## A Deed for Right-Of-Way, or a Right-Of-Way deed?

By David S. Drach

> "Do you wish me a good morning, or mean that it is a good morning whether I want it or not; or that you feel good this morning; or that it is a morning to be good on?"
> — J.R.R. Tolkien, *The Hobbit*

Sometimes even the simplest statements can generate vastly different interpretations. That was the case concerning deeds to several tracts of railroad right of way in North Dakota. The question at the root of the dispute was whether the deeds were intended to convey title to the land which the railroad intended to use for right of way, or if the deeds conveyed right of way over the land, which was, in effect, a conveyance of an easement.

No one spends the time, effort and expense to litigate the nuances of railroad deeds in the far reaches of western North Dakota without reasons above and beyond academic curiosity. For a railroad, the two most common motivations to litigate over title are preservation and regulation of operational rights or supporting facilities, and money. In this case, the motivation was revenue from the production of oil in the Bakken formation in western North Dakota. Soo Line Railroad Company[1] ("Soo Line") entered into a number of oil and gas leases for the exploration and production on tracts that included its property. Oil production is regulated to operable units that frequently encompass one or two Public Land Survey sections of land[2]. Soo Line's interest within an operable unit is typically comprised of its right of way which amounts to less than 2% of a section.

Mineral leases are frequently structured so that the landowner is paid an amount at the time of signing (a "bonus") and a percentage of the revenue after production and sale of the oil and gas, after deduction of production expenses (a "royalty.") The percentage of royalty payments varies depending upon the likelihood of finding marketable quantities of oil or gas. Oil and gas production is a risky endeavor and landowners in many oil/gas producing regions are guaranteed only to receive the bonus payment, while royalty percentages can often be fairly low – two to five percent. In the Bakken formation, however, due to the uncharacteristically high rate of success hitting oil (99% according to the North Dakota Petroleum Council)[3] royalty rates are fairly high for mineral leases-- as much as twenty-five percent. While royalties are paid on net revenue after expenses (of which there are a lot), royalties of even small shares, such as a right of way, can result in surprisingly significant amounts of revenue when hundreds of miles of corridor are involved.

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[1] Soo Line Railroad Company is a wholly-owned division of Canadian Pacific Railway and does business as Canadian Pacific. "Soo" comes from the phonetic pronunciation of "Sault" in the name of Sault Ste. Marie, Michigan. When formed, the Minneapolis, St. Paul and Sault Ste. Marie Railway's first line was from Minneapolis to Sault St. Marie, Michigan which was nicknamed the "Soo Line." In a 1960s merger of the Minneapolis, St. Paul, and Sault Ste. Marie Railroad, the Duluth South Shore and Atlantic Railroad, and the Wisconsin Central Railway, the surviving entity took the legal name Soo Line Railroad Company.

[2] A section of land is nominally one square mile, or 640 acres in size.

[3] See www.ndoil.org

In addition to the typical mineral lease, there is a second approach for capitalizing on oil and gas production — a participation agreement. Under this approach, the landowner, or its lessee, becomes a part owner of the operable unit. This means that the landowner shares in the costs of exploration and production, but upon sale of the oil or gas, it receives 100% of the potential net revenue for its share, versus 2% to 25% in a mineral rights lease.

Soo Line entered into a mineral lease with G-4 LLC that encompassed many miles of right of way in oil producing counties of North Dakota. Soo Line's agreement with G-4 was a typical bonus/royalty arrangement but G-4 in turn took participation roles in operable units that encompassed Soo Line's property.

Several of the tracts leased to G-4 were part of operable units of EOG Resources, Inc. EOG would arguably have to pay royalties on production to someone. But the difference between a royalty share and a production share can be significant, even when the share is less than 2% of the total operable unit. In this case, that differential was in excess of $1 million.

EOG sought to quiet Soo Line's claim of title to a number of parcels in Mountrail County, North Dakota. Before the North Dakota District Court in the North Central Judicial District in Mountrail County, EOG argued that Soo Line's title to the parcels was that of an easement, not fee title, and therefore Soo Line did not have a mineral interest.[4]

EOG's arguments relied on a 1960 North Dakota Supreme Court decision, *Lalim v. Williams County*[5] concluding that a second conveyance for widening of a highway was an easement, not a grant of fee title. EOG argued, among other things, that the inclusion of the words "Warranty Deed – Right of Way" or "Right of Way Deed" made the deeds more ambiguous than those considered in *Lalim* and therefore required judicial construction. The District Court agreed and granted EOG's motion for summary judgment.[6]

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[4] *EOG Resources, Inc. v. Soo Line Railroad Company d/b/a Canadian Pacific Railway, et al.*, Civil No. 31-10-C-00010, Order on Motions for Summary Judgment; Order for Judgment; and Judgment (Jan. 3, 2014).

[5] *Lalim v. Williams County*, 105 N.W.2d 339 (N.D. 1960) In *Lalim, a* predecessor in title conveyed two 33 foot wide easements to the County for a highway, and subsequently conveyed additional rights over 7 foot strips for widening of the highway. The nature of the second conveyance was the focus of the litigation. The County contended that the second conveyance was for fee title. The then-current owner of the adjacent land argued that the second conveyance was an easement similar to the first conveyance. The Court concluded that the deed to the County was sufficiently ambiguous to permit judicial construction, id. at 346, and that if construed to be a grant of fee simple would completely divide the grantor's fee title to the 33 foot strips (the initial highway easement) and that on the assumption that the county obtained the rights in lieu of eminent domain proceeding, where they would have acquired only an easement, the deed in question was an easement. Id. at 347.

[6] *EOG Resources, Inc.* before Mountrail County at ¶44.

Soo Line and G-4 appealed. In its decision reversing the District Court's decision in respect to the majority of the deeds[7] and remanding to the District Court in respect to one deed[8], the North Dakota Supreme Court[9] set forth the framework for review of railroad deeds:

> The primary purpose in interpreting a deed is to ascertain and effectuate the grantor's intent.[10] If a deed is ambiguous, the court may consider extrinsic evidence to determine the parties' intent.[11] The seven deeds in this case were different from *Lalim* and did not compel the Court to hold that the deeds conveyed only an easement. All of the deeds are on pre-printed forms containing similar provisions. Although the deeds are all similar, they do not reference each other and each should be considered separately to determine whether the deed is ambiguous. The parties' intent must be ascertained from the writing alone and if the deed is unambiguous, the Court will not consider extrinsic evidence and will determine the parties' intent form the deed itself.[12]
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> The deeds contain words "To have and to hold the same … FOREVER and that the parties of the first part will forever "WARRANT and DEFEND." [13] A deed that conveys a strip, piece, parcel or tract of land generally indicates an intent to convey a fee simple title. [14] A deed that limits the use of the parcel to railroad purposes indicates an intent to convey an easement. [15] The phrase "right of way" has two meanings when it is used in a railroad deed: it refers either to the strip of land upon which the track is laid, or the legal right use the strip of land. [16] However, when the phrase is included only in the title or caption of the deed, courts have generally held it is not a significant factor.

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[7] EOG Resources, Inc. v. Soo Line R. Co., 867 N.W.2d 308, 2014 ND 187, (2015) "EOG Resources"

[8] Warranty Deed from Olaf R. Faro and Dina Faro, his wife to Minneapolis, St. Paul & Sault Ste. Marie Railway Company, September 20, 1915, Recorded September 24, 1914 in Mountrail County Book 36 pf Deeds, on page 34. In that deed the N.D. Supreme Court determined that the description could be viewed as ambiguous but Summary Judgment not appropriate and remanded the matter to the District for further fact finding.

[9] North Dakota does not have an intermediate Court of Appeals.

[10] *EOG Resources* at 314 citing *Wagner v. Crossland Constr. Co., Inc.*, 840 N.W.2d 81 (N.D. 2013)

[11] Id. at 314, citing *In re Estate of Dionne, 772 N.W. 2d 891(N.D. 2009)*

[12] Id. at 315-16. citing *Wagner.*

[13] Id. at 316

[14] Id. at 317 citing *Bockelman v. MCI Worldcom, Inc.*, 403 F.3rd 528, 532 (8th Cir. 2005); and *Elton Schmidt & Sons Farm Co. v. Kneib*, 507 N.W. 2d. 305, 207 (Neb. 1993)

[15] I.d at 317 citing *Bockelman* at 531-32 and *Schmidt v. United States*, 203 F.R.D 387, 399 (S.D. Ind.2001)

[16] Id. at 319 citing *Hubbert v. United States*, 58 Fed.Cl 613, 615 (2003), *State v. Hess*, 684 N.W. 2d 414, 424 (Minn. 2004); and *Brown v. State*, 924 P.2d 908, 914 (Wash. 1996).

In conclusion, the Court held that the majority of the deeds were unambiguous and conveyed a fee simple title to the railroad.[17] Although other courts have held to the contrary[18], the decision in *EOG Resources* follows the majority of courts addressing the scope and nature of grants to railroads. In particular when the phrase "right of way" is used in the grant, as in "for right of way purposes," or included in the title or in the margin of a preprinted form, most courts have held that does not, by itself, establish that such a conveyance of land to a railroad is an easement.[19]

Scenarios similar *to EOG Resources* have occurred where owners of land adjacent to a railroad have sought to share in revenue derived from fiber optic or other longitudinal utility installments along the railroad, and as a challenge to re-use of a railroad following discontinuance of rail operations. In these other scenarios if the interest obtained by the railroad is deemed to be a fee interest, then whether that interest is absolute, or subject to defeasance giving rise to a reversionary interest. Even when a deed gives rise to a reversionary interest, these interests are frequently barred by applicable state curative acts.

In summary, the *EOG Resources* decision is important because it does a good job at outlining the fundamental analysis for deeds where "right of way" is contained in the label or margin and one could say the North Dakota decision was "unambiguous" in regard to this topic.

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[17] Id. at 322.

[18] See *Sherman v. Petroleum Exploration,* 132 S.W.2d 768 at 771(Ky. 1939) holding that "if, in a deed to a railroad, the land conveyed is described as a right of way, the deed may be construed as giving an easement right only, and not the full fee, notwithstanding there are other words in the deed referring to the fee simple, for such a conveyance does but imply a grant of the easement forever." ;and *Brugman v. Bloomer,* 13 N.W.2d 313 (Iowa 1944); and *Chicago & Northwestner Railway v. Sioux City Stockyards Co., 158 NW 769 (Iowa 1916)*

[19] *State v. Hess*, 684 N.W.2d 414 (Minn. 2004).