Some Good News for Joint Use of Federally Granted Railroad Rights of Way

■ CHARLES H. MONTANGE

Approximately 30,000 of the 150,000 miles of railroad lines in the United States were originally located on federal lands pursuant to federal statute. Most of these federally granted rights of way are west of the Mississippi River. Reams have been written concerning the ownership of minerals underlying these properties. Equally important, if much less extensively explored, is the subject of ownership interests in the surface and non-mineral subsurface estates.

Questions concerning ownership interests in the surface and non-mineral subsurface estates are more relevant today than ever before. Pipelines and utilities seeking corridors along or across railroad rights of way have long been vitally interested in these issues. Additionally, there is a growing interest in rail lines for fiber-optics purposes. Further, there is an expanding movement to preserve rail corridors for public recreational purposes and for future use as transportation corridors (so-called "railbanking"). Pipelines, utilities, fiber-optics companies, recreational users, and railbankers are all interested in the same thing: who owns the surface or non-mineral subsurface estates in federally granted railroad rights of way.

Charles H. Montange is an attorney engaged in the private practice of law in Washington, D.C. He is also on the board of directors of, and sometimes serves as counsel to, Rails to Trails Conservancy, a nonprofit organization also headquartered in Washington, which promotes the preservation of abandoned and about-to-be abandoned rail lines for alternative public use, especially as recreational trails.

Roller-Coaster Signals from the Interior Department

The United States Department of the Interior, which is the lead federal agency in interpreting federal land grants, has vacillated over the years on the question of who owns what in federally granted rail corridors. In recent years, the Department, frequently in reliance on the *ETSI* (Energy Transportation Systems, Inc.) cases of the Tenth and Eighth Circuits,[1] has suggested that federally-granted railroad rights of way are a "mere surface easement."[2] By implication, the ownership of virtually all non-railroad interests in the surface estate, as well as all non-mineral subsurface rights, are controlled by state common law. Under the common law of at least some western states, these rights appear to be owned by abutting landowners.[3] This can be desirable in certain instances from the perspective of potential corridor users. For example, if a pipeline wishes to transect a rail corridor, but the railroad for some reasons wishes to obstruct the pipeline, the ability to obtain the necessary rights from an abutting landowner is obviously beneficial to the pipeline. As Energy Transportation Systems did in the *ETSI* decisions, the pipeline company can negotiate the necessary rights from abutting landowners, leaving the railroad high and dry. However, concentrating the various property interests in abutting landowners can render infinitely more difficult the task of a utility, fiber-optics company, or public user seeking to use any substantial linear portion of a rail corridor. In such cases, the prospective user must secure rights from a myriad of abutting landowners, some of whom may simply refuse to deal. This can be a cumbersome, costly, and ultimately impossible process.

Two New Developments

Two recent events have dramatically altered the landscape regarding legal interests in federally granted rail corridors.

Two recent events have dramatically altered the landscape regarding legal interests in federally granted rail corridors.

First, on January 12, 1989, the Acting Solicitor of the Interior Department released an opinion expressly overruling certain earlier Interior Department opinions suggesting that federally granted railroad corridors were "mere surface easements."[4] The Acting Solicitor declared that the federally granted rail corridors were, as to pre-1871 grants, fee interests,[5] and as to 1875 Railroad Act[6] rights of way, "an interest tantamount to fee ownership."[7]

Second, the National Trail System Improvements Act of 1988 was signed into law on October 4, 1988.[8] Under prior law, manifest in 43 U.S.C. § 912, all non-mineral interests of the federal government in federally granted rights of way were vested (with certain exceptions) in abutting landowners within 1 year of a judicial decree or legislative declaration of abandonment. The new law in effect repeals this prospective gift. It retains, for all abandonments after October 4, 1988, all federal interests in the federal government. It encourages their availability for public recreational trail and other compatible purposes, and otherwise authorizes their sale if the property in question is not in or adjacent to existing federal lands.

Fees or Easements?

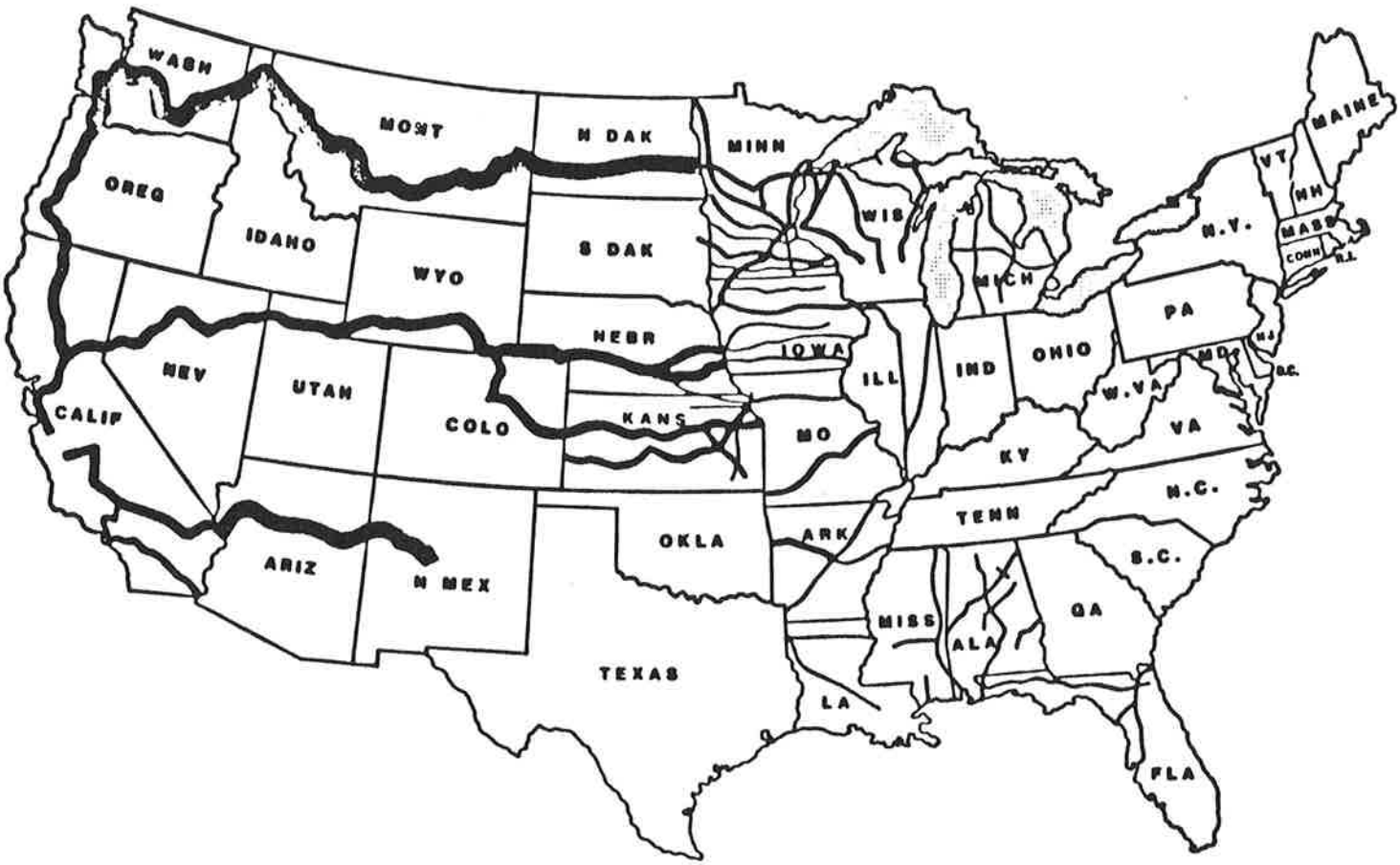
Before discussing the implications of these two events, it is necessary to lay some additional background. There are three basic categories of federally granted railroad rights of way. The first category encompasses the so-called "charter railroads," which predate 1871. From 1850 through 1871, the era of the great transcontinental railroads, Congress passed individual "charters" for each rail line, with associated checkerboard land grants on each side of the right of way itself. The second category, spanning the period 1871 to 1875, involved individual "charters" but without the associated checkerboard land grants. For reasons that are beyond the scope of this article, this second category can be regarded as a special case of the initial "charter" railroad classification. The third category is the so-called 1875 Railroad Act rights of way. The 1875 Railroad Act was a generic grant of right of way across federal lands to any railroad company. The nature of the interest held by the railroad, and the interest retained by the federal government, differs depending on the category.

In *Northern Pacific Railway v. Townsend*,[9] decided in 1903, the Supreme Court held that a pre-1871 "charter" railroad right of way grant conveyed a "limited fee" interest in the right of way. The interest was tantamount to a fee simple interest, with the "limit" referring not to the scope of the fee but to its duration. More specifically, the Supreme Court found 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." The reversion, if any, was to the United States, and not to abutting landowners who may have obtained federal patents to adjacent lands subsequent to the location of the railroad right of way.[10]

From 1850 through 1871, the era of the great transcontinental railroads, Congress passed individual "charters" for each rail line.

In its 1915 decision in *Rio Grande Western Ry. v. Stringham*,[11] the Supreme Court held that 1875 Railroad Act rights of way were also "limited fees." The Interior Department acceded to the *Stringham* decision, although it had previously taken the position that the 1875 Act did not convey a fee interest like the "charter" statutes.

Congress, which had earlier provided that "public highways" could be established on federally granted railroad rights of way,[12] was concerned about the administrative difficulties to the United States arising from reversion to the federal government of abandoned or forfeited strips after the *Townsend* and *Stringham* decisions. In 1922, Congress adopted legislation to dispose of these strips. The legislation, codified at 43 U.S.C. § 912, provided that the federal interest could be devoted to public highway use if a public highway were established in the corridor within 1 year of a judicial decree or congressional declaration of



The pre-1871 "land grant" railroad rights of way, and the relative amounts of checkerboard land grants associated therewith, are shown. 1875 Railway Act rights of way are basically west of the Mississippi and are too numerous to display on this scale. From Root, T. Railroad Land Grants from Canals to Transcontinentals. American Bar Association, 1987.