THE ALASKA RAILROAD

IBLA 81-426 Decided July 20, 1982

Appeal from decision of the Alaska State Office, Bureau of Land Management, tentatively approving State selection application F-024563.

Affirmed.

1. Alaska: Land Grants and Selections: Generally -- Alaska: Statehood Act -- State Selections

A selection by the State of Alaska under section 6(b) of the Alaska Statehood Act is limited to public lands which are "vacant, unappropriated, and unreserved." A right-of-way for the Alaska Railroad across the public lands constitutes an easement which does not separate the servient estate from the public domain with the result that the land may be available for selection subject to reservation of a railroad right-of-way in any patent issued to the State.

APPEARANCES: William J. Wong, Esq., Anchorage, Alaska, for appellant; Shelley J. Higgins, Esq., Office of the Attorney General, State of Alaska, for the State.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Alaska Railroad appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated January 30, 1981, tentatively approving State selection application F-024563 in part. The State of Alaska filed its general purposes grant selection application under the provisions of section 6(b) of the Statehood Act of July 7, 1958, P.L. 85-508, 72 Stat. 339, 340.

On appeal the Alaska Railroad asserts that the lands in the State selection which were at the time of selection included in appellant's railroad right-of-way were occupied, appropriated, and/or reserved,

and thus, unavailable for State selection. 1/ Therefore, appellant asserts these lands were exempt from State selection and that patents to the State of Alaska should contain exceptions for appellant's right-of-way.

The BLM decision states that on December 11, 1959, the State of Alaska under the provisions of section 6(b) of the Statehood Act filed general purposes grant selection application F-024563 for lands within the W 1/2 of T. 6 S., R. 8 W., Fairbanks meridian. Prior to December 11, 1959, Public Land Order (PLO) No. 553 of February 7, 1949, 14 FR 696 (Feb. 17, 1949), withdrew lands in secs. 27, 28, 32, 33, and 34 of T. 6 S., R. 8 W., Fairbanks meridian, from all forms of appropriation under the public land laws, and reserved them for use of the Alaska Railroad. On February 27, 1959, PLO 1812, 24 FR 1652 (Mar. 5, 1959), revoked PLO 553 insofar as it affected the described lands except for sec. 33 of T. 6 S., R. 8 W., Fairbanks meridian.

The BLM decision concluded that the lands other than sec. 33 applied for by the State of Alaska, subject to certain exceptions not relevant in this case, were proper for acquisition by the State and were tentatively approved. The decision provided that the patent will contain a reservation to the United States of a right-of-way for railroads under the Act of March 12, 1914, ch. 37, 38 Stat. 305.

Section 1 of the Act of March 12, 1914, (codified at 43 U.S.C. §§ 975c and 975d (1976)), provides in part:

> Terminal and station grounds and rights of way through the lands of the United States in the Territory of Alaska are hereby granted for the construction of railroads, telegraph and telephone lines authorized by this Act, and in all patents for lands hereafter taken up, entered or located in the Territory of Alaska there shall be expressed that there is reserved to the United States a right of way for the construction of railroads, telegraph and telephone lines to the extent of one hundred feet on either side of the center line of any such road and twenty-five feet on either side of the center line of any such telegraph or telephone lines, and the President may, in such manner as he deems advisable, make reservation of such lands as are or may be useful for furnishing materials for construction and for stations, terminals, docks, and for such other purposes in connection with the construction and operation of such railroad lines as he may deem necessary and desirable.

The issue raised by this appeal is whether the land within the right-of-way granted to the Alaska Railroad is occupied, appropriated,

1/ State selection is restricted by section 6(b) of the Statehood Act, 72 Stat. 340, to "public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection."

and/or reserved so as to be exempt from State selection. Neither counsel for appellant nor counsel for the State of Alaska have cited any cases on point and this appears to be a case of first impression.

[1] Consideration of the nature of the right-of-way granted by similar statutes provides guidance. The General Railroad Right of Way Act of March 3, 1875, ch. 152, 18 Stat. 482 (1875), 2/ granting a similar right-of-way for railroad across the public lands outside Alaska has been held to convey only an easement and not a fee interest in the land. Great Northern Railway Co. v. United States, 315 U.S. 262 (1942). The Court noted that section 4 of the Act provided in part that all public lands over which such right-of-way shall pass "shall be disposed of subject to such right of way." 315 U.S. at 271 (emphasis added). The Court held that the reserved right to dispose of the lands subject to the right-of-way is inconsistent with the grant of a fee and persuasive that the grant of an easement was the intent of the statute. 315 U.S. at 271. The location of a post-1871 railroad right-of-way across a tract of public land does not separate the servient estate

2/ Section 1 of the Act provides in part as follows:

"[T]he right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

General Railroad Right of Way Act of Mar. 3, 1875, ch. 152, § 1, 18 Stat. 482 (repealed, Act of Oct. 21, 1976, P.L. 94-579, § 706(a), 90 Stat. 2793).

Section 4 of the Act provides as follows:

"Sec. 4. That any railroad-company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

18 Stat. at 483 (repealed, Act of Oct. 21, 1976, P.L. 94-579, § 706(a), 90 Stat. 2793).

from the public domain with the result that title to the servient estate passes without express mention in a subsequent grant by the United States of the traversed tract of public domain. State of Wyoming v. Udall, 379 F.2d 635, 639-40 (10th Cir. 1967), cert. denied, 389 U.S. 985 (1967).

The issue of whether a railroad right-of-way grant under a different statute 3/ caused the land embraced therein to be otherwise disposed of so as to entitle the State of Wyoming to indemnity selections for such lands within school sections granted to the State under its Enabling Act has previously been litigated. State of Wyoming v. Andrus, 602 F.2d 1379 (10th Cir. 1979). Despite the broader limited or qualified fee interest granted by the earlier railroad right-of-way Acts of 1862 and 1864, the court held that lands within school sections granted to the states which were subject to such rights-of-way were not otherwise disposed of so as to entitle the State of Wyoming to indemnity selections for such lands. Rather, the court held it was the intent of Congress that Wyoming take the sections subject to the railroad right-of-way. Id. at 1385.

These cases decided under other railroad right-of-way statutes persuade us that the lands embraced in appellant's right-of-way should not be considered to be appropriated or reserved at the time of State selection so as to be excluded therefrom. The decision correctly held that a right-of-way for railroad shall be reserved in any State selection patent issued.

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

C. Randall Grant, Jr.
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

James L. Burski
Administrative Judge

3/ Act of July 1, 1862, ch. 120, § 2, 12 Stat. 489, as amended, Act of July 2, 1864, ch. 216, §§ 3, 4, 13 Stat. 356.