

# Abandoned Railroad Rights-of-Way = Title Problems

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***An analysis of various ways rights-of-way were acquired in Montana, and what happens to title when these rights-of-way are abandoned.***

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The problem with abandoned Railroad Right-of-Way is the method by which the land was originally acquired by the railroad for the construction of their facility. In Montana, six different types of documents or procedures were used by the railroads:

1. Grant and Filing Act of Congress - July 2, 1864
2. Grant and Filing Act of Congress - March 3, 1875
3. Right-of-Way by Deed
4. Right-of-Way by Easement
5. Right-of-Way by Condemnation
6. Right-of-Way by Condemnation for an Easement

## **Land Grant Act of July 2, 1864**

This was an "Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the Northern Route." Railroads constructed under this act are referred to as Charter Railroads.

Under this act, the Northern Pacific Railroad was granted a strip of land a

minimum 400 feet in width being 200 feet each side of said centerline of the railroad for the construction, operation and maintenance of a railroad, to have and hold in their possession for as long as the strip is being used for an operating railroad. The railroad has the right to do anything with the land while it is being held, except sell it. They may grant easements, permits, licenses or leases over, along or across the strip.

Under this act, Congress ordered odd number sections of public land forty (40) miles on both sides of the right-of-way which were to be surveyed. These sections of land were granted to the railroad for construction of a railroad. This is known as token land or checker board land of the railroad and is how the railroads acquired their timber and mineral lands. These odd numbered sections were granted to the railroad in fee, usually without any restrictions.

Land grant railroad right-of-way land when abandoned does revert back to the federal government or their successors or assigns of the lands adjoining the railroad right-of-way.

## **Grant and Filing Act of March 3, 1875**

This granted any railroad company a right-of-way easement through public lands only of the United States 200 feet

in width, 100 feet each side of said railroad centerline. Any railroad company securing the benefits under this act, had 12 months after the location of any 20 mile section of its road bed to survey and another 12 months after survey to file a profile of its road bed with a U.S. Registrar's land office for the district where such land was located. If the railroad was not constructed within five years of the filing, all rights under this act were forfeited.

In Montana at the present time, there is a lawsuit pending between a railroad and the federal government to determine if and when the land is not being used for railroad purposes and is abandoned, does the 200 foot strip of land revert back to the federal government or their successors and assigns that were granted under this act.

## **Right-of-Way by Deed**

When the railroad negotiated in good faith with landowners and obtained fee ownership of a defined strip of land, a Warranty Deed, Grant Deed or a Quit Claim Deed was used. The deeds may, or may not, contain reversionary clauses, to the grantor, their heirs, successors and assigns.

## **Right-of-Way by Easement**

This occurred when the railroad negotiated with land owners for an easement for a defined strip, with or without a reversionary clause.

## **Right-of-Way by Condemnation for Fee**

This was seldom done in Montana.

## **Right-of-Way by Condemnation for Easement**

This was done regularly in Montana. The grant was for a specific purpose, usually with a reversionary clause to the grantors or their heirs, successors and assigns.

## **Operating Railroads:**

*Burlington Northern*, better known as BN, was formed by consolidating the Northern Pacific Railroad and the Great Northern Railroads. Northern Pacific Railroad was a land grant railroad, while Great Northern was not a charter or land grant railroad. Northern Pacific's grant under the 1864 Act was the largest rail-

road land grant and embraced more than 45 million acres. But, it does have spur lines off of the mainline where easements or deeds were acquired either by negotiation or condemnation.

*Union Pacific Railroad*, known in Montana as U-P, was not a Land Grant Railroad. In Montana it acquired operating right-of-way by easements through negotiations, condemnations or under the Act of March 3, 1875.

#### **Abandoned Railroad:**

*Milwaukee Railroad*, which was in bankruptcy, abandoned its operating railroad in Montana from Miles City West to the Montana-Idaho border in 1976. It was not a land grant railroad and had acquired its right-of-way for the railroad under the Grant and Filing Act of March 3, 1875, or by easement or deed, with or without reversionary clauses.

Railroad title is questionable in most cases, for two (2) reasons:

1. Because of the method in which the land was acquired.
2. Because the railroad did not put all of its acquisition of public record.

When acquiring a parcel of land from a railroad in fee, the railroad will make their conveyance by Quit Claim Deed only, regardless of their title or type of deed obtained in the original acquisition.

#### **Identifying the Existence of Abandoned Railroad Right-of-Way**

Quite apart from the legal problems associated with ownership of railroad rights-of-way, there is the basic problem of determining if a particular parcel is burdened by railroad right-of-way. All of the railroad right-of-way acts made lands available to the railroads only if the line was actually built. In the case of earlier transcontinental grants, the government commonly asked to be advised of the approximate location of the line prior to the construction, but only so that the area could be withdrawn to allow subsequent primary land grants. In the case of the 1875 Act and other specific grants, Congress asked that a profile showing the location of the road be provided the Department of the Interior after the construction of each 20 miles of track. Final profiles were transferred to the appropriate BLM State Offices.

Only if such maps were transferred to the state offices, however, could they be

posted to the MT plat. Since homestead patents were issued without any notation or reservation of the railroad right-of-way, it is quite possible for a present day title examiner to review an entire fee abstract and never know that the property is burdened by a railroad right-of-way. While a quick examination of the MT plat certainly will increase the chances of identifying a right-of-way, it is still possible that the railroad profile, never having been transferred to the state office, has not been posted to the plat.

In addition, it is possible that the railroad, as constructed, will be in a different location than that shown on the profile, usually as a result of survey error. Since Congress did not grant the right-of-way along any specifically described course, but instead, simply made land available for the construction of the railroad, the movement of the line causes no legal problems. The right-of-way, as constructed, will be owned by the railroad pursuant to the terms of the applicable act. It is, however, important to verify that the railroad was originally constructed in different location than that shown by the survey. If originally constructed at the surveyed location and later abandoned in favor of another route, different legal results may attach to both the abandoned right-of-way and the right-of-way actually in use.

The solution to these problems lies in careful surface inspection, examination of the MT and county assessor's plats, discussion with the landowner, and communication with an attorney. In many cases, the lands person or other person performing the surface inspection will be the only person who is aware that a railroad crosses the property. The existence of the railroad must be communicated to the examining attorney so that the MT plat and case file may be reviewed to determine the act under which the right-of-way was granted and, in turn, the ownership of the right-of-way. If a known railroad does not appear on the MT 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, it is likely (though not certain) that the right-of-way is owned by the federal government.

#### **Private Grants**

Title examiners have long been troubled by warranty deeds which convey narrow strips of land measured from the centerline of a railroad and tracts of land granted expressly for railroad purposes. The interpretive problems are made none the easier by the early practice of transcribing pertinent conveyance information onto preprinted forms, raising the possibility that a standard deed form may have been used when a custom right-of-way deed was actually intended. In addition, while lawyers often use the term "right-of-way" to describe a specific real property interest in the nature of an easement, the term is used with equal frequency by lawyers and laymen alike as a geographical description of the tract itself. This usage has resulted in numerous conveyances of property bounded by a railroad "right-of-way" without any concern as to the legal nature of the railroad's estate. Finally, statutes adopted in most states provided that a conveyance always creates a fee simple estate in the grantee, unless the conveyance itself expresses a clear

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