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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS

IBLA 2014-27) AA-55129
)
PETER SLAIBY AND REJANI SLAIBY,) Land Conveyance
)
Appellants.)
_____)

**INTERVENOR ALASKA RAILROAD CORPORATION'S ANSWER
TO APPELLANTS' SUPPLEMENTAL STATEMENT OF REASONS**

The Appellants requested and were granted leave to file a brief addressing a 1982 Board decision entitled *The Alaska Railroad*, 65 IBLA 376 (1982) ("1982 Decision") in the context of this appeal. In their Supplemental Statement of Reasons, Appellants contend that the 1982 Decision somehow undermines the decision of the Bureau of Land Management ("BLM") to issue a patent to Intervenor Alaska Railroad Corporation ("ARRC") for right-of-way ("ROW") land that is at issue in this case.^{1/} But Appellants are wrong for several reasons.

First, the 1982 Decision is irrelevant to the determinative issue in this appeal, which is whether BLM complied with the Alaska Railroad Transfer Act ("ARTA")^{2/} when it issued its decision approving a patent to ARRC that is the subject of this appeal. Second, the discussion in the 1982 Decision regarding the Act of March 12, 1914 ("1914 Act") that led to the creation of the Alaska Railroad is irrelevant to the property interest in the ROW that was conveyed to ARRC in the property at issue here. That property interest was purchased by the federal Alaska Railroad via a warranty deed in 1965; it was not created pursuant to the 1914 Act. Third, even if the 1982 Decision was relevant to the issues in this appeal, Appellants mischaracterize its holdings. The 1982 Decision simply does not support the contentions made by Appellants about the nature of ARRC's interest in the subject ROW property.

^{1/} Appellants' Supplemental Statement of Reasons ("Supp. SOR") at 3-7.

^{2/} Pub.L. 97-468, 96 Stat. 2556 (January 14, 1983), codified at 45 U.S.C. §§ 1201 et seq.

1 A. The 1982 Decision is Irrelevant to Whether BLM Complied with
2 ARTA.

3 Most critically, the 1982 Decision bears no relevance to the question of whether
4 BLM complied with ARTA when it entered Decision No. AA-55129-20 (“Decision”)
5 approving the patent to ARRC for the ROW land that is the subject of this appeal (the
6 “Proposed Patent”). In ARTA, Congress provided detailed requirements and
7 instructions to BLM for conveying federal interests in Alaska Railroad lands to the
8 State of Alaska. As both ARRC and BLM demonstrated in their initial Answers to
9 Appellants’ Statement of Reasons, the determinative question in this appeal is whether
10 BLM complied with those requirements of ARTA when it issued the Decision.^{3/}

11 The 1982 Decision had nothing to do with compliance under ARTA for two very
12 simple reasons. First, ARTA had not even been enacted in 1982. Second, the 1982
13 Decision decided a narrow issue arising under the Alaska Statehood Act of July 7,
14 1958, Pub.L. 85-508, 72 Stat. 339, 340 (“Statehood Act”) that is unrelated to ARTA.

15 ARTA was not enacted until January 1983.^{4/} The 1982 Decision, by contrast,
16 was decided on July 20, 1982, and involved the appeal from a 1981 BLM decision.^{5/}
17 The issue decided on appeal in the 1982 Decision was whether BLM correctly
18 determined that land within the federally-owned Alaska Railroad ROW was available
19 for selection by the State of Alaska under the Statehood Act because it was not
20 “occupied, appropriated, and/or reserved” so as to be exempt from selection under
21 Section 6(b) of the Statehood Act.^{6/} The 1982 Decision addressed only this narrow
22 issue under the Statehood Act, which is unrelated to ARTA, which in turn did not even
23 exist at the time of the 1982 Decision.

24 ARTA supplies the rule of decision for this appeal. ARTA’s requirements as to
25 the minimum property interest BLM must convey to ARRC in federal Alaska Railroad

26 ^{3/} See Intervenor Alaska Railroad Corporation Answer to Appellants’ Statement of Reasons
27 (“ARRC Answer”) at 1-2, 14; see also *id.* at 6-8, 14-17 (describing ARTA’s provisions relating
28 to the transfer of federal Alaska Railroad lands to the State of Alaska and BLM’s compliance
29 with those provisions with respect to the subject property); see also BLM’s Answer (“BLM
30 Answer”) at 4-7 & n.5.

^{4/} See Pub.L. 97-468, 96 Stat. 2556, enacted January 14, 1983.

^{5/} See 1982 Decision, 65 IBLA at 376.

^{6/} See 65 IBLA at 377-78.

1 ROW lands and how BLM must proceed in effectuating those conveyances are very
2 specific.^{7/} Except in a few exceptional cases, such as ROW in Denali Park and
3 through military bases, BLM must issue a patent to ARRC conveying the entire federal
4 interest in the ROW lands, but that interest must be not less than an exclusive use
5 easement as defined in ARTA.^{8/} And ARTA does not leave the particulars of the
6 required exclusive use easement to the imagination, instead setting out a very detailed
7 definition of what that interest entails.^{9/}

8 In deciding to grant the Proposed Patent to ARRC that is at issue here, BLM
9 complied with these requirements of ARTA.^{10/} Nothing in the Appellants' briefs to date,
10 including their Supplemental Statement of Reasons, undermines that conclusion. For
11 that reason alone, the Board should hold that the BLM Decision was proper.

12 **B. Appellants' Arguments Relating to the 1914 Act Do Not Apply to the**
13 **Land at Issue Here.**

14 Just as they did in their initial Statement of Reasons, Appellants devote the
15 lion's share of their Supplemental Statement of Reasons to arguments relating to the
16 1914 Act that led to the creation of the Alaska Railroad, which was both owned and
17 operated by the federal government.^{11/} Although Appellants' arguments relating to the
18 1914 Act are unavailing on their merits,^{12/} those arguments are also irrelevant to the
19 issues in this appeal for two reasons. First, the 1914 Act has no bearing on whether
20 BLM complied with the conveyance requirements of ARTA. Second, even if the 1914
21 Act was relevant to the issues in this appeal, which it is not, the 1914 Act bears no
22 relationship to the property interest the federal government seeks to convey to ARRC
23 in the Proposed Patent.

24 As described in greater detail in ARRC's initial Answer, the federal government
25 purchased its interest in the property at issue in this appeal from an adjoining
26 residential landowner via warranty deed in 1965.^{13/} That purchase was necessitated

27 ^{7/} See ARRC Answer at 6-10.

28 ^{8/} See *id.* at 7-10, 15-16.

29 ^{9/} See 45 U.S.C. §1202(6) (quoted in full in ARRC Answer at 9-10).

30 ^{10/} See ARRC Answer at 14-17.

^{11/} See Supp. SOR at 2-7.

^{12/} See ARRC Answer at 21-23; see also Section C, *infra*.

^{13/} See ARRC Answer at 10-11.

1 by the need to reconstitute the Alaska Railroad ROW in the area, which was
2 devastated by the Good Friday Earthquake of 1964. The federal government's
3 property interest in the subject property, therefore, arose from the warranty deed
4 obtained in 1965. That warranty deed (the "Jarvi Deed"), which conveyed "[a]
5 perpetual right of way and easement to construct, reconstruct, operate and maintain a
6 railroad line and appurtenances, including telephone and telegraph lines," does not
7 invoke or otherwise refer to the 1914 Act.^{14/} The federal government's property
8 interest in the subject property, therefore, was not created pursuant to the 1914 Act
9 but solely by the 1965 Jarvi Deed. The 1914 Act simply is not relevant to the scope or
10 nature of that property interest.

11 Although the nature of the property interest conveyed to the federal government
12 under the Jarvi Deed is not relevant to the determinative issue on appeal of whether
13 BLM complied with ARTA in deciding to issue the Proposed Patent, the Jarvi Deed
14 did, in fact, convey an exclusive use easement to the federal Alaska Railroad. As
15 described in ARRC's initial Answer, a legal opinion obtained by BLM prior to its
16 issuance of the Decision confirmed both ARTA's requirement that BLM convey at least
17 an exclusive use easement to ARRC and that the Jarvi Deed conveyed an exclusive
18 use easement meeting the minimum property interest requirement of ARTA.^{15/}

19 **C. Appellants Mischaracterize the Holding in the 1982 Decision, Which**
20 **Would Fail to Support Their Position Even if it Were Relevant Here.**

21 Appellants contend in their Supplemental Statement of Reasons that the 1982
22 Decision "defined the nature and extent of the federal Alaska Railroad's land interest
23 under the 1914 Act."^{16/} They further contend that in the 1982 Decision, the Board
24 "conclude[d] that because of the specific purposes and the light, non-exclusive burden
25 of the 1914 easement, its presence did not disqualify that land from selection by the
26 State of Alaska."^{17/} With all due respect, these descriptions of the 1982 Decision
27 misstate the Board's actual holdings in that decision.

28 ^{14/} See Appellants' Exhibit ("App. Ex.") 12, at 2; ARRC Answer at 11.

29 ^{15/} See ARRC Answer at 12-13; 20-21 (citing App. Ex. 12).

30 ^{16/} Supp. SOR at 4.

^{17/} *Id.*

1 Although the Board discussed the 1914 Act and its relationship to previous
2 federal acts granting railroad ROWs, the Board nowhere in the 1982 Decision made a
3 definitive finding about the nature and extent of the federal Alaska Railroad's interests
4 in lands designated as ROW under the 1914 Act. The Board considered "the nature of
5 the right-of-way granted by similar statutes" as a means of obtaining guidance on the
6 question of whether the Alaska Railroad ROW was "occupied, appropriated and/or
7 reserved so as to be exempt from State selection."^{18/} In doing so, the Board
8 considered cases relating to both pre-1871 and post-1871 railroad ROW grants. The
9 Board noted that pre-1871 grants were sometimes characterized as granting ROWs
10 that were in the nature of limited fee interests, while some post-1871 grants were
11 determined to have granted easements that did not rise to the level of a fee interest.^{19/}
12 The Board considered whether these various ROW grants rendered the granted ROW
13 lands occupied, appropriated or reserved so as to be exempt under statehood acts. In
14 the end, the Board identified cases in which courts held that neither pre-1871 nor post-
15 1871 railroad ROW grants were exempt from statehood act selections.^{20/} With respect
16 to pre-1871 ROW grants, the Board stated that:

17 Despite the broader limited or qualified fee interest granted by the earlier
18 railroad right-of-way Acts of 1862 and 1864, the court held that lands
19 within school section granted to the states which were subject to such
20 rights-of-way were not otherwise disposed of so as to entitle the State of
21 Wyoming to indemnity selections for such lands. Rather, the court held it
22 was the intent of Congress that Wyoming take the sections subject to the
23 railroad right of way.^{21/}

24 Based on those authorities, the Board held that Alaska Railroad ROW should not be
25 considered to be appropriated or reserved and therefore not exempt from State of
26 Alaska selection under the Statehood Act.^{22/}

27 Nowhere in the 1982 Decision, however, did the Board either expressly or
28 implicitly conclude, as Appellants argue, that either "the specific purposes of the 1914
29 Act" or any "light, non-exclusive burden of the 1914 easement" rendered the Alaska

30 ^{18/} See 65 IBLA at 378.

^{19/} *Id.* at 378-79.

^{20/} *Id.*

^{21/} *Id.* at 379 (citing *State of Wyoming v. Andrus*, 602 F.2d 1379, 1385 (10th Cir. 1979)).

1 Railroad ROW open for selection under the Statehood Act. For one thing, the Board
2 did not discuss the specific purposes of the 1914 Act. If it had, it would have had to
3 compare and contrast the designation of the Alaska Railroad ROW from federal land
4 for use by a federally constructed, owned and operated railroad under the 1914 Act
5 with the granting of railroad ROWs to privately owned and operated, for-profit railroads
6 under other railroad ROW statutes.^{23/}

7 And nowhere in the 1982 Decision did the Board find that the Alaska Railroad
8 ROW consisted of an easement with a "light, non-exclusive burden." Instead, as
9 described above, the Board made the general finding that federally-granted railroad
10 ROWs, whether granted as limited fee interests or as easements, were not exempt
11 from state selection under statehood acts. Nowhere, even in its discussions of post-
12 1871 railroad ROW grants that it characterized as being in the nature of easements,
13 did the Board address the exclusivity of such easements, much less find that such
14 easements were non-exclusive. The idea that the Board held that the Alaska Railroad
15 ROW was a non-exclusive easement has been created by the Appellants from whole
16 cloth. The Board certainly never made any such finding or ruling.

17 Indeed, as ARRC demonstrated in its initial Answer, railroad ROWs, even when
18 characterized as "easements," provide railroads with exclusive control over the
19 surface. As has been recognized by many courts and commentators, exclusive
20 control over railroad ROWs is crucial to the safe and economic functioning of the
21 railroads that use them.^{24/} This is true whether a railroad ROW is described as a
22 "limited fee" or an "easement." As explained by the Tenth Circuit in one of the cases
23 relied upon by the Board in the 1982 Decision, the concept of a "limited fee" interest in
24 railroad ROWs is no longer necessary in order to denote exclusive use and

25 ^{22/} *Id.*

26 ^{23/} See ARRC Answer at 21 (comparing the purposes of the 1914 Act and the 1875 Act).

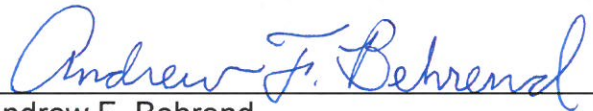
27 ^{24/} See ARRC Answer at 18-21 (citing authorities regarding exclusive control of ROWs by
28 railroads); see also *Union Pacific R.R. v. Santa Fe Pacific Pipelines*, 231 Cal.App. 4th 134, 163
29 (Cal. Ct. App. 2014) ("As to rights-of-way granted by Congress in 1875 and beyond, the
30 Railroad has exclusive rights to the surface and, in addition, 'broad and extensive rights of
sub-lateral and subjacent support to prohibit interference with railroad operations and
maintenance.'). The legal opinion obtained by BLM prior to its decision to issue the Proposed
Patent concurred that railroad ROWs are exclusive to railroads. See App. Ex. 12 at 4.

1 possession.^{25/} Instead, '[w]ith the expansion of the meaning of easement to include,
2 so far as railroads are concerned, a right in perpetuity to exclusive use and possession
3 the need for the "limited fee" label disappeared."^{26/} Both ARTA itself and its legislative
4 history demonstrate that Congress recognized how critical exclusive control of the
5 Alaska Railroad ROW would be to operating the Alaska Railroad after it was
6 transferred to the State of Alaska.^{27/}

6 **D. Conclusion.**

7 For the reasons stated above, neither the 1982 Decision itself nor anything in
8 Appellants' Supplemental Statement of Reasons undermines in any way the Decision
9 at issue in this appeal.^{28/} BLM complied with the requirements of ARTA in issuing the
10 Decision and the Proposed Patent. Consequently, the Decision should be upheld by
11 the Board and BLM should issue a final patent for the ROW land at issue here.

12 DATED this 10th day of June, 2015.

13 

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22 ^{25/} See *Wyoming v. Udall*, 379 F.2d at 639 (citations omitted).

23 ^{26/} *Id.*; see also *State of Wyoming v. Andrus*, 602 F.2d 1379, 1382-83 (10th Cir. 1979) (citing
24 *Wyoming v. Udall*, 379 F.2d at 640).

25 ^{27/} See ARRC Answer at 5-6, 9-10, 23-26.

26 ^{28/} ARRC objects to the insinuation by Appellants that it is somehow improper that the 1982
27 Decision was not raised by ARRC or BLM in their initial Answers. There is no basis for such a
28 criticism. As discussed in this brief, the 1982 Decision is neither relevant to the determinative
29 issues in this appeal nor supportive of Appellants' positions. Appellants' criticism also rings
30 hollow given that they did not raise the 1982 Decision in either their initial Statement of
Reasons or their reply brief despite the fact that the decision is publically and readily available.

1 **CERTIFICATE OF FILING AND SERVICE**

2 I certify that on June 10, 2015, I filed and served this Answer to Appellants'
3 Supplemental Statement of Reasons, as indicated below, on:

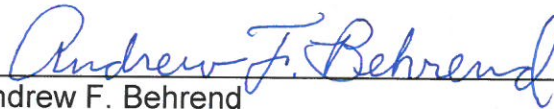
4 **FILED:**

5 United States Department of the Interior
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9 Arlington, Virginia 22203
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