, injury, or removal of . . . mineral materials from public lands under the jurisdiction of [DOI], except when authorized by law and the regulations of [DOI], is an act of trespass. Trespassers will be liable in damages to the United States, and will be subject to prosecution"¹⁷⁰ In recent years BLM has been ramping up its efforts to discover instances of mineral trespass. In 2014, the Office of the Inspector General issued a report finding that in North

^[168]*Id.*

^[169]235 U.S. 211, 217 (1914).

^[170]43 C.F.R. § 9239.0-7.

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Dakota alone trespass to federal minerals occurred at least 10 times over just a few years.¹⁷¹ The following year the U.S. Department of Justice settled cases with two producers accused of mineral trespass for a total of nearly \$3 million.¹⁷²

The 2014 report was somewhat critical of BLM's efforts, finding that BLM lacks the resources to fully uncover instances of mineral trespass, it learns of such instances only by "happenstance," and it lacks nationwide policies and procedures to detect, process, or deter mineral trespass.¹⁷³ However, that report also noted that BLM is increasingly engaging state regulatory agencies, which typically already gather directional survey information, to discover instances of trespass on federal mineral parcels.¹⁷⁴ The authors understand that BLM has been working for some time on policy guidance for dealing with mineral trespass cases but no instruction memorandum or other guidance had been finalized as of August 2018.

Mineral trespass liability was discussed in a recent chapter in these *Proceedings*, which discussion will not be replicated here.¹⁷⁵ We note, however, that failure to pay royalties on produced federal minerals could also potentially expose an operator (and even individual employees thereof) to liability under the False Claims Act (FCA).¹⁷⁶ In this context, an operator or its employees could be liable when it

knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.¹⁷⁷

"Knowingly" is defined as having "actual knowledge of the information," or acting in "deliberate ignorance" or "reckless disregard" of the truth.¹⁷⁸ Under the FCA, operators could face civil penalties (up to \$22,363 per false claim¹⁷⁹) in addition to treble the amount of the government's damages,¹⁸⁰

[171] Office of the Inspector General, DOI, "Bureau of Land Management: Federal Onshore Oil & Gas Trespass and Drilling Without Approval," at 3 (Sept. 2014) (OIG Report).

[172] See Schroder & Lambert, *supra* note 109, at 12-5 to 12-6.

[173] OIG Report, *supra* note 171, at 4.

[174] *Id.*

[175] See generally Schroder & Lambert, *supra* note 109.

[176] 31 U.S.C. §§ 3729 -3733.

[177] *Id.* § 3729(a)(1)(G).

[178] *Id.* § 3729(b)(1).

[179] 15 C.F.R. § 6.3(a)(3).

[180] 31 U.S.C. § 3729(a)(1).

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generally measured as the full value of the produced minerals.¹⁸¹ Historically, oil and gas operators have most frequently faced FCA charges in the context of underpaid royalties owed on produced federal minerals.¹⁸² Though we are unaware of any formal FCA charges being filed in the railroad or reservoir right-of-way context, such a claim could potentially be brought where an operator has failed to account to DOI for the value of such unleased minerals.

§ 23.08 Conclusion

The foregoing discussion illustrates that there are no simple answers to the question of who owns the minerals under a railroad or reservoir right-of-way. The answer is highly fact dependent and can vary in different portions of the same right-of-way depending on the source of the right-of-way holder's title in a given tract. However, to avoid the onerous results that may occur if a horizontal well inadvertently trespasses on an unleased tract of federally owned minerals, operators in areas crossed by railroads or within the boundaries of a reservoir constructed under the 1891 Reservoir Act must take the time to confirm the identity of the owners and, if necessary, secure a 1930 Act lease from the United States.

[181] See, e.g., 43 C.F.R. § 9239.5-2(b) (measure of damages for willful oil trespass); see also Schroder & Lambert, *supra* note 109, at 12-4.

[182] See, e.g., News Release, U.S. Dep't of Justice, "United States Attorney's Office for the District of Colorado Recovers over \$66,000 Resolving Allegations that Slawson Exploration Company Violated the False Claims Act" (Apr. 10, 2015).