



PETER SLAIBY & REJANI SLAIBY

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Decided September 10, 2015



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

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Appeal from a decision by the Alaska State Office, Bureau of Land Management, to convey not less than an exclusive-use easement on private lands to the Alaska Railroad Corporation, pursuant to the Alaska Railroad Transfer Act of 1982, 45 U.S.C. §§ 1201-1214 (2012). AA-55129-20.

Affirmed.

1. Alaska: Generally–Conveyances: Interest Conveyed–Rights-of-Way: Nature of Decision

The Alaska Railroad Transfer Act of 1982, 45 U.S.C. §§ 1201 - 1214 (2012), requires the United States to convey no less than an exclusive-use easement to the State of Alaska (or a State-owned railroad) if land within a Federal railroad right-of-way was conveyed out of Federal ownership prior to January 14, 1983. Since that requirement applies without regard to whether the United States actually owns an exclusive-use easement, we affirm BLM determining it proper for the U.S. Secretary of Transportation to issue a patent for an exclusive-use easement to the Alaska Railroad Corporation, a State-owned railroad.

APPEARANCES: Roy L. Longacre, Esq., Anchorage, Alaska, for Appellants; Andrew F. Behrend, Esq., Anchorage, Alaska, for the Alaska Railroad Corporation; and Steve Scordino, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

Peter and Rejani Slaiby, husband and wife, appeal from a decision dated September 16, 2013, by the Alaska State Office, Bureau of Land Management (BLM), under the caption “Lands Found Proper for Conveyance to the Alaska Railroad Corporation” (Decision). BLM was then acting pursuant to the Alaska Railroad

Transfer Act of 1982 (ARTA), 45 U.S.C. §§ 1201 - 1214 (2012), which directed the U.S. Secretary of Transportation, after consultation with the Secretary of the Interior, to transfer all “rail properties of the Alaska Railroad^[1] to the State” or the Alaska Railroad Corporation (ARRC), a State-owned railroad.² 45 U.S.C. § 1203(a); *see* 45 U.S.C. §§ 1202(1) (definition of “Alaska Railroad”), (10) (definition of “rail properties of the Alaska Railroad”), (14) (definition of “State-owned railroad”); *see also* Report to Congress, “Alaska Railroad: Federal Role Should End; Some Management Problems Remain” (General Accounting Office, Feb. 25, 1982), Ex. 26 (GAO Report). BLM found it proper for the Secretary of Transportation to grant a patent to ARRC for an “exclusive-use easement” over Appellants’ residential property, which is on and adjacent to a portion of the Alaska Railroad’s right-of-way (ROW). Decision at 1 (citing 45 U.S.C. § 1202(6)).³ The Board granted ARRC’s motion to

¹ The Alaska Railroad, a Federal railroad, was created by the Act of Mar. 12, 1914, commonly referred to as the Alaska Railroad Act, 38 Stat. 305, 43 U.S.C. § 975 (1980). The Act granted the power of eminent domain to the Alaska Railroad and authorized it to purchase real and personal property for a railroad to aid in developing the Territory of Alaska. Although originally administered by this Department, the Alaska Railroad was transferred to the U.S. Department of Transportation in 1966 and subsequently became the responsibility of its Federal Railroad Administration.

² The Department of Transportation will issue the patent at issue, but it will do so only if this Department (BLM) finds it proper under the ARTA. Thus, BLM’s finding it proper to convey an exclusive-use easement to ARRC constitutes an appealable decision.

³ An “exclusive-use easement” is defined by ARTA as an easement granting to Alaska or a state-owned railroad (ARRC):

(A) the exclusive right to use, possess, and enjoy the surface estate of the land subject to this easement for transportation, communication, and transmission purposes and for support functions associated with such purposes; (B) the right to use so much of the subsurface estate of the lands subject to this easement as is necessary for the transportation, communication, and transmission purposes and associated support functions for which the surface of such lands is used; (C) subjacent and lateral support of the lands subject to the easement; and (D) the right (in the easement holder’s discretion) to fence all or part of the lands subject to this easement and to affix tracks, fixtures, and structures to such lands and to exclude other persons from all or part of such lands. 45 U.S.C. § 1202(6).

intervene in this appeal, by Order dated December 5, 2013.⁴ For the reasons discussed below, we affirm BLM's decision under ARTA.

Legal and Factual Background

After over 50 years of Federal ownership and operation of the Alaska Railroad, Congress enacted the ARTA, "pursuant to the Federal goal and ongoing program of transferring appropriate activities to the States." 45 U.S.C. § 1201(4) (2012). ARTA required the U.S. Secretary of Transportation to "transfer all rail properties of the Alaska Railroad to the State" on the date of transfer (*i.e.*, the day he simultaneously delivers to the State the bill of sale, interim conveyance, exclusive license, and deed described in 45 U.S.C. § 1203(b)(1)⁵). 45 U.S.C. § 1203(a); *see* 45 U.S.C. § 1202(4). The Act broadly defines "rail properties of the Alaska Railroad" and established a transition period for identifying, inspecting, and determining their fair market value.⁶

⁴ Appellants filed a statement of reasons (SOR), with numbered exhibits. BLM responded on Mar. 20, 2014 (Answer), as did ARRC (ARRC Answer), with lettered exhibits. The Slaibys replied on June 16, 2014 (Reply), with additional exhibits. For simplicity, we cite these exhibits by number or letter. BLM also supplied the Board with its case file for AA055129/D (Case File). Pursuant to Order dated May 5, 2015, Appellants filed a supplemental SOR (SSOR), which BLM and ARRC responded to. This matter is now ripe for review and decision by the Board.

⁵ 45 U.S.C. § 1203(b)(1) states in relevant part:

On the date of transfer, the Secretary shall simultaneously: (A) deliver to the State a bill of sale conveying title to all rail properties of the Alaska Railroad except any interest in real property; (B) deliver to the State an interim conveyance of the rail properties of the Alaska Railroad that are not conveyed pursuant to subparagraph (A) and this paragraph and are not subject to unresolved claims of valid existing rights; (C) deliver to the State an exclusive license granting the State the right to use all rail properties of the Alaska Railroad . . . pending conveyances in accordance with the review and settlement or final administrative adjudication of claims of valid existing rights; (D) convey to the State a deed granting the State . . . an exclusive-use easement for that portion of the right-of-way of the Alaska Railroad within the Denali National Park.

⁶ Despite ARTA's prescriptive procedures, the record does not include any document identifying or valuing the ROW at issue under 45 U.S.C. § 1204 (a), (d), or an interim conveyance of that real property interest on the date of transfer, as required by 45 U.S.C. § 1203(b)(1)(B), or an exclusive license pending resolution of valid existing rights under 45 U.S.C. § 1203(b)(1)(C).

See 45 U.S.C. §§ 1202(10), 1204(a), (b), (d). Based on that valuation by the United States Railway Association, the State paid \$22.7 million to the United States for the rail properties of the Alaska Railroad. See 45 U.S.C. § 1203(d)(5).

Edwin A. Jarvi was granted patent to 150 acres of public land on September 6, 1950. See Ex. 5. After the catastrophic Good Friday 1964 earthquake, trackage in southern Alaska needed to be realigned and reconstructed. As part of that process, the Alaska Railroad purchased three parcels of land from Jarvi on July 2, 1965, plus a “perpetual right of way and easement [ROW] to construct, reconstruct, operate and maintain a railroad line and appurtenances” on Lots 4, 13, and 14, Block 3, Sunset Hills West Subdivision (plat of survey filed July 17, 1961), which were all in T. 12 N., R. 3 W., Seward Meridian, Alaska. More than 30 years later, the Slaibys acquired a home at 14200 Jarvi Drive, Anchorage, Alaska, which is on Lots 13 and 14 of the Sunset Hills West Subdivision. See Exs. 4, 16 at 51-65.

In apparent response to comments on impacts to the Slaibys’ property under a proposed ARRC Residential Right-of-Way Use Policy, its counsel explained that the Alaska Railroad had acquired a real property interest in their property because the 1964 earthquake “caused the bluff in the vicinity of what is now Jarvi Drive to slide” and “the federal Alaska Railroad determined that it needed to acquire additional property on the bluff side of the ROW to provide for a stable and secure right-of-way in that area.” ARRC Letter dated July 24, 2012 (copy to Deputy BLM State Director (DSD)), Ex. 28 at 22. Counsel stated ARRC has an exclusive right of use and occupancy, including “the right to prohibit or to require a permit for any residential uses of or structures” within its ROW, and while that ROW is still owned by the Federal government, the “intent of the federal government is that this land will be finally conveyed to ARRC pursuant to ARTA.” *Id.* at 22, 23; see DSD email dated Aug. 13, 2012 (Case File) (“I am working with the BLM Alaska staff to finalize our conveyance for this property to the ARR.”); ARRC email to Dennis J. Hopewell, Esq., Office of the Regional Solicitor (copy to DSD), dated Sept. 13, 2012, Ex. 21 at 3-4.

The Slaibys responded to ARRC counsel on December 6, 2012, who forwarded their response to Hopewell (copy to DSD). He then replied to them on December 21, 2012 (copy to Hopewell and DSD). See Case File. Meanwhile, based on the July 2012 ARRC response, the Slaibys wrote to the DSD to urge BLM not to grant an “exclusive use easement” and to grant ARRC only what had been acquired by the United States in 1965, a “limited easement.” Letter dated Dec. 19, 2012 (Case File) at 3.⁷ At about that same time, Hopewell issued an opinion in which he stated:

⁷ “A few feet behind their house is a 50 foot 30 degree bluff at the bottom of which there is 30 feet of property on their lot on which the railroad lies.” Letter dated Dec. 19, 2012 (Case File), at 1. Since the 1965 grant of a limited ROW “has been more than sufficient for railroad purposes since it was authorized in 1914,” the Slaibys

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“ARTA requires conveyance of all the federal interests in the property and at a minimum conveyance of an exclusive-use easement.” Memorandum dated Dec. 20, 2012 (Case File), at 1; *see id.* (“the property can be conveyed by patent using the same legal description used in the acquisition of the land by the United States”).

By decision dated September 16, 2013, BLM found it proper to convey “the full and complete right, title, and interest of the United States in and to” the Slaibys’ residential property, which “shall be not less than an exclusive use easement as defined in Sec. 603(6) of ARTA [45 U.S.C. § 1202(6)].” Decision at 1 (citing 45 U.S.C. § 1205(b)(4)(B)). Attached to its decision was a draft patent to be executed by the Secretary of Transportation. This appeal timely followed.

Discussion

Appellants contend that the “exclusive-use easement” defined in 45 U.S.C. § 1202(6) is significantly and substantially more than the limited ROW acquired by the United States in 1965 for the realignment and reconstruction of the Alaska Railroad. *See* SOR at 9-10; Reply at 3-7; *supra* note 2. They contend that since the United States cannot convey what it does not own, BLM erred in finding it proper to grant ARRC a patent to an “exclusive-use easement” over their residential property. *See* SOR at 13-14; Reply at 8-12. BLM counters by claiming “this case turns on the construction of 45 U.S.C. 1205(b)(4)(B).⁸” Answer at 4. Moreover, according to BLM: “Appellants may ask for the Board to determine the extent of the interest conveyed in the 1965 Deed. However, this is beyond the scope of the question before the Board. ARTA requires BLM to convey all Federal interest to the lands within the Alaska Railroad right-of-way, but at a minimum an exclusive use easement.” *Id.* at 7 (citing 45 U.S.C. § 1205(b)(4)(B)); *see id.* at 4 (“ARTA requires the United States to issue a

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feared that granting an exclusive-use easement to ARRC under the ARTA would result in its building a fence and requiring them to pay fees to use their land on the bluff. *Id.*

⁸ 45 U.S.C. § 1205(b)(4)(B) provides, “to avoid potential impairment of railroad operations resulting from joint or divided ownership in substantial segments of right-of-way,” that

Where lands within the right-of-way . . . have been conveyed from Federal ownership prior to January 14, 1983, . . . the conveyance to the State [under 45 U.S.C. § 1203(b)(1)(B)] shall grant not less than an exclusive-use easement in such properties. The foregoing requirements shall not be construed to permit the conveyance to the State of less than the entire Federal interest in the rail properties of the Alaska Railroad required to be conveyed by [45 U.S.C. § 1203(b)].

patent for the lands. 45 U.S.C. § 1205(b)(2).”). The ARRC response is substantially similar.⁹ See ARRC Answer at 14-16, 23-26.

[1] ARTA states that if lands within a railroad ROW were conveyed out of Federal ownership prior to January 14, 1983, the U.S. Secretary of Transportation “shall grant not less than an exclusive-use easement in such properties [to ARRC].” 45 U.S.C. § 1205(b)(4)(B). Appellants’ property was patented to Jarvi “prior to January 14, 1983,” and the ROW he granted to the Alaska Railroad in 1965 is a rail property subject to transfer under 45 U.S.C. § 1203(b)(1)(B). The language of ARTA is clear. Under such circumstances, where the lands have been surveyed, the U.S. Secretary of Transportation must issue a patent to ARRC for not less than an “exclusive-use easement.” See 45 U.S.C. § 1203(b)(3) (“the Secretary shall issue a patent therefor”). We therefore affirm the Decision, but in doing so, we express no view as to what was acquired by the United States in 1965 (*e.g.*, whether its acquisition of that real property interest included the right to erect a fence and/or exclude successors-in-interest from their land on the top of the bluff). See 45 U.S.C. § 1202(6); *supra* note 2. As to those and other issues, the parties may wish to have their rights determined by an appropriate court. See, *e.g.*, *Dias v. State of Alaska*, 240 P.3d 272 (Alaska 2010).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

/s/
James K. Jackson
Administrative Judge

I concur:

/s/
Christina S. Kalavritinos
Administrative Judge

⁹ However, ARRC separately claims the ROW acquired “from the Jarvis in 1965 meets ARTA’s definition of an exclusive use easement,” but even if it does not, BLM would still be obligated “to convey to ARRC at least an exclusive use easement.” ARRC Answer at 18; *see id.* at 18-23.