



United States Department of the Interior

OFFICE OF THE SOLICITOR
ALASKA REGION

4230 University Drive
Suite 300
Anchorage, Alaska 99508-4626
(907) 271-4131

BLM.AK.4458
(LLAK944200)

December 20, 2012

Memorandum

To: Margaret McDaniel, Land Law Examiner,
Bureau of Land Management, Alaska State Office

From: Dennis J. Hopewell, Senior Attorney *Dennis J. Hopewell*

Subject: Alaska Railroad Transfer – Potter Hill

Introduction

You requested my opinion on the conveyance of seven¹ lots in the Potter Hill area of Anchorage to the Alaska Railroad Corporation (ARRC) under the Alaska Railroad Transfer Act (ARTA), Pub. Law 97-468, 45 U.S.C. §§ 1201-1214. The United States still holds legal title to the railroad easements for these seven lots and you want advice on how to proceed. Three main issues are implicated: 1) what level of title should be conveyed; 2) what process should be used for the conveyance; and 3) what legal description should be used.

Short Answer

The short answer to your questions is ARTA requires conveyance of all the federal interests in the property and at a minimum conveyance of an exclusive-use easement. The Bureau of Land Management (BLM) should use its normal process for conveying property to ARRC, namely a decision to do so with copies served on all appropriate parties. Following issuance of the decision, the property can be conveyed by patent using the same legal description used in the acquisition of the land by the United States.

¹ Initially the inquiry included eight lots. However, it was determined that one of the lots, Lot 19 of Block 3, Sunset Hills West Subdivision, was included in a prior interim conveyance to the ARRC. Therefore, no legal advice is needed on for that particular piece of property and it is not addressed in this memorandum.

Background

The seven lots in question were acquired from private parties in two separate transactions by the Alaska Railroad in 1965. At that time the Alaska Railroad was still owned and operated by the United States. The acquisitions were part of a realignment of the Alaska Railroad necessitated by the 1964 earthquake.

Portions of Lots 4, 13 and 14 of Block 3 of Sunset Hills West Subdivision² were acquired from Edwin and Yula Jarvi by a warranty deed dated July 2, 1965. Portions of Lots 15-18 and 20 were acquired from William Hancock by a warranty deed for perpetual easement of November 4, 1965.

The Jarvi deed included Lots 4, 13 and 14 as Parcel 4 of the legal description. The interest conveyed in Parcel 4 was described as:

A perpetual right of way and easement to construct, reconstruct, operate and maintain a railroad line and appurtenances, including telephone and telegraph lines, upon the lands described ... [Parcel 4].

The Hancock deed lumped Lots 15-18 and 20 together as Parcel 3. By its express terms the deed conveyed:

... the right privilege, and easement of using for railroad purposes authorized under the Act of March 12, 1914, 38 Stat. 304, as amended, 48 USC 301-308, exclusive of any other person or persons, as parties of the second part [United States of America] shall solely determine, in perpetuity, without hindrance, over and on those certain strips of parcels of land situate, lying and being in the Anchorage Recording Precinct, Third Judicial District, State of Alaska, and more particularly described as ... [Parcel 3].

Applicable Law

Several provisions of ARTA control this matter. Where private property is involved, the federal interest in the property must be determined even though ARTA requires the federal government to convey at least an exclusive-use easement to the Alaska Railroad Corporation. Section 606(b)(4)(B) of ARTA, 45 U.S.C.A. § 1205(b)(4)(B) (2011), sets out the requirement for conveyance of at least an exclusive-use easement as follows:

(B) Where lands within the right-of-way, or any interest in such lands, have been conveyed from Federal ownership prior to January 14, 1983, or is subject to

² All references to lots and blocks in this memorandum are to Block 3 of the Sunset Hills West Subdivision. The portions of the lots acquired in 1965 which will be conveyed under ARTA can be more particularly described as: those portions of Lots 3, 13-18 and 20 of Block 3 of Sunset Hills West Subdivision, according to the recorded plat thereof, lying southwesterly of the line designated as the "Tako Line" on that certain map titled Potter Hill Relocation, Alaska Railroad, designated as document 64-105, filed October 9, 1964, in the Office of the District Recorder for the Anchorage Recording Precinct, Third Judicial District, Alaska.

a claim of valid existing rights by a party other than a Village Corporation, the conveyance to the State of the Federal interest in such properties pursuant to section 1203(b)(1)(B) or (2) of this title 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 section 1203(b) of this title. (Emphasis added.)

The minimum conveyance required by ARTA is defined in section 603(6), 45 U.S.C.A. § 1202(6) (2011), as:

(6) "exclusive-use easement" means an easement which affords to the easement holder the following:

(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 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 track, fixtures, and structures to such lands and to exclude other persons from all or part of such lands;

Finally, section 604(b)(2), 45 U.S.C.A. § 1203(b)(2) (2011), requires:

(2) The Secretary shall deliver to the State an interim conveyance of rail properties of the Alaska Railroad described in paragraph (1)(C) of this subsection that become available for conveyance to the State after the date of transfer as a result of settlement, relinquishment, or final administrative adjudication pursuant to section 1205 of this title. Where the rail properties to be conveyed pursuant to this paragraph are surveyed at the time they become available for conveyance to the State, the Secretary shall deliver a patent therefor in lieu of an interim conveyance.

Analysis

Since ARTA requires the conveyance of all federal interest in rail properties and at least an exclusive-use easement, the starting point of our analysis is to determine and identify the federal interests in each of the parcels under consideration.

By its terms, as well as its title, the Hancock deed conveyed a perpetual railroad easement. The terms of that deed, quoted above, are essentially equivalent to the ARTA definition of exclusive-use easement, also quoted above. The perpetual easement is for railroad purposes. It is also exclusive of non-railroad parties and it is the United States and its assigns that have the authority to determine how others can use land within the easement.

The Jarvi deed also granted a perpetual easement for railroad purposes. The wording of that easement, quoted above, contains terms and provisions very similar to the requirements of an exclusive-use easement as defined in section 603(6) of ARTA, 45 U.S.C.A. § 1202(6), quoted above. Both the deed and the statute provide the right to use the land to operate and maintain a railroad line, to lay (construct) more tracks and to use the easement for communication purposes such as telephone lines. But the terms of the Jarvi deed are not as detailed as the ARTA definition and the deed does not specify that the easement is exclusive of all other uses. Still, there is no doubt the property is physically and legally subject to an easement for an existing railroad easement. Railroad easements are by their nature both broad and exclusive. 74 C.J.S. *Railroads* § 225 (2002).³ Exclusive control is necessary to insure uninterrupted and safe operation of the railroad and to protect members of the public from physical harm. The exclusive-use easement defined in ARTA mirrors the general terms of a standard railroad easement and the terms of the Jarvi deed should be construed to match the specific terms of the exclusive-use definition in ARTA. Even if the Jarvi deed were construed to grant less interest than the exclusive-use easement of ARTA, conveyance of at least an exclusive-use easement is still required by that Act. 45 U.S.C.A. § 1205(b)(4)(B) (2011).

Conclusion

Based on the above background, referenced law and analysis, the BLM should proceed with a decision to convey to the ARRC the following lots in Block 3 of the Sunset Hills West Subdivision:

1. Exclusive-use easement to portions of lots 4, 13 and 14 (Jarvis deed); and
2. Exclusive-use easement to a portions of Lots 15-18 and 20 (Hancock deed).

The process for conveyance is the normal one. The BLM should issue a decision approving conveyance to the ARRC pursuant to ARTA. Copies of the approval decision must be served on interested parties including the successors in interest to the Jarvi and Hancock deeds. The actual conveyance must wait until the appeal period plus applicable grace period has run. If there is an appeal, the appeal must be resolved before the lots can be conveyed to the ARRC.

The legal descriptions used to acquire the land in 1965 are sufficient for conveyance under ARTA. Those legal descriptions were based on a proper state survey and are shown on an accepted and recorded state subdivision plat. Carefully matching the legal descriptions is the

³ Since it may help in understanding the comparison to a general railroad right-of-way, in 74 C.J.S. *Railroads* § 225, it is explained: "Generally, after a railroad company's right of way has been located and constructed, it has the right to the uninterrupted and exclusive possession, use, and control of the surface of the land constituting its right of way and necessary for conducting its business. ... As long as the railroad company occupies any portion of its right of way, it has the exclusive use and right of control coextensive with its boundaries. [footnotes omitted]."

best way to ensure BLM is conveying all of the federal interests in those parcels. It also creates the best title record because it makes clear that the property previously acquired by the United States is the land being conveyed to the ARRC. Moreover, use of the existing survey description is consistent with section 604(b)(2) of ARTA which provides for issuance of a patent when the land is surveyed. 45 U.S.C.A. § 1203(b)(2) (2011). Accordingly, when the time for conveyance arrives, BLM should prepare and issue a patent for the lots at issue using the same descriptions under which title was acquired by the United States.

While this opinion memorandum is covered by the attorney-client privilege and can be kept confidential, BLM may decide to release copies to nonfederal parties, such as the ARRC and the interested landowners.

If you have any questions, please do not hesitate to contact me or, in my absence, Steve Scordino, Attorney-Advisor, or Joe Darnell, Acting Regional Solicitor, at 907 271-4131.