

State Lands, Right-of-Way Abandonment Of. Abandonment, Right-of-way on State Lands. Railway, Abandonment of Right-of-way.

Where a railroad company have simply an easement for a right-of-way and abandons such right-of-way over a school section, the land embraced within such right-of-way reverts to the state as the owner of the servient estate.

November 3, 1911.

Mr. Joseph Oker,
Deputy Register of State Lands,
Helena, Montana.

Dear Sir:

I am in receipt of your letter of the 23rd ult., in which you state

"The old right of way of the N. P. R. Co., on Section 16, Township 2 South, Range 8 East, has been abandoned and a new one purchased from the State * * * Query: Does not this land revert or fall to the state, it being on a school section, and cannot the state give good title thereto in case of sale?"

Sec. 7 of the Act of July 2nd, 1864, being a charter granted to the N. P. Railroad Company by the United States Government, makes provision for the acquiring of the right of way for such road, and provides in part as follows:

The said Northern Pacific Railroad Company "is hereby authorized and empowered to enter upon, purchase, take and hold any lands or premises that may be necessary and proper for the construction and work of said road, etc."

13 U. S. Stats. at Large, 369.

Prior to the enactment of this act, however, the act of congress of May 26, 1864 (13 State. 91) reserves for the purpose of being applied to common schools, Sections 16 and 36 of each township in the territory. Title to such lands became vested in the state by the provisions of Sec. 10 of the Enabling Act, the express purpose of the grant being for the support of the common schools.

Prior to the admission of the territory as a state this was a mere reservation and not a grant.

U. S. v. Bissel, 8 Mont. 20.

However, by the Charter granted to the N. P. Railroad Company, the right of way therein granted was not in fee; an easement only was granted to it, and the servant estate passed absolutely to the state upon its admission into the Union. If then the right of way, as originally acquired by said road, under the provisions of Sec. 7 of its charter above quoted, has been fully abandoned, it is my opinion that such right of way would revert to the state, it being the owner of the servient estate at the time of such abandonment.

"A railroad company's easement in its right of way or through land may be lost by abandonment or surrender, but where the land is conveyed to the railroad company in fee, its title thereto is not lost by non-user or abandonment.

33 Cyc. 221.

However, it is necessary that a complete abandonment of this right of way must have been had to entitle the state to dispose of said section and give a valid deed therefor. This, however, is a question of fact and there must be to constitute such abandonment, non-user accompanied by unequivocal and decisive acts on the part of

the company clearly showing the intention of abandonment.

33 Cyc, 221.

In this instance, however, there seems to be an admission on the part of the said company to finally abandon this old right of way, and it seems that a request should be made by your office to said company to quit claim to the state whatever rights it may have to this portion of said school section, and, if their abandonment has been complete, I have no doubt but what they will be glad to give to the state a quit-claim deed.

However, it is my opinion that upon an abandonment of this right of way the title reverts to the state as the owner of said section.

Yours very truly,

ALBERT J. GALEN,

Attorney General.