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Department of the Interior (D.O.I.)

STATE OF ALASKA, DEPT. OF TRANSPORTATION AND PUBLIC FACILITIES [a1]

Decided June 26, 1981

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-14866-A, F-14866-A2 and AA-9368.

Affirmed in part; modified in part.

1. Rights-of-way: Revised Statutes Sec. 2477--Rights-of-way: Nature of Interest Granted
A right-of-way granted by Revised Statutes Sec. 2477 is a less-than-fee interest in the nature of an easement. Following the acceptance of a Revised Statutes Sec. 2477 grant of right-of-way, the Federal Government retains its fee interest in the land, subject to the right-of-way, and may dispose of it pursuant to law.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests--Alaska Native Claims Settlement Act: Conveyances: Easements--Alaska Native Claims Settlement Act: Easements: Public Easements
The existence of a Revised Statutes Sec. 2477 right-of-way precludes neither the reservation of an overlapping § 17(b) public easement nor the conveyance of the underlying fee. Such reservation or conveyance does not affect the previously existing right-of-way.

3. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests--Alaska Native Claims Settlement Act: Conveyances: Easements--Alaska Native Claims Settlement Act: Easements: Public Easements
The continued existence of a Revised Statutes Sec. 2477 right-of-way following conveyance of the underlying fee interest is entirely independent of any reservation, pursuant to § 17(b), of a public easement.

4. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance--Alaska Native Claims Settlement Act: Administrative Procedure: Conveyances--Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests
Rights-of-way granted by Revised Statutes Sec. 2477 shall be identified in the decision to issue conveyance and in the conveyance document in the same manner as other third-party interests which the Bureau of Land Management need not adjudicate.

****1*** APPEARANCES: Susan Urig, Esq., on behalf of the State of Alaska, Dept. of Transportation and Public Facilities; M. Francis Neville, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeal

This appeal involves the question of whether the Bureau of Land Management erred in deciding to convey land pursuant to the Alaska ****630*** Native Claims Settlement Act (ANCSA) without expressly declaring the conveyance to be subject to an alleged R.S. 2477 right-of-way located thereon. The issues raised are whether the land subject to an R.S. 2477 right-of-way can be conveyed, and whether the Bureau of Land Management may reserve, pursuant to § 17(b) of ANCSA, a public easement along the entire length of the right-of-way.

The Board holds that the existence of an alleged R.S. 2477 right-of-way neither precludes conveyance of the subject land nor the reservation of a coincident public easement, but that where the Bureau of Land Management is informed of the existence of the right-of-way, the decision to issue conveyance and the subsequent conveyance document must expressly declare that the conveyance and the public easement are each subject to the right-of-way.

Jurisdiction

***2** The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended,* 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

In 1959 and 1960, the State of Alaska constructed, on public lands, a road from the south end of the Hooper Bay Airport easterly to the village of Hooper Bay. In so doing, the State purported to accept the grant, pursuant to Revised Statutes Sec. 2477, 14 Stat. 253 (1866) (repealed 1976) (R.S. 2477), of a 100# right-of-way (r/w) along the entire length of the road.

On Sept. 30, 1980, the Bureau of Land Management (BLM) issued its decision numbered F-14866-A, F-14866-A2, and AA-9368. The decision approved for conveyance to Sea Lion Corp. (Sea Lion) lands surrounding the village of Hooper Bay, including the lands covered by the Hooper Bay Airport Road.

On Oct. 30, 1980, the State of Alaska, Dept. of Transportation and Public Facilities (hereinafter State), appealed the above-designated decision. The State alleged that R.S. 2477, prior to its repeal in Oct. 1976, was a standing offer of a free r/w, which r/w was created upon acceptance of the offer by the State. The State argued that acceptance was complete when the road was finished (in 1960), if not previously.

The State declared that all subsequent entries are subject to the State's r/w, thus BLM may reserve a public easement pursuant to § 17(b)(3) of ANCSA only subject to the State's 100# r/w. In fact, the State argued, there is no r/w interest remaining for the BLM to reserve to itself. By the reservation of an easement to itself, BLM in effect seeks to repeal the State's r/w. The State asserted that the road itself is a preexisting (pre-ANCSA) 100# ***631** r/w, and that the BLM's failure to object 20 years ago to the State's acceptance of a 100# r/w should now estop BLM from seeking to limit that r/w by almost half its present width.

The BLM filed its Answer on Jan. 9, 1981. BLM asserted that the State's alleged r/w "does not preclude the reservation of a § 17(b) casement for the road and the conveyance of the underlying fee to Sea Lion Corp. Neither the § 17(b) easement nor the conveyance to the village corporation will affect the State's interest, if any, under [R.S. 2477]."

The BLM pointed out that the State devoted a significant portion of its brief to arguments that it has a valid interest pursuant to R.S. 2477. BLM asserted that the Department is not the proper forum for such arguments, and that questions involving the validity of rights-of-way under R.S. 2477 should be resolved in State court. The BLM further asserted that, pursuant to the Nov. 20, 1979, amendment to Secretary's Order No. 3029, 43 FR 55287 (1978) (S.O. 3029), the BLM has neither the authority nor the obligation to adjudicate R.S. 2477 r/w interests, thus the existence of the State's claimed r/w cannot be a factor in deciding whether a § 17(b) easement should be reserved.

***3** The BLM disagreed with the State's apparent assumption that the State's claimed r/w would somehow be diminished by the proposed conveyance of lands and reservation of a § 17(b) easement for the airport road. The BLM declared that, as the appealed decision expressly states, all ANCSA conveyances are subject, pursuant to § 14(g) of ANCSA, to valid existing rights. The BLM further asserted that the appealed decision, in compliance with the Nov. 20, 1979, amendment to S.O. 3029, did not and could not recognize the State's claimed r/w.

The BLM argued further that an R.S. 2477 r/w is a less-than-fee interest in the nature of an easement. BLM declared that the Federal Government may dispose of its remaining fee interest in spite of an R.S. 2477 claim and regardless of the absence of a reservation or exception in the patent for the alleged r/w, and that conveyance is not inconsistent with an R.S. 2477 claim.

BLM also asserted that reservation of a § 17(b) easement is not inconsistent with a claimed R.S. 2477 r/w, and that the State's argument is based upon a mistaken view of the nature of an R.S. 2477 r/w interest.

The State, on Feb. 9, 1981, replied that the true effect of the BLM's reservation of a 60# wide § 17(b) easement is to dedicate 40 feet of the State's r/w to a third party while appropriating the remainder of the State's property interest for itself. The State

declared that the only dispute before the Board concerns the effects rather than the validity of the State's r/w, and that this *632 Board is the proper forum before which the State may seek protection of its r/w interest.

The State declared that its acceptance of the R.S. 2477 grant severed the resulting r/w from the public domain, and thus there is nothing for BLM to adjudicate. The State argued that if the BLM has a duty to make certain that public rights-of-way are preserved, then § 17(b) of ANCSA requires only that BLM recognize the State's valid existing r/w at Hooper Bay, and that such recognition is merely an acknowledgment, and not an adjudication, of the r/w. The State also argued that should the BLM believe further action is necessary to fulfill its § 17(b) obligations, the BLM could reserve a 100# public r/w and expressly state that such r/w is subject to the State's R.S. 2477 r/w.

The State asserted that the BLM's failure to reserve to itself the full 100# width of the State's r/w causes the State to lose its r/w interest in the portion not reserved, and that the State's ability to exercise its property rights within the 60# reserved to the United States is greatly diminished. For an example of the latter concern, the State declared that if the BLM's reservation were recognized, the State would no longer be authorized to independently, without Federal approval, locate and relocate utilities within its r/w. Further, the Federal Government would become responsible along with the State for maintenance of the Hooper Bay Airport Road, resulting in considerable management problems.

***4* The State argued that acceptance of the R.S. 2477 grant severed the *land* underlying the r/w from the public domain, and that BLM cannot now reserve an interest in property which it relinquished to the State.

Finally, the State asserted that there is no authority for the proposition that the State's r/w can exist concurrently with the public easement reserved to the United States. The State distinguished *Berger* v. *Ohlson,* 9 Alaska 389 (D.C. Alaska 1938), on the basis that the court ruled therein with regard to a specific intersection, and not a lengthwise concurrence, of two rights-of-way.

Decision

The State has brought this appeal asking:

(1) cancellation of the proposed reservation of a public easement coincident with a portion of the State's R.S. 2477 r/w for the Hooper Bay Airport Road;

(2) alternatively to item 1, reservation of a 100# wide public easement entirely coincident with, and expressly subject to, the State's R.S. 2477 r/w;

(3) exclusion of the State's 100# R.S. 2477 r/w from conveyance to Sea Lion Corporation;

The State also, without explanation, asserts that BLM's reservation of only a 60# wide § 17(b) public easement causes the State to lose that 40# wide portion of its R.S. 2477 r/w not overlapped by the § 17(b) easement.

The BLM has responded that the State's alleged R.S. 2477 r/w precludes *633 neither reservation of a § 17(b) public easement for the Hooper Bay Airport Road nor conveyance of the underlying fee to Sea Lion Corp. BLM asserted that it has neither the authority nor the obligation to adjudicate the validity of the asserted r/w, and that the existence of the alleged r/w cannot be a factor in deciding whether a § 17(b) easement should be reserved. The BLM also asserted without explanation, except by allusion to the Nov. 20, 1979, amendment to S.O. 3029, that it cannot recognize the r/w claimed by the State.

Sec. 14(g) of ANCSA provides in part:

> All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement * * * has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him.

Departmental regulations found in 43 CFR 2650.3-1(a) provide further that:

> Pursuant to sections 14(g) and 22(b) of [ANCSA], all conveyances issued under the act shall exclude any lawful entries or entries which have been perfected under, or are being maintained in compliance with, laws leading to acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as * * * rights-of-way * * *.

*****5*** Accordingly, ?? Native-selected lands subject to rights-of-way are to be included in conveyances pursuant to ANCSA, but the conveyances are subject to the rights-of-way. Further, the Board has previously ruled that both the decision to convey lands and the subsequent conveyance document must specifically identify interests in the lands being conveyed which are protected under ANCSA as valid existing rights. [1] Since rights-of-way granted by the United States are, if valid, protected under § 14(g) of ANCSA as valid existing rights, they must be specifically identified in both the BLM's decision to convey lands and the subsequent conveyance document.

Prior to its repeal in 1976, R.S. 2477 provided simply: "The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

The State asserts that its acceptance of the R.S. 2477 r/w grant severed from the public domain the land underlying the r/w. Such assertion is incorrect.

"A right-of-way is most typically defined as the right of passage over another person's land." *Wilderness Society* v. *Morton,* 479 F. 2d 842, 853 (D.C. Cir. 1973). It would be unusual to apply the term to absolute ownership of the fee simple of lands to be used for a railway or ****634*** any other kind of a way. *Williams* v. *Western Union Ry. Co.,* 5 N.W. 482, 484 (Wis. 1880); BLACK'S LAW DICTIONARY 1489 (4th ed. rev. 1968). Furthermore, "grants by the sovereign for which no compensation is made will be strictly construed against the grantee and pass nothing but what is conveyed in clear and explicit language." *Oregon Short Line R.R. Co.* v. *Murray City,* 277 P. 2d 798, 802 (Utah 1954). "[A] ny ambiguity in a grant is to be resolved favorably to a sovereign grantor-- 'nothing passes but what is conveyed in clear and explicit language' * * * ." *Great Northern Ry. Co.* v. *United States,* 315 U.S. 262, 272, 62 S.Ct. 529, 533, 86 L.Ed. 836 (1942).
[1] Accordingly, a r/w granted by R.S. 2477 is a less-than-fee interest in the nature of an easement. *Berger* v. *Ohlson,* supra at 395; *Oregon Short Line R.R. Co.* v. *Murray City, supra* at 802. Following the acceptance of an R.S. 2477 grant of r/w, the Federal Government retains its fee interest in the land, subject to the r/w, and may dispose of it pursuant to law. *Alfred E. Koenig,* A-30139 (Nov. 25, 1964); *Herb Penrose,* A-29507 (July 26, 1963).

The Federal Government's retention and control of the fee interest in the land affected by an R.S. 2477 r/w, which control includes the Government's authority to issue additional rights-of-way affecting the same land, is manifest in Departmental regulations in 43 CFR 2822. 2-2, which state:

> A right-of-way granted pursuant to R.S. 2477 confers upon the grantee the right to use the lands within the right-of-way for highway purposes only. Separate application must be made under pertinent statutes and regulations in order to obtain authorization to use the lands within such rights-of-way for other purposes. Additional rights-of-way will be subject to the highway right-of-way. Future relocation or change of the additional right-of-way made necessary by the highway use will be accomplished at the expense of the additional right-of-way grantee. Prior to the granting of an additional right-of-way the applicant therefor will submit to the Authorized Officer a written statement from the highway right-of-way grantee indicating any objections it may have thereto, and such stipulations as it considers desirable for the additional right-of-way. Grants under R.S. 2477 are made subject to the provisions of § 2801.1-5(b), (c), (d), (e), (i), and (k) of this chapter.

*****6*** The decision of the District Court in *Berger* v. *Ohlson, supra,* is not contrary. The Court, in discussing an earlier Colorado case, specified that the grant of a r/w under R.S. 2477 "severs the land" from the public domain, and that following appropriation and proper designation, the "way" ceased to be a portion of the public domain. 9 Alaska at 395. But the Court immediately went on to find that the right granted under R.S. 2477 was in the nature of an easement which could exist concurrently with a r/w subsequently granted to the Alaska Railroad. 9 Alaska at 395. The Court manifestly was not declaring that the grantee of

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an R.S. 2477 r/w received fee simple title to the affected ground. The specification that such a grant severs the “land” seems to be an unfortunate choice of words rendered in a context in which the emphasis was on the severance, ***635** and the point being made was that an R.S. 2477 r/w is not a right obtained merely by prescription.
[2, 3] Thus, the existence of an R.S. 2477 r/w for the Hooper Bay Airport Road precludes neither the reservation of an overlapping § 17(b) public easement nor the conveyance of the underlying fee. In either case, the owner of the R.S. 2477 r/w retains the r/w interest, and the reservation and/or conveyance is subject to that r/w interest. [2] Such reservation and/or conveyance does not affect the previously existing r/w. [3] Accordingly, the continued existence of the R.S. 2477 r/w following conveyance of the underlying fee interest is entirely independent of any reservation, pursuant to § 17(b), of a public easement coincident with that r/w interest.

Overlapping § 17(b) public easement and R.S. 2477 r/w interests may cause some administrative concern regarding future maintenance and other responsibility within the affected area. Such concerns, however, do not preclude the existence of both interests concurrently.

[4] The BLM has asserted that it has neither the authority nor the obligation to adjudicate the validity of the State's asserted r/w. In deed, the Secretary's Nov. 20, 1979, amendment to S.O. 3029 declared that BLM should not adjudicate rights-of-way claimed under R.S. 2477. Nonetheless, said amendment does not preclude identification of claimed R.S. 2477 rights-of-way. Such rights-of-way shall be identified in the decision to issue conveyance and the conveyance document in the same manner as other third-party interests which the BLM need not adjudicate. Such identification does not recognize or declare the validity of the alleged interest.

Order

The above-designated decision of the Bureau of Land Management is hereby amended so as to conform to this decision of the Board. Publication of an amended decision to issue conveyance is not required. The conveyance document issued pursuant to the above-designated decision of the Bureau of Land Management shall expressly state that the conveyance of land and the reservation of a public easement for the Hooper Bay Airport Road are each subject to the State's R.S. 2477 right-of-way, if valid, for the Hooper Bay Airport Road.

***7** This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge
ABIGAIL F. DUNNING
Administrative Judge
JOSEPH A. BALDWIN
Administrative Judge

Footnotes

a1 Not in chronological order.
FN1. *Appeals of the State of Alaska/Seldovia Native Association, Inc.,* 2 ANCAB 1, 84 I.D. 349 (1977) [VLS 75-14/75-15]. Secretarial policy expressed in S.O. 3029 and not changed by the Nov. 20, 1979 amendment thereto essentially affirmed the Board's ruling on this matter.

2 43 U.S.C. § 1613(g); *State* v. *Crawford,* 441 P. 2d 586, 590, (Ariz. 1968).

3 The rights acquired by the public pursuant to R.S. 2477 are not affected by the passing into private ownership of land over which a public highway has been thus established. *Lovelace* v. *Hightower,* 168 P. 2d 864 (N.M. 1946).

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