OFFICIAL OPINION NO. 72-24, Title to abandoned right-of-way over land granted to the State of South Dakota pursuant to the Enabling Act of 1889, and for which a right-of-way deed was issued by the State for the line of railroad between Stratford and Leola

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

May 17, 1972

Ralph Ginn, Commissioner
School and Public Lands
Pierre, South Dakota 57501

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**Title to abandoned right-of-way over land granted to the State of South Dakota pursuant to the Enabling Act of 1889, and for which a right-of-way deed was issued by the State for the line of railroad between Stratford and Leola, South Dakota.**

Dear Mr. Ginn:

On the 29th of January, 1969, the Chicago and North Western Railway Company (purchaser of the M.D. & Pacific Railway Co.) filed with the Interstate Commerce Commission its application for a certificate of public convenience and necessity authorizing the abandonment of its line of railroad between Stratford and Leola, South Dakota, a distance of 42.7 miles. (Finance Docket No. 25527)

On the 7th day of August, 1969, the Interstate Commerce Commission issued its certificate and order granting the application.

The tariffs applicable to the line, retirement of the line from service, and the abandonment of this segment of rail line is now an accomplished fact.

Upon the passage of the Enabling Act of 1889, title to the several sections of school lands in South Dakota was transferred to the State of South Dakota. (Vol. 1, page 188, Sec. 10 SDCL 1967). These school lands were then no longer a part of the public lands of the United States to which the general **Railroad Right-of-Way Act of 1875** of Congress was

applicable. As a result, the first session of the South Dakota Legislature in 1890 passed Chapter 61, Laws of 1890, which is now a part of Chapter 49, Section 1-14, under which railroads were able to obtain rights-of-way over school sections.

It is pursuant to this statute that the right of way was obtained by the railroad over the subject school lands, the title to which is at issue in this opinion. The Act of 1890 is a special statute on 1 separate subject carried into our present code entitled "Railroad Right-of-Way Act" and controls the subject at issue herein. Chapter 49-1, SDCL 1967.

Section 49-20-5 grants to a railroad the privilege to build its lines over state school lands. Section 49-20-6 requires the filing of a plat of the land occupied. Section 49-20-7 provides for the issuance of a certificate reserving the lands by the Commissioner of School and Public Lnads, 49-20-8 vests the right to build the line of railroad, and 49-20-9 the issuance of a right-of-way deed to the railroad upon construction. All of these procedural steps were fully complied with in this case.

Section 49-20-9 reads as follows:

Deed from Governor after construction of railroad-payment of value.

As soon as such railroad shall be constructed over such lands, so selected, and a station erected thereon, on proof of such fact to the satisfaction of the Governor, and upon paying the full value of the lands so taken for station purposes and all grounds herein contemplates, such value to be ascertained and payment made in the manner provided in Section 49-20-12, the Governor shall convey, by deed of right of way, to the corporation constructing such railroad, the right to hold and use such lands for such purposes only as are herein contemplated, which deed shall be executed in the name of the state by the Governor, under the great seal of the state, and attested by the commissioner of school and public lands, under the seal of his office.

A deed to the school lands was thereafter issued by the State of South Dakota containing reversion and restoration clauses of title to grantor as follows:

... the said party of the first part has given, granted, bargained, sold, conveyed and confirmed, and by these presents does give, grant, bargain, sell, convey and confirm to said party of the second part and to its successors and assigns forever, for the purpose of

constructing said railroad thereon, and for all purposes connected with the construction, operation, maintenance, and use of its railroad, the following described tracts of land ...

. . . TO HAVE, HOLD, AND ENJOY the lands conveyed so long only as they are used by the said second party for the purpose herein stated with the appurtenances and privileges thereto appertaining and the right to use the said lands, and material within the limits of the land hereby conveyed unto the said party of the second part, and to its successors and assigns for any and all purposes connected with the construction, improvement, maintenance, operation and enjoyment of said railroad. Provided, that all valuable minerals are reserved from this conveyance and the right reserved to mine beneath the said strip of land for the purpose of removing said minerals, so far as the same can be done without impairing the safety or security of the surface or right of way herein granted to the party of the second part, provided further, that if said right-of-way shall be abandoned or shall cease to be used by said second party, or its assigns for the purposes herein named the title shall revert to and invest in the owner of the legal subdivision over which said right-of-way runs.

The question to be determined here presented is whether upon the abandonment of service and dismantling of this segment of railroad, did the rights and title to the right of way revert to the present owner of the subdivision over which the railroad was operated?

The Enabling Act of February 22, 1889, transferred to the State in trust Sections 16 and 36, and other public lands and it therefore was obvious that it became essential to provide a method for a railroad to build its lines intersecting instead of going around it. Session Laws of 1890, Chapter 61, now SDCL 49-20, is the answer to that problem.

There are two types of transfers or conveyances issued for right-of-way deeds to railroads: (a) one grants the land and (b) those that grant a right.

74 CJS, page 476, Section 84, even applied to a private owner of land not limited by the restrictions of the state officers as obtained herein states the rule:

As a general rule, where land obtained by purchase or agreement is conveyed by an instrument which purports to convey a right of way only, it does not convey title to the land itself, but the railroad company acquires a mere easement in the land for right of way purposes.

Typical statements from WORDS & PHRASES reveal as follows:

The words "deed of right of way" connotes, (a) the right to pass over land, (b) a servitude is meant, (c) the words "right of way" in a grant to a railroad company taken alone means an easement only and does not pass the land itself.

The term used in our state "by deed of right of way" has a controlling significance, limiting the rights transferred to be that of merely an easement.

Section 49-20-9 authorized the Governor under this special statute on this separate subject to issue "the Governor shall convey by deed of right-of-way the right to hold and use such lands for such purposes only as are herein contemplated," this language is far afield from conveying a fee title, or authorizing it.

The fee title of the State held in trust under the Enabling Act of 1889 for the public purpose therein detailed may not without definite and further legislative authorization be conveyed to railroads in fee by the Governor or by state officers over which to operate its trains.

The case of Sherman v. Sherman, 23 S.D. 486, is the only case in South Dakota in which the issues herein are considered. This case originated in 1887 under Territorial Statutes and was decided by a divided court, two of the judges holding by the deed there issued a fee title passed to the railroad, and one member in a dissenting opinion held that an easement merely was conveyed by the deed. The following recital from the majority opinion, page 498, should be noted:

There is nothing in the instrument in question, reserving the grantors any use of or dominion over the land, or any provision whereby the grantors might re-enter or resume possession in case it was not used for railroad purposes.

Obviously, the recital above quoted in the **Sherman** case is the controlling reason given by the two judges who decided the Shermancase. One member of the court held it only constituted an easement.

The deed issued in this case contains a specific provision that title revert to the state upon abandonment of the railroad.

We, therefore, conclude that (1) by the Enabling Act title to Section 16 and 36 was transferred by Congress to the state as school and public land, (2) that the deed issued to the railroad conveyed an easement only, and (3) that under the recitals of the deed, and

the present applicable statutes the servitude of the easement has reverted to the present owner of record.

Where the state is the record owner, it owns the former right-of-way and when sold by the state, the record owner grantee holds title to the portion of the subdivision occupied by the former railroad right-of-way.

This conclusion is made necessary because the original deed to the railroad recites (1) "for use of said railroad," (2) "rights of way herein granted," and (3) "if the right of way herein granted shall be abandoned, title shall revert to and rest in the owner." These conditions are all limitations of the conferred powers, as recited in the statutes controlling the subject at issue.

Respectfully submitted,

Gordon Mydland
Attorney General