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RAILROAD LAND GRANTS FROM CANALS TO TRANSCONTINENTALS 1808-1941. By Thomas E. Root. Chicago: American Bar Association, Natural Resources Law Section, Monograph Series, No. 4; University of Tulsa College of Law, The National Energy Law and Policy Institute, eds. 1987. Pp. iii, 121. $19.95 to Section Members, $29.95 to Non-Members.

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*Reviewed by Don H. Sherwood**

The Natural Resources, Energy, and Environmental Law Section of the American Bar Association publishes monographs on a variety of topics.[1] The fourth of these publications, *Railroad Land Grants from Canals to Transcontinentals 1808-1941,* appeared in February of 1987, was revised in March of 1988 to include a table of cases, and covers the subject from its beginnings to the end of its era.[2] The subject is one of the principal topics of public land law, at least in terms of public land acreage transferred into private ownership, and is important

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1. Until recently, the Section was called the Natural Resources Law Section; the change in name reflects increasing membership with differing interests. Historically, the Section has not quite been able to decide what sort of a publications program is best suited to the needs of its members. Twenty years ago, and more, the Section published small pamphlets, which contained annual reports of its various committees. Because these were useful only to the extent they were recognized to be accurate and complete, which was not always apparent, they fell into disfavor, particularly as the body of law involving natural resources increased dramatically from about that time forward. The Section then commenced, in competition with the law schools, publication of a law review, *The Natural Resources Lawyer,* containing original material written by section members and others. This publication also was of erratic quality, and was not particularly well received. It has been abandoned in favor of a more traditional bulletin, called *Natural Resources & Environment,* and occasional publication of monographs, a development which is much for the better. The bulletin is timely and practical, but necessarily quite general. The monographs, since they are not subject to deadline pressures, but are subject to editorial review and revision, have the potential to be among the most useful of publications. They should appear only when they have been finished to the satisfaction of the authors, the editors, and the Editorial Board, which together will give each monograph the imprimatur of the Section, the American Bar Association, and the National Energy Law and Policy Institute of the University of Tulsa College of Law, though not, of course, as to the views or positions taken by the authors. As the focused result of intensive legal research, however, the monographs promise to provide useful and authoritative materials on specific subjects no one of which could command sufficient circulation to attract a commercial publisher; furthermore, the audience is sufficiently knowledgeable not to require the rigorous citation to authorities favored by law-review editors.

2. T. ROOT, RAILROAD LAND GRANTS FROM CANALS TO TRANSCONTINENTALS 1801-1841 (American Bar Association Natural Resources Law Section, Monograph Series, No. 4, 1987). The era during which land dispositions occurred under the various Congressional grants made in aid of railroad construction ended just as the United States was about to be drawn into the Second World War. *See* P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 384-86 (1968).

even today.[3] Furthermore, mineral law questions litigated in connection with such grants profoundly influenced the development of the law of mines and mining upon the public domain. The subject is deserving of thorough analysis and thoughtful exposition, and the author of this monograph, Thomas E. Root,[4] is well-qualified to write on this topic. His text is well-written, easily understood, and instructive.[5]

Mr. Root is a product of a land-grant legal education under the Morrill Act,[6] having graduated from the University of Wyoming College of Law.[7] His experience in the practice of mining law is extensive; more importantly, his work over a number of years for the Burlington Northern, successor to the Northern Pacific Railroad, the greatest of the Pacific Railroads in terms of land grant acreage received, created an interest in the subject and provided access to relevant information not readily available outside the archives of that company.[8] Observing that there is a rich store of material available on the legislative and social history of the land grant railroads, but next to nothing on the development and implementation of the legal principles applicable to the

3. Litigation involving railroad land grants continues. *See, e.g.,* Anschutz Land & Livestock Co. v. Union Pac. R.R. Co., 820 F.2d 338 (10th Cir.), *cert. denied,* 108 S.Ct. 347 (1987).

4. B.A., 1970, University of Colorado; J.D., 1973, University of Wyoming; attorney, 1980-86, Meridan Minerals Co., then a subsidiary of Burlington Northern, Inc., successor to the Northern Pacific Railway Company; presently with Bradley, Campbell, Carney & Madsen, Golden, Colorado; member of the bar in Colorado, Illinois, and Montana.

5. It is derived, in a large part, from work which Mr. Root did for the Rocky Mountain Mineral Law Foundation, here considerably expanded. *Compare* ROCKY MTN. MIN. L. FOUND., 1 AMERICAN L. OF MINING, §§ 13.03 - .17[2][b], and appendices (2d ed. 1986). In that treatise, the material on land grants in general, of which Mr. Root's work on railroad grants forms the greatest part, is skeletal; save for the contribution of Mr. Root, the Foundation's coverage is superficial. For example, the user of the Foundation's treatise is not warned of the practice, common in New Mexico and sometimes found elsewhere as well, by which owners of Spanish and Mexican land grants created their own private mining laws, modelled on the General Mining Law of 1872, by virtue of which one finds deeded mining claims, complete with "mineral survey" numbers, within the boundaries of such land grants. Sanctioned by statute in New Mexico, N. MEX. STAT. ANN. § 69-3-23 (1978) (derived from 1897 N.M. LAWS ch. 58 § 7), that practice was custom in Colorado, though today only title examiners familiar with the titles to the major Mexican grants in Colorado have had occasion to deal with its relics. In his monograph on railroad grants, Mr. Root insures that the reader will find neither history nor the authorities so slighted. He puts flesh on the bones supplied in the Foundation's treatise, and provides the serious researcher with the references necessary to get quickly into the voluminous and largely uncharted materials which define the law of railroad grants.

6. Act of July 2, 1862, ch. 130, 12 Stat. 503 (now 7 U.S.C. §§ 301-08 (1982)).

7. Mr. Root also took the water law course, and, in 1979-80, taught the mining law course at the University of Denver College of Law.

8. The railroad companies were the first of the Nation's great corporations; as such, they were often vilified and the subject of political debate and judicial inquiry. But like the Governor and Company of Adventurers of England Trading Into Hudson's Bay—The Hudson's Bay Company—chartered in 1670 by Charles II, which was in many ways the model on this continent for the land grant railroad company, these institutions survive, and maintain enormous treasuries of archived materials. *See, e.g.,* P. NEWMAN, COMPANY OF ADVENTURERS (1985) and CAESARS OF THE WILDERNESS (1987), the first two volumes in a projected three-volume history of The Hudson's Bay Company in Canada.

130,390,692.92 acres awarded to 61 different land grant railroads,[9] Mr. Root has provided the first comprehensive treatment of the legal aspects of a major chain of events in the industrialization of an agrarian society.[10]

The methods adopted by Congress to thrust iron rails across the continent did not spring forth full-blown; they developed from original models much different from those in use at the end of the land grant era, and it took nearly a century to implement the Pacific Railroad Laws.[11] To cover the whole, and to produce a "systematic legal treatment . . . which addresses railroad land grants from the time of initiation of the device to conclusion of land grant patent issuance activity . . . is the purpose of this monograph."[12] The arrangement settled upon for the materials presented is a function of and controlled by the overriding fact, often found to be true in public land law, that the legal literature on the subject cannot be understood save in the light of the historical development of the topic. Accordingly, Mr. Root has relied heavily upon available historical material,[13] and he presents the results of his research in three parts, one almost wholly historical and two substantive.

The structure of the monograph is compelled by the nature of the device which Congress selected ultimately in its effort to attract capital for the construction of railroads and to people the interior of the continent: The railroads were granted the right-of-way across the public domain; they were also offered title to vast acreages of the public domain at the time for the most part unoccupied and unsurveyed. The railroads became, in effect, colonial proprietors, not unlike the original proprietors of the English grants on the East Coast and of many of the Spanish and Mexican grants in the Southwest which were confirmed in accordance with the Treaty of Guadalupe Hidalgo.[14] Congress

9. T. ROOT *supra* note 2, at 2-3; the statistics are taken from Appendix C thereto, *id.* at 119-20.

10. There was a similar social history in Canada, well described in Pierre Berton's study of the building of the Canadian Pacific Railroad. P. BERTON, THE IMPOSSIBLE RAILWAY: THE BUILDING OF THE CANADIAN PACIFIC (1972) (originally published in Canada in two volumes as THE GREAT RAILWAY, 1871-1881: THE NATIONAL DREAM (1970) and THE LAST SPIKE (1971)). Although the financial limitations upon the much smaller of the two countries greatly increased the difficulties which the Canadians had to overcome, the parallels in the efforts of the two nations to span the continent with rails are striking. Neither country avoided intrigue, scandal, and failure. But both reached the Pacific in time to bind three coasts to each nation.

11. T. ROOT *supra* note 2, at 2. Drawing upon secondary sources, 66 Acts of Congress are listed, *id.* at 116-18, as comprising the Pacific Railroad Laws enacted from 1862 to 1888.

12. T. ROOT *supra* note 2, at 3.

13. *Id.* at 2.

14. Feb. 2, 1848, in force May 30, 1848, 9 Stat. 922, T.S. No. 207. The Mexican term for such a land grant described it as an "empresario grant" made to an individual who was expected then to collect and bring immigrants to settle the granted lands. *See* United States v. Maxwell Land-Grant Co., 121 U.S. 325 at 360-61, *reh'g denied,* 122 U.S. 365 (1887) (with opinion); *cf.* J. PEARSON, THE MAXWELL LAND GRANT (1961). English colonial grants to William Penn, Lord Baltimore, and others, of course, were intended to achieve ends much the same.

expected the railroad companies to colonize their territories, albeit by subsequent sales, through land grants in aid of construction, a device which provided cash indirectly rather than directly.[15] It is into these two subjects that Mr. Root divides his substantive treatment of the topic: Rights-of-Way, and Land Grants in Aid of Construction.

In the first of these, Mr. Root well describes the fate of the right-of-way, which almost certainly began as a fee-simple title; was early construed to be a limited fee subject to reverter upon implied condition subsequently broken,[16] and came in the end to be a mere easement. He describes, with admirable restraint, the consequences of this progression upon the land grant railroads, which lost title to minerals within their rights-of-way — two hundred to four hundred feet in width — even as to some extent they secured protection against loss of title to their rights-of-way through adverse possession and other kinds of encroachments.[17] The central story of this section of the monograph, however, is that of perhaps the most outrageous reversal of a rule of property which has yet occurred in our vaunted legal system: *United States v. Union Pacific Railroad Co.*,[18] in which Mr. Justice Douglas tortured both history and statute to make law of a policy which the Supreme Court thought Congress would have selected in 1862 if it had had the wisdom of the 1957 Court.[19] The result of this remarkable decision was that grants made prior to 1875, when Congress plainly *did* choose to grant easements rather than fee title to rights-of-way, became equivalent to those made after 1875. So today one can acquire the title to minerals in railroad rights-of-way only under the 1930 Railroad Right of Way Leasing Act,[20] which was intended not for that purpose but for another.[21] The Supreme Court so changed the law applicable to rail-

15. Colonization was for the railroads a two-edged sword. It provided the incentive and for the most part the funds necessary for construction, and it certainly peopled the interior, but it also attracted the population which became the political force which in the end overwhelmed the political force which the railroads had themselves become. Settlement so dominated policy that "[w]estern dissatisfaction with railroad land holdings, farmer discontent with railroad rates, and the objections of organized labor led to pressure for action to halt the policy of making land grants to railroads. Solicitude for settlers and homesteaders was also a factor in ending the policy." T. ROOT, *supra* note 2 at 24-25. In a way, history has treated mining and mining companies similarly. *See, e.g.*, R. KELLEY, GOLD VS. GRAIN: CALIFORNIA'S HYDRAULIC MINING CONTROVERSY: A CHAPTER IN THE DECLINE OF THE CONCEPT OF *LAISSEZ FAIRE* (1959).

16. T. ROOT *supra* note 2, at 30.

17. *See, e.g.*, Anderson v. Union Pac. R.R. Co., 188 Colo. 337, 534 P.2d 1201 (1975), *aff'g* Board of County Comm'rs of Weld County v. Anderson, 34 Colo. App. 37, 525 P.2d 478 (1974); Allard Cattle Co. v. Colorado & S. Ry. Co., 187 Colo. 1, 530 P.2d 503 (1974), *aff'g* 33 Colo. App. 39, 516 P.2d 123 (1973). *See also* Guild Trust v. Union Pac. Land Resources Corp., 475 F. Supp. 726 (D. Wyo. 1979), *aff'd* 682 F.2d 208 (10th Cir. 1982). Unfortunately, Mr. Root chose to treat cases such as these concerning railroad land grants after title was settled in the railroads as beyond the scope of his effort. T. ROOT, *supra* note 2 at 3.

18. 353 U.S. 112 (1957).

19. Owen Olpin, in his review of Mr. Root's Monograph, 59 U. COLO. L. REV. 633, at 635 (1988), is more charitable, saying that "Justice Douglas's opinion for the majority strained the statutory language to find a federal mineral reservation."

20. 30 U.S.C. §§ 301-06 (1982), an incomplete solution which provides for oil and gas but not for other minerals.

21. T. ROOT *supra* note 2, at 39-40.

road rights-of-way in its 1957 decision that it rendered wrong the construction of title to rights-of-way by the Department of the Interior, the very agency charged with the administration of such titles.[22] No more apparent and bald-faced act of legislation by a court exists than *United States v. Union Pacific,* and if it is not that, then it is proof that *stare decisis* is a hollow hallmark rather than the victory of American jurisprudence.[23]

Grants in aid of construction led to the checkerboarding of the West, a fact not without significance today,[24] and to mind-wrenching distinctions between place grants and floats, indemnity lands and mineral indemnity lands, and mineral lands and iron and coal lands. The railroad became entitled to each odd-numbered section of land on either side of its line when constructed, to a distance of ten or even twenty miles each way, and if upon survey it was found that, for any reason, such lands were not available to the railroad, the railroad became entitled to lands in lieu thereof out to another ten or twenty miles on each side of its line. The railroad was to sell these lands to settlers, who would be the most numerous of the railroad's customers, and thereby raise the necessary funds for construction of the line itself. Certainly it was not intended that the railroad would keep these lands and bar them to settlement; nor was it practical to lease them when the United States was disposing of the even-numbered sections in fee under the various homestead and cash entry laws. And in fact the railroads did sell most of their agricultural lands; what they kept they could not sell.

The opportunities for fraud and imposition were infinite; the tools in the hands of the Government to prevent either, in the years before the Income Tax, were wholly inadequate. As a result, disputes raged between the railroads who claimed grant lands and those who claimed that the lands were not vacant and unoccupied at the time the grant

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22. *See, e.g., id.* at 41, n.196.

23. Owen Olpin, in a footnote to his review of Mr. Root's Monograph, 59 U. COLO. L. REV. 633, at 637, n.8 (1988), again with more restraint, makes this point so well that it deserves repetition in full:

> It is a legal curiosity that the precise statutory language upon which Justice Douglas relied in *Union Pacific* to find United States mineral reservations in the rights-of-way appears only in the separate provision of the Union Pacific statute dealing with alternate section grants. Justice Douglas took license to invoke the limiting language nonetheless because the words state that mineral lands are excluded "from this act." Thus, most curiously indeed, the mineral lands exclusion in the alternate section provision resulted in a Supreme Court holding that minerals under rights-of-way were reserved by the United States, even though the same language had previously been held not to invalidate passage of full fee title to both surface and minerals in the alternate sections initially classified as non-mineral when minerals were subsequently discovered.

24. *See, e.g.,* Leo Sheep Co. v. United States, 440 U.S. 668 (1979), discussed in Olpin, *supra* note 23, at 633; Note, *Public Lands—Problems in Acquiring Access to Public Lands Across Intervening Lands,* 15 LAND & WATER L. REV. 119 (1980); Comment, *Gamesmanship on the Checkerboard: The Recurring Problem of Access to Interlocked Public and Private Lands Located Within the Pacific Railroad Land Grants,* 17 LAND & WATER L. REV. 429 (1982).

became fixed; that they were known mineral lands at that time, and thus not subject to the grant, or that they were not mineral and thus should have been subject to the grant rather than classified as mineral so that prime agricultural lands could be substituted therefor by the railroad.

The monograph records a complex and sorry story, which spawned lawsuits in large numbers, many of which reached the United States Supreme Court and some of which settled fundamental principles of mining law, but left the railroads the targets of the Government's lawyers and of politicians in Congress. Land grants were, of course, forfeited for non-construction, but for various reasons, including sheer avarice on the part of the railroads,[25] the land grant era came to an end in 1941, with the relinquishment of 8,000,000 acres or more of railroad grant lands in fifteen states.[26] In the eighty years which then came to a close, numerous cases were litigated on subjects ranging from the effect of patents to the interpretation of statutes of limitations on attacking patents, and from the classification of land as mineral in character to what constitute "known" mineral deposits. Those cases came like cars in the train to the Supreme Court, and were decided conservatively, in accordance with the characterizations with which the trust-busters and modern-era politicians attacked the Court as having no social conscience. Monumental cases upon which public land lawyers still rely, for example, *Burke v. Southern Pacific Railroad Co.*,[27] and *Barden v. Northern Pacific Railroad Co.*,[28] are all covered, in great detail. Yet it is clear, in reading the material presented, that with *United States v. Northern Pacific Railway Co.*,[29] the railroads came to the end of the line; henceforth, as in the *Land Grant Case*,[30] an ever more liberal Supreme Court would whittle away the railroads' rights.

It is in the light of this observation that the text of this monograph must be viewed. The author's approach is to cover the landmark cases in detail. His focus is on the Supreme Court cases; there is little discussion of the lower-court decisions in those cases, and practically no discussion of non-Supreme Court cases at all. Likewise, there is very little description of the facts which controlled the cases which are discussed. Well enough, perhaps, for a monograph of this kind, but disconcerting nonetheless. One wonders what might be learned from what has been left out. One is troubled by omissions all along the right-of-way traced by Mr. Root. For example, to what did the parties stipulate

25. T. ROOT *supra* note 2, at 109-12.

26. *Id.* at 110, n.568.

27. 234 U.S. 669 (1914) (holding known mineral lands included in the railroad grant, unless they were known to exist at the time of the grant, could be attacked directly, rather than collaterally, by a prior claimant who could establish privity with the United States [ed.]).

28. 154 U.S. 288 (1894) (holding mineral lands reserved to United States [ed.]).

29. 256 U.S. 51 (1921) (holding the government could sue to set a land grant patent aside if it had mistakenly issued it [ed.]).

30. United States v. Northern Pac. Ry. Co., 311 U.S. 317 (1940) (limiting rights of railroads to indemnity lands [ed.]).

in putting "to an end" all of the "claims of the United States against the Northern Pacific and *vice versa.*"[31] If the United States gave up its right to free passage on land grant railroads under the Transportation Act of 1940,[32] upon the release of land claims by September 18, 1941, which the railroads did, how was it possible "that by virtue of . . . [the] provisions of the land grant acts [which required rate concessions by land grant railroads to the Government] the War Department saved $2,000,000,000" as reported in 1944?[33]

Perhaps more important, this monograph as it has been conceived and structured is at best a concise and principled statement of the law. It is neither hornbook nor treatise, but rather a Michelin Guide to a thicket. The author provides a system map which the reader can use to find the principal authorities. But the reader must call up and study the authorities for himself. It is, then, a summary, rather than an exhaustive treatment of the subject, and it certainly makes no attempt to be predictive. If as one learns from this text, seventy years of law can be overturned and title to millions of acres of land destroyed in 1957 by an interventionist Supreme Court in the case of rights-of-way, can that not happen in the 1990s with respect to the land grants themselves? In other words, remembering Mr. Root's injunction at the conclusion of his introductory preface that "given the magnitude of grants of land to railroads, and the quantity of lands currently owned by successors in interest to those railroads, it is suggested that a comprehensive treatment of legal and historical issues regarding railroad land grants is appropriate,"[34] it is possible to predict, notwithstanding Mr. Root's conclusion to the contrary,[35] that one day an activist and revisionist Supreme Court will hold that it was the intention of Congress in enacting the railroad land grant laws to provide the railroads with lands to be sold for the purpose of bringing shippers and passengers to the railroads' territories and for the purpose of raising funds for the construction of the railroads and their attendant facilities, but that it was "obviously" not the intent of Congress to create "checkerboard monopolies" and baronies of the kind held today by the Burlington Northern and the Union Pacific. In times such as these, in which the Supreme Court is steadily eroding private property rights, from Grand Central Station in New York[36] to the unpatented mining claim in the

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31. T. ROOT *supra* note 2, at 112.

32. Act of Sept. 18, 1940, ch. 722, 54 Stat. 898.

33. T. ROOT *supra* note 2, at 111. One must look to P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 385 (1968), for the answer to that puzzle: "Finally on December 12, 1945, . . . Congress provided for the complete end of all land grant rates." Some ended earlier. *Id.* at 384-85.

34. T. ROOT *supra* note 2, at 4.

35. *Id.* at 90: "[O]ne can conclude that, based upon the law, railroads obtained fee simple title to lands for which patents were issued, absent fraud."

36. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, *reh'g denied,* 439 U.S. 883 (1978), *aff'g* 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977) (upholding New York City's Landmarks Preservation Law and thus preventing construction of a multistory building over Grand Central Station [ed.]).

West,[37] and even with respect to fee mineral titles,[38] the Court need only cite *United States v. Union Pacific Railroad*[39] to hold that place and indemnity lands were granted and patented subject to the condition subsequent that they be sold to settlers to raise funds for construction, and that in the absence of demonstrated need thereof for that purpose, title necessarily reverts by operation of law to the United States, free of any claim for compensation.[40]

37. United States v. Locke, 471 U.S. 84 (1985) (holding that unpatented mining claimants must file maintenance evidence each year "prior to December 31," and not "on or before" December 31, as claimant contended [ed.]).

38. Texaco, Inc. v. Short, 454 U.S. 516 (1982); *cf.* Keystone Bituminous Coal Ass'n v. De Benedictis, 107 S.Ct. 1232 (1987).

39. 353 U.S. 112 (1957).

40. Unless and until the Supreme Court takes that next step, however, the lower courts are not likely to be so bold. *See, e.g.,* Anschutz Land & Livestock Co. v. Union Pacific R.R. Co., 820 F.2d 338 (10th Cir.), *cert. denied,* 108 S.Ct. 347 (1987), decided after publication of Mr. Root's Monograph.