

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

Intervenor Alaska Railroad Corporation ("ARRC") hereby files its Answer to the Statement of Reasons filed by Appellants.<sup>1'</sup>

**I. INTRODUCTION**

The decision by BLM to grant ARRC a patent conveying at least an exclusive use easement in the portion of the ARRC railroad right-of-way ("ROW") adjacent to Appellants' residential property<sup>2'</sup> is proper as a matter of law. The Alaska Railroad Transfer Act, 45 U.S.C. §§ 1201-1214 ("ARTA") specifically requires BLM to issue such a patent to ARRC. ARTA, which authorized the transfer of the federally-owned Alaska Railroad to the State of Alaska ("State"),<sup>3'</sup> requires BLM to convey to the State the United States' entire interest in all Alaska Railroad properties. More specifically, ARTA requires BLM to convey at least an exclusive use

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<sup>1'</sup> Appellants' Statement of Reasons ("SOR") was served on ARRC on January 13, 2014. ARRC and appellee Bureau of Land Management ("BLM") received 30-day extensions of their time to respond to the SOR pursuant to 43 C.F.R. § 4.405(f).

<sup>2'</sup> The portion of the ARRC ROW at issue in this appeal will be referred to herein as "the Property." The Property is more specifically described in Section II, *infra*.

<sup>3'</sup> ARTA defines "State" as the "State of Alaska or the State-owned railroad, as the context requires." 45 U.S.C. § 1202(13). ARRC is the instrumentality created by the State of Alaska to own and operate the Alaska Railroad upon transfer from the United States. See AS 42.40 (Alaska Railroad Corporation Act).

easement, as defined in ARTA, in the ROW.<sup>41</sup> That requirement is critical. Congress recognized in passing ARTA that transfer of less than an exclusive interest in the ROW would undermine ARRC's ability to operate a railroad safely and economically. The exclusive use easement requirement functions as a safety net to ensure that even where ARRC owns less than fee simple interest in the ROW, it can still safely and economically operate a railroad.

Appellants argue that BLM may not convey an exclusive use easement in the Property to ARRC. They assert that BLM may only convey a non-exclusive easement. They base this argument on three incorrect premises: (i) that ARTA does not require BLM to convey an exclusive use easement in the Property; (ii) that the United States does not own at least an exclusive use easement in the Property; and (iii) that Congress cannot require the United States to convey a greater interest than it owns in the Property. They also argue that a patent is an improper instrument for conveying an easement. All of these assertions are wrong.

Under ARTA, that BLM must convey to ARRC at least an exclusive use easement in all portions of the ARRC ROW. Moreover, the warranty deed by which the United States purchased a perpetual railroad right-of-way and easement in the Property granted the United States exclusive use of the ROW, and that right is available for conveyance to ARRC. Not only is a patent an appropriate vehicle for conveying an exclusive interest in the ROW, ARTA expressly requires BLM to issue patents for the railroad lands to be conveyed. Finally, even if the perpetual railroad right-of-way and easement obtained by the United States is non-exclusive - which it is not - Congress had the authority to require BLM to obtain and transfer to ARRC an exclusive interest in the Property. That Congress intended to exercise that authority is evident from the fact that ARTA requires the U.S. Department of Justice to defend any challenges to ARRC's exclusive title to the ROW.

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<sup>41</sup> See Section II.A.2, *infra* (describing ARTA and its exclusive use easement requirement).

## II. BACKGROUND

This appeal challenges a decision by BLM approving the issuance of a patent to ARRC for the Property, which is located adjacent to Appellants' home in Anchorage, Alaska. The Property is described in the proposed patent at issue in this appeal:

All those portions of Lots Four (4), Thirteen (13) and Fourteen (14) of Block Three (3) of Sunset Hills West Subdivision, according to the recorded plat thereof, laying southwesterly of the line designated as "Take 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, State of Alaska.<sup>61</sup>

On September 16, 2013, BLM issued Decision No. AA-55129-20 ("Decision"), which approved the issuance of a patent for the Property pursuant to ARTA and set forth a proposed patent conveying to ARRC all of the United States' interest in the Property, but not less than an "exclusive use easement" as that term is defined in ARTA ("Proposed Patent").<sup>61</sup> In order to understand why BLM decided to issue a patent for an exclusive use easement to the Property, and why that decision is required by ARTA, a general understanding of the histories of both the Alaska Railroad and the Property is critical. Those histories are summarized below.

### A. The Alaska Railroad

The Alaska Railroad is the only railroad ever constructed, owned and operated by the United States federal government. Accordingly, the history of its establishment, operation and eventual transfer to the State of Alaska is unique.

#### 1. The Federally-Owned Alaska Railroad

During the early 1900s, several privately-owned railroads were built and operated in the Territory of Alaska. Each of these railroads ultimately failed or faced dire financial

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<sup>61</sup> See Appellants' Exhibit ("App. Ex.") 1, at 4. Appellants assert an interest only in the portions of Lots 13 and 14 contained in the lands to be patented. The owner of the non-ROW portion of Lot 4 has not appealed.

<sup>62</sup> See App. Ex. 1. The Decision and the process leading to it are detailed in Section II.C, *infra*.

circumstances.<sup>7/</sup> Having seen the difficulties faced by private entities constructing and operating railroads in Alaska, and recognizing the importance of rail service to the development of the Territory, Congress took a different approach. It passed legislation authorizing the creation of a federally owned and operated railroad in Alaska.<sup>8/</sup>

The Act of 1914 authorized and directed the President to take a broad range of actions to construct, own and operate a railroad on a route of up to 1,000 miles in the Territory of Alaska. Among the actions authorized by the Act of 1914 were (i) "to purchase or otherwise acquire all real and personal property necessary to carry out the purposes of this Act"; (ii) "to exercise the power of eminent domain in acquiring property for such use"; and (iii) "to acquire rights of way, terminal grounds, and all other rights . . . ."<sup>9/</sup> The Act went on to provide that:

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 . . . .<sup>10/</sup>

The federal government wasted no time in complying with Congress's directives in the Act of 1914. Rights-of-way were established between the seaport of Seward and the interior mining community of Fairbanks and preliminary construction began on the railroad in 1915.<sup>11/</sup> The Alaska Railroad's "golden spike" was driven by President Harding in Nenana in July 1923.<sup>12/</sup>

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<sup>7/</sup> See ARRC Exhibit ("ARRC Ex.") A at 27-28.

<sup>8/</sup> Act of March 12, 1914, 43 U.S.C. 975 *et seq.*; 38 Stat. 305 ("Act of 1914"), repealed by ARTA, Pub.L. 97-468, Title VI, §615(a)(1). A copy of the Act of 1914 is attached as ARRC Ex. B.

<sup>9/</sup> See ARRC Ex. B at 2 (Act of 1914, Section 1).

<sup>10/</sup> See *id.* at 3 (Act of 1914, Section 1).

<sup>11/</sup> See ARRC Ex. A at 35-41

<sup>12/</sup> See ARRC Ex. A at 49.

For the next several decades, the federal government owned and the U.S. Department of Transportation operated the Alaska Railroad, moving freight and passengers between Seward, Anchorage and Fairbanks. By the early 1980s, however, the federal government began discussing the concept of transferring the Alaska Railroad to another entity.

## 2. The Alaska Railroad Transfer Act (ARTA)

In 1982, the legislation was introduced in Congress authorizing the transfer of the Alaska Railroad, including all of its real and personal property, to the State of Alaska. As the proposed legislation worked its way through Congress, the issue of the appropriate level of title to the Alaska Railroad ROW and other lands to be transferred to the State of Alaska was prominent among the points under discussion.

There was general agreement that most land of the federally-owned Alaska Railroad, including its ROW, was held in fee simple title by the United States and that most land therefore would be transferred to the State in fee.<sup>13/</sup> It was recognized, however, that some Alaska Railroad lands were subject to third party claims, including claims by Native groups and individuals under the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.* ("ANCSA") and claims of other third-parties such as those holding homestead patents.<sup>14/</sup> Congress

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<sup>13/</sup> See, e.g., ARRC Ex. C, Report No. 97-479, Senate Committee on Commerce, Science and Transportation, 97<sup>th</sup> Congress, 2d Session, June 22, 1982, at 5 (Under the proposed ARTA, the United States "would convey to the State a fee interest in the 200-foot strip comprising the railroad track right-of-way, amounting to roughly 12,000 acres. This fee estate is recognized by the Committee to be the current interest of the Alaska Railroad derived from common practice and authorized under section 1 of the March 12, 1914 Alaska Railroad Act.").

<sup>14/</sup> See ARRC Ex. C, at 4. Federal lands in Alaska could have been subject to a wide variety of both Native and non-Native claims prior to transfer of the Alaska Railroad to the State. Such claims could have arisen under several Native allotment acts, including the Alaska Native Allotment Act, 34 Stat. 197, May 17, 1906; the Alaska Native Townsite Act, 44 Stat. 629, May 25, 1926; the Townsite Act, 26 Stat. 1099, March 3, 1891; Native Regional Corporation selections; the Homestead Act of Alaska, 30 Stat. 409, May 14, 1898; mining claims under the General Mining Act, 17 Stat. 91, May 10, 1872; and acts providing for claims of trade and manufacture sites. Appellants' focus on just on 1906 Native Allotment Act claims and Native Village Corporation claims in arguing for a narrow construction of the coverage of Section 1205

recognized not only that the proposed transfer legislation must set forth a process for determining any such third-party claims, but also that it was critical that the United States provide the State with exclusive control of the ROW.<sup>16f</sup> Otherwise, the State's ability to maintain and operate a safe and economical railroad would be undermined.<sup>16f</sup> Consequently, a minimum interest to be conveyed to the State, called an "exclusive use easement" was developed "to insure that the State-owned railroad will receive exclusive and complete control over land traversed by the right-of-way."<sup>17f</sup>

ARTA was enacted on January 14, 1983. It provides detailed procedures governing the transfer of the Alaska Railroad from federal to State ownership. Several provisions relate to transfer of real property, the type of conveyances to be used in that transfer and the nature of the title to be conveyed.<sup>18f</sup> ARTA requires that, upon the date of transfer of the Alaska Railroad to the State, the United States must convey to the State all federal interest in "rail properties of

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effectively - and improperly - ignores the many and various third-party claims that might have been necessary to resolve under the process laid out in ARTA.

<sup>16f</sup> See, e.g., ARRC Ex. D, Congressional Record-Senate, Dec. 21, 1982, at 2 ("On the date of the transfer [under ARTA], the State would be granted fee title to lands not subject to such [unresolved] claims [of valid existing rights] and, with respect to lands so subject, an operating license to insure that operations of the railroad are not affected in any way by the new process."); *id.* ("The concept of an exclusive use easement . . . represents the minimal interest the State is to receive in the Alaska Railroad right-of-way following completion of the expedited adjudication process. . . . It is also the interest the State will receive through the Denali National Park and Preserve. In other areas, where the right-of-way crosses land owned in fee by the Federal Government, the full fee title to the right-of-way will be transferred to the State.")

<sup>16f</sup> See, e.g., ARRC Ex. C, at 5 ("[T]ransfer of the railroad right-of-way in fee simple is essential to the continued operation of the railroad, and . . . the actual physical characteristics of the railroad (e.g., the right-of-way and reserves) [should] be maintained to the extent required to assure the transfer of an economically viable railroad operation."); *id.* at 9 (in adjudicating third party claims, the Secretary of the Interior "is directed to consider the findings and policies of this legislation, including the importance of transferring the right-of-way in fee to the continued operation of the railroad . . . . [T]his determination is critical to the future of the railroad and must be made expeditiously."); ARTA, 45 U.S.C. § 1205(b)(4)(A)(ii) ("Congress finds that exclusive control over the right-of-way by the Alaska Railroad has been and continues to be necessary to afford sufficient protection for safe and economic operation of the railroad.").

<sup>17f</sup> ARRC Ex. D, at 2.

<sup>18f</sup> See 45 U.S.C. §§ 1203, 1204, 1205.

the Alaska Railroad."<sup>19/</sup> Rail properties of the Alaska Railroad are defined broadly as:

[A]ll right, title, and interest of the United States to lands, buildings, facilities, machinery, equipment, supplies, records, rolling stock, trade names, accounts receivable, goodwill, and other real and personal property, both tangible and intangible, in which there is an interest reserved, withdrawn, appropriated, owned, administered or otherwise held or validly claimed for the Alaska Railroad by the United States or any agency or instrumentality thereof as of January 14, 1983 . . . .<sup>20/</sup>

Under ARTA, therefore, the State received the entire federal interest in the ROW. As discussed above, the United States owned fee simple title in most of the ROW when ARTA was enacted.

ARTA mandates several types of conveyance of rail properties to the State depending on the property type and status.<sup>21/</sup> Two conveyance methods apply to land located outside Denali National Park. With respect to surveyed land that is not subject to unresolved claims of valid existing rights,<sup>22/</sup> the United States must deliver a patent to the State.<sup>23/</sup> With respect to unsurveyed land not subject to unresolved claims, the United States must deliver to the State an interim conveyance.<sup>24/</sup> An interim conveyance "shall . . . convey to and vest in the State exactly the same right, title, and interest in and to the rail properties identified therein as the State would have received had it been issued a patent . . . ."<sup>25/</sup>

With respect to land that is subject to unresolved claims of valid existing rights, the United States must deliver to the State an exclusive license pending the determination of such claims.<sup>26/</sup> The exclusive license shall be subject only to leases, permits, and other instruments

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<sup>19/</sup> See 45 U.S.C. §1203(a), (b). Section 1203(c) provides for the conveyances to contain certain reservations in favor of the United States which are not relevant here.

<sup>20/</sup> 45 U.S.C. §1202(10).

<sup>21/</sup> See 45 U.S.C. §1203 (b)(1)(A)-(D).

<sup>22/</sup> A "claim of valid existing rights" is "any claim to the rail properties of the Alaska Railroad on record in the Department of the Interior as of January 13, 1983." 45 U.S.C. §1202(3).

<sup>23/</sup> See 45 U.S.C. §§1203(b)(1)(B); 1203(2).

<sup>24/</sup> See 45 U.S.C. §1203(b)(1)(B).

<sup>25/</sup> See 45 U.S.C. §1203(b)(3).

<sup>26/</sup> See 45 U.S.C. §1203(b)(1)(C).

issued before the date of transfer and certain easements in favor of the United States.<sup>27/</sup> Once land subject to an exclusive license becomes available for conveyance due to resolution of claims, an interim conveyance must be issued for that land.<sup>28/</sup>

Once Alaska Railroad land was transferred to the State using one of the conveyances described above, ARTA required the United States to survey any remaining unsurveyed land and then to issue a patent for that land.<sup>29/</sup> Surveys were completed for most of the ROW during the 1980s and 1990s, and patents to those lands began to be issued. For example, the patent for the portion of the ROW adjacent to the Property was patented by BLM to ARRC in 2006.<sup>30/</sup> Only a few portions of the ROW remain to be conveyed by patent, including the Property.

In addition to the above-described conveyance provisions, ARTA contains procedures for the resolution of third party claims to Alaska Railroad lands that existed when ARTA was enacted. Recognizing that the United States did not own some portions of the ROW in unencumbered fee simple, ARTA includes detailed provisions to resolve third-party claims while still ensuring that ARRC can operate a railroad on the entire ROW without interference.

ARTA, at 45 U.S.C. §1205(b), contains procedures requiring the Secretary of the Interior ("DOI") to resolve any third-party claims to Alaska Railroad lands. Subsection 1205(b)(1) sets up an initial ten-month review and settlement process for claims by Native Village Corporations. Subsection 1205(b)(2) requires DOI to resolve any remaining claims of valid existing rights, including both Native and non-Native claims, by January 14, 1986, except for remaining Village Corporation claims, which were to be resolved by January 14, 1985. Subsection 1205(b)(2) also requires DOI to survey all unsurveyed lands by January 14, 1988. Subsection 1205(b)(3) requires that land subject to Village Corporation claims be managed in accordance with certain

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<sup>27/</sup> See 45 U.S.C. §1203(b)(4).

<sup>28/</sup> See 45 U.S.C. §1203(b)(2).

<sup>29/</sup> See 45 U.S.C. §1203(b)(3).

<sup>30/</sup> See ARRC Ex. E, U.S. Patent No. 50-2006-0363, dated August 9, 2006.



agreements pending the resolution of such claims. Subsection 1205(b)(4) sets up procedures to ensure finality of Village Corporation claims and “to avoid potential impairment of railroad operations resulting from joint or divided ownership in substantial segments of the right-of-way.” To that end, the United States is required to convey to the State at least an exclusive use easement in all portions of the ROW that left federal ownership before January 14, 1983, or as to which a claim of valid existing rights existed as of that date.<sup>31/</sup>

ARTA also specifically explains why Congress guaranteed at least an exclusive use easement with respect to all portions of the ROW:

The Congress finds that exclusive control over the right-of-way by the Alaska Railroad has been and continues to be necessary to afford sufficient protection for safe and economic operation of the railroad.<sup>32/</sup>

Further underscoring Congress’s recognition that it was critical to provide the State with exclusive rights in the ROW, ARTA specifically requires the federal government to defend the State’s title in the ROW against claims that it had less than an exclusive use easement.<sup>33/</sup>

The exclusive use easement that ARTA requires to be conveyed to the State provides broad exclusive rights to the ROW:

“[E]xclusive-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 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

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<sup>31/</sup> As noted above, “claims of valid existing rights” refers to both Native and non-Native claims.

<sup>32/</sup> See 45 U.S.C. §1205(b)(4)(A)(ii); see also ARRC Ex. D, at 2.

<sup>33/</sup> See 45 U.S.C. §1205(b)(4)(B).

(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.<sup>34/</sup>

ARTA therefore required the United States to convey to the State, at a minimum, the exclusive right to use and occupy the ROW for transportation, communication and transmission purposes, including the right to exclude all other persons and entities from all or any of the ROW.

### **3. Conveyance of Patents to ARRC ROW by BLM**

As required by ARTA, BLM initially conveyed Alaska Railroad lands, including ROW, to ARRC by means of an interim conveyance and an exclusive license.<sup>35/</sup> After BLM surveyed those lands, it issued patents for them. The interim conveyance, exclusive license and patents all transferred to ARRC the entire interest of the United States in the land and specified that said interest was "not less than an exclusive use easement, as defined in [45 U.S.C. § 1202(6)]."<sup>36/</sup> The Proposed Patent is the latest example of such a conveyance.

#### **B. The Property at Issue in this Appeal**

The Property is a portion of the ARRC ROW in the Potter Hill area of Anchorage, Alaska. It lies adjacent to the portion of the ROW conveyed to ARRC in 2006 by means of U.S. Patent No. 50-2006-0363.<sup>37/</sup> The Property, like several other parcels in the Potter Hill area, was added to the ROW shortly after the devastating earthquake of 1964.

On Good Friday of 1964, an earthquake of magnitude 9.2 on the Richter scale caused extensive damage to Southcentral Alaska. It severely damaged the Alaska Railroad ROW in the Potter Hill area, requiring the tracks in that area to be realigned.<sup>38/</sup> Consequently, in 1965, the United States purchased portions of a number of lots on Potter Hill in order to provide a

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<sup>34/</sup> 45 U.S.C. § 1202(6) (emphasis supplied).

<sup>35/</sup> See ARRC Ex. F (example interim conveyance); ARRC Ex. G (example exclusive license).

<sup>36/</sup> See ARRC Ex. E, at 2.

<sup>37/</sup> See *id.*

<sup>38/</sup> See App. Ex.12, at 2.

stable ROW for rebuilding. Portions of two of those lots constitute the Property. The Property had previously been patented by the United States to Edwin Jarvi in 1950 by means of a homestead patent to a larger tract that included the Property.<sup>39/</sup> In 1965, Edwin and Yula Jarvi sold and conveyed an interest in the Property to the United States via a warranty deed dated July 2, 1965 (the "Jarvi Deed").<sup>40/</sup> With respect to the Property, the Jarvi Deed conveyed:

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 [as Parcel 4 of the Jarvi Deed].<sup>41/</sup>

The Jarvi Deed explains that "the above-described premises are being acquired for the Alaska Railroad, Department of the Interior." The United States paid a total of \$24,115<sup>42/</sup> to the Jarvis for the purchased interest in the Property and other parcels conveyed by the Jarvi Deed.<sup>43/</sup>

Property records indicate that between 1965 and today, the portions of Lots 13 and 14 not included in the ARRC ROW were transferred to new owners on several occasions. The last transfer was to Appellants in 2008 via a warranty deed that expressly excluded the Property from the property they purchased:

EXCEPTING THEREFROM that portion thereof lying southwesterly of the "Take Line" shown on the plat of Potter Hill Relocation Alaska Railroad Right-of-Way Acquisition Map, according to Plat No. 64-105.<sup>44/</sup>

Indeed, the deeds issued to convey the portion of Lots 13 and 14 lying outside the ROW from

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<sup>39/</sup> See App. Ex. 16, at 17-19.

<sup>40/</sup> See App. Ex. 12, at 2.

<sup>41/</sup> The Jarvi Deed included four parcels comprising portions of Lot 21 (Parcel 1); Lots 6, 11 and 12 (Parcel 2); Lot 10 (Parcel 3) and Lots 3, 13 and 14 (Parcel 4) of Block 3 of Sunset Hills West Subdivision. The portions of Lots 13 and 14 contained in Parcel 4 constitute the Property at issue here. See App. Ex. 16, at 27-28.

<sup>42/</sup> This amount is approximately equivalent to \$180,000 in 2014 dollars. See ARRC Ex. H.

<sup>43/</sup> App. Ex. 16, at page 27.

<sup>44/</sup> See App. Ex. 16, at 62. The express exclusion from Appellants' warranty deed of the portion of Lots 13 and 14 within the ROW raises substantial doubt about whether Appellants hold any interest at all in the Property, much less the servient fee estate they claim. That doubt, in turn, suggests that Appellants may not qualify as an "adversely affected" party eligible to appeal the Decision under 43 CFR § 4.410(a).

1972 and 2008 consistently excluded the portions of those lots within the ROW from the premises being conveyed.<sup>46i</sup> The forty-year absence of any ownership interest in the ROW by the various residential owners, including Appellants, throws substantial doubt on any claim of ownership of the Property by Appellants.<sup>46i</sup>

**C. The Decision, the Proposed Patent and This Appeal**

In 2012, BLM identified the Property and other lots on Potter Hill obtained for the ROW after the 1964 earthquake to be considered for conveyance to ARRC by patent. As BLM prepared to make a patent determination regarding those lots, it obtained a memorandum offering a legal opinion regarding the United States' legal interest in the lots from a Senior Attorney in the U.S. Department of the Interior, Office of the Solicitor, Alaska Region ("Senior Attorney"). In a memorandum dated December 20, 2012, the Senior Attorney noted that "ARTA requires conveyance of all the federal interests in the property and at a minimum conveyance of an exclusive use easement."<sup>47i</sup> The Senior Attorney then explained that the lots in question should be conveyed to ARRC using BLM's normal process of issuing a decision to convey with copies served on all appropriate parties. Following the decision, requisite notice and the resolution of any appeal, BLM could convey the lots by patent.

With respect to the Property in particular, the Senior Attorney noted that the Jarvi Deed granted the United States a perpetual easement for railroad purposes and that "[t]he wording of that easement . . . contains terms and provisions very similar to the requirements of an

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<sup>46i</sup> See App. Ex. 16 at pages 56-64.

<sup>46i</sup> In 2012, Appellants obtained a quit claim deed purporting to "correct the legal description" of a 1972 warranty deed that expressly excluded the ROW portion of Lots 13 and 14. See App. Ex. 16 at 64. The effect of that quitclaim deed, an issue beyond the scope of this appeal, is questionable given the forty-year absence of the Property from the adjacent owners' chain of title.

<sup>47i</sup> App. Ex. 12, at 1.

exclusive-use easement as defined in section 603(6) of ARTA, 45 U.S.C. § 1202(6) . . . .<sup>48/</sup>

Although acknowledging that the Jarvi Deed did not specify that the easement granted was exclusive of all other uses, the Senior Attorney concluded that the granted easement was nevertheless exclusive:

[T]here 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. 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 easement definition in ARTA.<sup>49/</sup>

The Senior Attorney observed that ARTA required BLM to convey at least an exclusive use easement “[e]ven if the Jarvi deed were construed to grant less interest than the exclusive-use easement of ARTA.”<sup>50/</sup> Accordingly, the Senior Attorney found that BLM should issue a decision approving conveyance of an exclusive use easement in the Property and the other lots.<sup>51/</sup>

On September 13, 2013, BLM issued the Decision, which attached the Proposed Patent.<sup>52/</sup> The Decision explained that the conveyance of the Property was being made pursuant to the transfer provisions of 45 U.S.C. § 1203(b)(2) and 45 U.S.C. § 1203(b)(3), and that pursuant to 45 U.S.C. § 1205(b)(4)(B), the interest being granted was “not less than an exclusive use easement as defined in [45 U.S.C. § 1202(6)].”<sup>53/</sup> The Proposed Patent grants and conveys to ARRC “the full and complete right, title, and interest of the United States in and

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<sup>48/</sup> App. Ex. 12, at 4.

<sup>49/</sup> App. Ex. 12, at 4 (citing 74 C.J.S. Railroads § 225 (2002)).

<sup>50/</sup> App. Ex. 12, at 4 (citing U.S. 45 U.S.C. § 1205(b)(4)(B)).

<sup>51/</sup> App. Ex. 12, at 4.

<sup>52/</sup> App. Ex. 1 (BLM Decision No. AA-55129-20 and attached Proposed Patent).

<sup>53/</sup> App. Ex. 1 at 1-2.

to the said real property . . .,” and provides that the interest conveyed in the Property “is not less than an exclusive use easement.”<sup>54/</sup>

On October 15, 2013, Appellants filed their Notice of Appeal, challenging BLM’s decision to approve the patent to ARRC for the Property. ARRC intervened in this appeal. On January 10, 2014, Appellants filed their Statement of Reasons.

### III. STANDARD OF REVIEW

Decisions of BLM regarding the use and disposition of the public lands and their resources are reviewed de novo by the Board to determine whether the record in a case supports the action taken.<sup>55/</sup>

### IV. ARGUMENT

The Decision is correct as a matter of law. ARTA mandates that BLM convey to ARRC the entire federal interest in the Property and that the interest conveyed be at least an exclusive use easement as defined in 45 U.S.C. § 1202(6). BLM complied precisely with that mandate in issuing the Decision and the Proposed Patent, which grants to ARRC an exclusive use easement in the Property. BLM could not have acted otherwise and still complied with ARTA. BLM also employed the correct procedures applicable to the Decision and Proposed Patent. None of Appellants’ arguments, many of which are based on misreadings of ARTA, alter the fact that the Decision and Proposed Patent are proper as a matter of law and should be affirmed.

#### A. BLM’s Issuance of the Proposed Patent is Mandatory Under ARTA

ARTA requires - the statute is mandatory, not permissive - BLM to convey to the State

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<sup>54/</sup> App. Ex. 1 at 5. The conveyance is made subject to two reservations not relevant here. *Id.*

<sup>55/</sup> See *Wyoming Outdoor Council*, 160 IBLA 387, 397-98 (2004) (citing *National Wildlife Federation*, 145 IBLA 348, 362 (1998)); see also *Hickory & Tinnell*, 160 IBLA 166, 176 n.14 (2003) (applying de novo review in case affirming rejection of application to correct a patent).

all of the United States' right, title and interest in "rail properties of the Alaska Railroad."<sup>56/</sup> "Rail properties of the Alaska Railroad" include "lands" in which the United States held an interest as of January 14, 1983.<sup>57/</sup> The United States purchased a perpetual railroad right of way and easement in the Property on July 2, 1965, and held that interest as of January 14, 1983. BLM was required to convey that entire interest in the Property to ARRC, and to issue a patent to ARRC for the Property.

BLM also was required to ensure that the interest it conveyed in the Property was at least an exclusive use easement. Because most of the ROW was owned solely by the United States prior to transfer of Alaska Railroad lands to the State, the requirement that the State receive the United States' full interest in the land means that ARRC holds fee simple interest in most of the ROW. But even where the United States did not own fee simple interest in a portion of ROW at the time of transfer, ARTA nevertheless requires DOI to convey to ARRC at least an exclusive use easement, as that term is explicitly defined in ARTA:

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 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.<sup>58/</sup>

Underscoring the mandatory nature of DOI's obligation to convey to ARRC at least an exclusive use easement is ARTA's requirement that the federal government defend the State's title against claims that it had less than an exclusive use easement in its ROW.<sup>59/</sup>

The plain language of ARTA, therefore, compels BLM not only to convey to ARRC the United States' entire interest in the Property, but also to ensure that the interest conveyed is at

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<sup>56/</sup> See 45 U.S.C. §1203(a),(b). Section 1203(c) provides for the conveyances to contain certain reservations in favor of the United States which are not relevant here.

<sup>57/</sup> 45 U.S.C. §1202(10).

<sup>58/</sup> 45 U.S.C. §1205(b)(4)(B) (emphasis added).

<sup>59/</sup> See 45 U.S.C. §1205(b)(4)(B).

least an ARTA exclusive use easement. That is precisely what BLM has done by means of the Decision and the Proposed Patent. For that reason alone, BLM's Decision is correct as a matter of law and should be affirmed.

**B. BLM Followed the Appropriate Procedures in Issuing the Decision**

BLM not only complied with ARTA's substantive mandate in issuing the Decision and Proposed Patent, it also followed appropriate procedures in doing so. As a preliminary matter, BLM complied with the procedures set forth in ARTA, which expressly provides a detailed process to be employed in transferring Alaska Railroad property from federal to State ownership. ARTA commands DOI to issue an interim conveyance of rail properties to ARRC except where properties have already been surveyed, in which case DOI is to issue a patent.<sup>60/</sup> Because the Property has been surveyed, BLM issued the Proposed Patent. This precisely tracks with the process required in ARTA.

BLM also followed its own procedures for conveying property under ARTA. As described by the Senior Attorney, the appropriate process to be used to convey the Property was BLM's "normal process." The memorandum specified that process: BLM was to (i) issue a decision approving conveyance of the Property to ARRC; (ii) serve copies of the decision on interested parties, including specifically successors in interest to the Jarvi Deed; and (iii) wait to make the actual conveyance until the appeal period had run or any appeal had been resolved.<sup>61/</sup> That is exactly how BLM proceeded in issuing the Decision and Proposed Patent. In short, all applicable procedures have been properly followed.

Appellants attempt to throw doubt on BLM's process by arguing that issuance of a patent is an improper procedure for conveying the federal interest in the Property. Invoking BLM regulations, they assert that BLM must convey a railroad easement via an assignment using

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<sup>60/</sup> 45 U.S.C. §1203(b)(2); see also *supra* Section II.A.2.

<sup>61/</sup> See App. Ex. 12, at 4.



BLM Form SF-299.<sup>62/</sup> This argument fails for several reasons. First, ARTA expressly requires conveyances of Alaska Railroad land to be made by patent. BLM's regulations do not purport to - nor could they - control over ARTA's specific conveyance instructions.<sup>63/</sup> Second, the cited regulation applies to rights of way under the Federal Land Management Policy Act ("FLMPA"), 43 U.S.C. §§ 1701 *et seq.* The specific provisions of ARTA, not the FLMPA or its implementing regulations, apply to transfers under ARTA. Congress could have provided that ARTA transfers would apply FMPLA procedures; ARTA was passed after the FMPLA. But it did not do so, instead including in ARTA very specific procedural requirements for property transfers. Finally, the cited regulation neither requires nor prefers assignment of easements to patents; it merely states that an easement may be transferred via assignment.

Most fundamentally, a patent is the appropriate method for conveying lands under ARTA because that is the mechanism Congress chose. That approach is also appropriate because of the exclusive nature of the minimum interest Congress directed be conveyed to the State.

**C. Appellants' Arguments Misread ARTA and/or are Irrelevant to the Review of the BLM's Decision**

Appellants make several arguments challenging the propriety of BLM conveying an exclusive use easement to ARRC for the Property. They assert that BLM (i) impermissibly seeks to convey an interest the United States does not hold; (ii) has mischaracterized the scope of the easement it proposes to convey; and (iii) did not follow the correct procedures in deciding to issue the Proposed Patent. Each of these assertions is incorrect as a matter of law and fact. Appellants also assert that ARRC does not qualify to take ownership of the Property under Alaska law. Besides being an incorrect legal assertion, this argument is irrelevant to the issue

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<sup>62/</sup> See SOR at 14-15 (citing 43 CFR § 2807.21).

<sup>63/</sup> See *Krier*, 92 IBLA 101, 103-104 (1986) (Burski, AJ, concurring) (BLM substantive regulation contrary to ANCSA would have "no force and effect" and would be a "nullity not binding on anyone.") (citing *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936)).

on appeal here, namely whether BLM's Decision passes legal muster.

1. The United States has the Exclusive Interest in the Property that BLM Proposes to Convey to ARRC
  - a. The United States Owns an Exclusive Railroad ROW and Easement in the Property

A recurring theme in Appellants' Statement of Reasons is that BLM is attempting to convey an exclusive interest in the Property to ARRC when the United States only holds a non-exclusive interest. Appellants further assert that such a conveyance is improper. They are wrong on both counts.

First, as correctly determined by the Senior Attorney, the United States owns an exclusive interest in the Property. The perpetual railroad right-of-way and easement the United States acquired in the Property from the Jarvis in 1965 meets ARTA's definition of an exclusive use easement. The United States purchased a "perpetual right of way and easement to construct, reconstruct, operate and maintain a railroad line and appurtenances . . ." in the Property. The United States still owned that interest in the Property in 1985, when federal Alaska Railroad properties were transferred to ARRC, and it has never conveyed any portion of that interest to any other party since that transfer. In short, the Property is subject to a perpetual railroad right-of-way and easement held by the United States.<sup>64/</sup>

The perpetual railroad right-of-way and easement held by the United States in the Property is an exclusive interest. As the Senior Attorney noted, "[t]he wording of that easement . . . 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. § 1202(6) . . ."<sup>65/</sup> Indeed, railroad

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<sup>64/</sup> Even Appellants do not argue that the United States does not hold a perpetual railroad right-of-way and easement in the Property. Instead, they incorrectly assert that the admitted railroad right-of-way and easement is non-exclusive in nature.

<sup>65/</sup> App. Ex. 12, at 4.

easements are by their nature broad and exclusive. Settled law and public policy demonstrate that railroad easements provide exclusive possession and use with many hallmarks of fee title:

A railroad under an easement for railroad purposes acquires the right of exclusive possession and most of the qualities of a fee title subject to the limitation that an easement must be used for railroad purposes.

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It would seem to be true generally that a railroad right-of-way partakes more of the nature of an estate in fee than an easement. A railroad right-of-way includes the actual possession or the right to the actual possession of the entire surface for every proper use and purpose in construction and operation of the road.<sup>66/</sup>

As stated by another commentator:

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.<sup>67/</sup>

The U.S. Supreme Court and other courts have agreed with this interpretation. In *Western Union Telegraph Company v. Pennsylvania Railroad Company*, the Supreme Court stated:

A railroad right-of-way is a very substantial thing. It is more than a mere right of passage. [A right-of-way] is more than an easement. . . . [I]f a railroad's right-of-way was an easement it was 'one having the attributes of the fee, perpetuity and exclusive use and possession' . . . .").

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A railroad's right of way has, therefore, the substantiality of the fee, and it is private property, even to the public, in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given.<sup>68/</sup>

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<sup>66/</sup> G. Thompson, Commentaries on the Modern Law of Real Property (1965), §381, at 503, 512 (emphasis added).

<sup>67/</sup> 74 C.J.S. Railroads § 225 (2002) (emphasis added; footnotes omitted). See also 65 Am.Jur.2d, Railroads, §104, at 403 (Railroad right-of-way easement is essentially different from any other in that it requires exclusive occupancy).

<sup>68/</sup> 195 U.S. 540, 570 (1904) (emphasis added); see also *State v. Oregon Shortline Railroad Co.*, 617 F.Supp. 207, 210 (D. Idaho 1985) (Federally-granted railroad rights-of-way entitle railroads to the exclusive use and occupancy of those rights-of-way, which is necessary for

The basis for the exclusivity of a railroad easement, even where a separate underlying fee owner is present, lies in the nature and risk of railroad operations.<sup>69f</sup>

The inherent risk facing trespassers around the operation of railroad tracks precludes any safe uses of the land available to the landowner holding the underlying fee. The danger to a trespasser from a fast-moving train, lacking the ability to stop suddenly, is the basis for the exclusivity of use. An easement for a railroad right-of-way differs in important respects from other easements, [in] that the right of possession of the right-of-way is exclusive in the railroad.<sup>70f</sup>

In ARTA, Congress recognized these concerns and specifically explained why it guaranteed the transfer to the State of at least an exclusive use easement with respect to all portions of the Alaska Railroad ROW:

The Congress finds that exclusive control over the right-of-way by the Alaska Railroad has been and continues to be necessary to afford sufficient protection for safe and economic operation of the railroad.<sup>71f</sup>

Railroad easements provide a railroad with exclusive use and possession of its right-of-way as a matter of law. Such exclusive rights are critical to ensure the safe and economic railroad and utility corridor operations in the ROW.<sup>72f</sup> The legal and public policy principles described above apply specifically to the interest in the Property BLM proposes to convey to ARRC. As the Senior Attorney concluded:

Exclusive control [of the Property] 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

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railroads to function); *cf. Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330, 1333 (1990) (referring to post-1871 federal railroad rights-of-way as "exclusive use easements").

<sup>69f</sup> The railroad operating environment is inherently a hazardous one. Trespassing along railroad rights-of-way is the leading cause of rail-related fatalities in America, resulting in approximately 500 deaths each year. See ARRC Ex. I.

<sup>70f</sup> Jeffery M. Heftman, *Railroad Right-of-Way Easements, Utility Apportionments, and Shifting Technological Realities*, 2002 *Univ. of Illinois Law Review*, Vol. No. 5 at 1409 (citing cases; emphasis added).

<sup>71f</sup> See 45 U.S.C. §1205(b)(4)(A)(ii).

<sup>72f</sup> See App. Ex. 12, at 4 (citing 74 C.J.S. *Railroads* § 225 (2002)); see also ARTA, 45 U.S.C. § 1205(b)(4)(A)(ii); see also *supra* Section II.A.2 (discussing ARTA legislative history).

construed to match the specific terms of the exclusive-use easement definition in ARTA.<sup>73f</sup>

As demonstrated both by the plain language of the Jarvi Deed and the settled law applicable to railroad rights-of-way and easements, the property interest that BLM proposes to convey to ARRC provides the holder with an exclusive right to use and occupy the Property. That property interest equates to an exclusive use easement as defined in ARTA, 45 U.S.C. § 1202(6). Contrary to Appellants' assertions, therefore, the United States does have an exclusive interest to convey to ARRC.

**b. Neither the 1875 Act nor the 1914 Act Apply Here.**

In attempting to evade the obvious conclusion that the perpetual railroad right-of-way and easement applicable to the Property provides exclusive use and occupancy rights, Appellants invoke the 1875 General Railroad Right-of-Way Act<sup>74f</sup> and the 1914 Act. Appellants' reliance on those statutes is misplaced.

Neither the 1875 Act nor the 1914 Act supports a conclusion that the property interest at issue here is less than an exclusive use easement. The 1875 Act has never applied to any property of the Alaska Railroad, including the ROW. The federal government established the original Alaska Railroad ROW pursuant to the 1914 Act, which does not mention, much less incorporate, the 1875 Act. The very nature of the 1914 Act - authorizing and directing the federal government to designate federal lands for a railroad to be owned and run by the federal government - is completely different from the purposes of the 1875 Act and other acts that granted lands to private railroad companies on which to operate railroads. Simply put, the 1875 Act is irrelevant to any aspect of the Alaska Railroad ROW, including the Property.<sup>75f</sup>

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<sup>73f</sup> App. Ex. 12, at 4 (citing 74 C.J.S. Railroads § 225 (2002)).

<sup>74f</sup> General Railroad Right-of-Way Act of March 3, 1875, 18 Stat. 482 (43 U.S.C. §§ 934-39).

<sup>75f</sup> In any event, railroad rights-of-way granted under the 1875 Act are exclusive in the sense of allowing railroad companies exclusive use and occupancy of the right-of-way lands as long as they operate railroads within those corridors. See *supra* Section IV.C.1.a.

Appellants appear to assert that adding the Property to the Alaska Railroad ROW in 1965 constituted an exercise by the United States of a 1914 Act railroad easement reserved in Mr. Jarvi's 1950 homestead patent. That assertion is incorrect. The 1914 Act, while implicated in the establishment of the original Alaska Railroad ROW, is not at issue with respect to the Property. The Property was not part of the original ROW. The perpetual railroad right-of-way and easement in the Property was purchased by the United States in 1965 - decades after the original ROW was established - to realign the ROW in an area damaged by the 1964 earthquake. Neither the Jarvi Deed nor any other document describes that 1965 purchase as an exercise of an easement under the 1914 Act or even mentions that Act.

Moreover, the fact that the United States paid a significant amount of money - the equivalent of over \$180,000 in 2014 dollars - for the property interests it purchased from the Jarvis in 1965 to realign the ROW belies the idea that the United States was merely exercising an existing easement right. The railroad easement under the 1914 Act was already reserved by the United States when it granted the 1950 Jarvi patent. The United States could have exercised that interest in 1965. If that was the United States' intent, it certainly would have done so expressly and would not have paid such a substantial amount to acquire an interest it already held by virtue of its reservation under the 1950 patent.

Simply put, the United States was not exercising its reservation under the 1914 Act when it purchased its interest in the Property from the Jarvis in 1965. To the contrary, the plain language of the Jarvi Deed, the lack of any reference to the 1914 Act in that deed or other documents and the payment made by the United States for the Property point unmistakably to the conclusion that the United States purchased the perpetual and exclusive railroad right-of-way and easement in the Property, separate and apart from any rights it might have had under the 1914 Act. Appellants' assertions to the contrary simply do not hold water.

Even if Appellants' assertions that the 1914 Act applies here were correct - which they are not as explained above - railroad rights-of-way and easements acquired under that statute are exclusive. As explained in Section IV.C.1.a, *supra*, settled law holds that railroad rights-of-way provide the exclusive use and occupancy rights necessary to safely and economically operate a railroad. The legal and public policy principles and authorities underpinning this approach to railroad rights-of-way apply just as strongly to Alaska Railroad ROW designated by the United States under the 1914 Act as they do to any other railroad right-of-way.

Finally, even if the 1914 Act conflicted with ARTA's requirement to convey an exclusive use easement in the ROW, ARTA's provisions would expressly trump the 1914 Act. ARTA, 45 U.S.C. § 1213, flatly states that "[t]he provisions of [ARTA] shall govern if there is any conflict between [ARTA] and any other law."

**c. The Requirement that the United States Convey an Exclusive Use Easement is Not Limited to Denali National Park or Areas Subject to Native Claims**

Appellants try to avoid ARTA's requirement that ARRC receive at least an exclusive use easement for all portions of the ROW by arguing that the requirement only applies to portions of the ROW within Denali National Park and areas subject to Native land claims.<sup>76/</sup> Appellants assert that other than those areas, the ROW was to be transferred as only a non-exclusive easement. This argument flatly misreads ARTA and makes no sense given ARTA's purpose of providing the State with a ROW allowing safe and economical railroad operations.

Congress recognized in passing ARTA that the United States owned most of the ROW in fee simple and would transfer it as such.<sup>77/</sup> Fee simple title, by its nature, provides exclusive rights to the ROW. Congress also expressly recognized that the State needed exclusive control over the entire ROW in order to operate a safe and economical railroad. Consequently, ARTA

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<sup>76/</sup> See SOR at 11-13 (citing 45 U.S.C. §§ 1203(a)(1)(D); 1205(b)(4)(B)).

<sup>77/</sup> See Section II.A.2, *supra* (describing legislative history of ARTA).

set the defined exclusive use easement as a safety net for situations where full fee ownership was not possible or not allowed under ARTA.

For example, since the U.S. National Park Service did not want the State to own land in fee within the boundaries of Denali National Park, Congress expressly provided in 45 U.S.C. § 1203(a)(1)(D) that the United States would transfer only an exclusive use easement in the ROW through Denali National Park.<sup>78/</sup> The fact that Congress chose to limit the ROW to an exclusive use easement in Denali Park has no bearing on the level of title to be conveyed with respect to other portions of the ROW.

Appellants' argument that 45 U.S.C. § 1205(b)(4)(B) only applies to Native claims fails based on the plain language of that subsection and Section 1205 as a whole. Appellants first argue erroneously that 45 U.S.C. § 1205, in its entirety, applies only to Native claims. But Section 1205, entitled "Lands to be Transferred," deals with Alaska Railroad lands subject to claims from parties, both Native and non-Native, other than the federal government and the State that existed as of January 13, 1983.

Subsection 1205(b) nowhere provides that its coverage is limited to Native claims. Indeed, as described in Section II.A.2, *supra*, although some provisions in subsection 1205(b) relate to Native Village Corporation claims under ANCSA,<sup>79/</sup> its plain language demonstrates that it covers lands subject to any third-party claims, whether Native or non-Native. Subsection 1205(b)(2) requires the Secretary of Interior to adjudicate all claims (not just Native claims) within two years of enactment of ARTA. Subsection 1205(b)(4)(B), asserted by Appellants to be

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<sup>78/</sup> See 45 U.S.C. § 1203(b)(1)(D); ARRC Ex. J, Congressional Record-House, Dec. 21, 1982, at 14 (exclusive use easement in Denali National Park was intended "to allow continued operation of the railroad [in Denali Park] without creating new administrative and management problems arising from the creation of new non-Federal inholdings.") ARTA also provides that the State's use of the ROW in Denali National Park would be limited to uses made of the ROW prior to the effective date of ARTA. 45 U.S.C. § 1203(b)(1).

<sup>79/</sup> Subsections 1205(b)(1) and 1205(b)(3) deal with Native Village Corporation claims, giving them priority in adjudication and making such adjudications subject to certain prior agreements.



limited to Native claims, sets out specific administrative adjudication procedures for all claims on lands subject to ARTA transfer. It applies “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 [*sic*] subject to a claim of valid existing rights by a party other than a Village Corporation . . . .”

Subsection 1205(b)(4)(B), rather than being limited to Native claims, expressly applies to all claims to ROW lands that left federal ownership before ARTA was enacted and all claims to the ROW other than Native Village Corporation claims qualifying as “claims of valid existing rights.”

Section 1202(3) defines a “claim of valid existing rights” as “any claim to the rail properties of the Alaska Railroad on record in the Department of the Interior as of January 13, 1983.” That provision unambiguously encompasses both Native and non-Native claims. In summary, subsection 1205(b)(4)(B) and its requirement to convey at least an exclusive use easement, apply to all portion of the ROW as to which any third party may have a valid claim.

Appellants’ argument that Congress intended to limit exclusive use easements to ROW located in Denali National Park or subject to Native claims also contradicts Congress’s purpose in transferring the Alaska Railroad to the State. Congress intended to supply the State with legal rights in the ROW that would allow safe and economical operation of a railroad. To achieve that end, it required in ARTA that the State receive the exclusive control of the ROW necessary to allow safe and economical railroad operations. It would undermine this very purpose of ARTA in guaranteeing exclusive control of the ROW if any portion of the ROW was conveyed subject to a non-exclusive easement. The ROW, like a chain, is only as robust as its weakest link. To convey any of the ROW without exclusive use rights would render the entire ROW potentially unsafe and uneconomical, thereby undermining the purpose of ARTA.

The meaning, intent and operation of ARTA are clear. As to all portions of the Alaska Railroad ROW, including areas subject to Native claims or other third-party claims, BLM must convey to the State at least an exclusive use easement so there is a protective floor in place for

the State to operate a railroad. ARTA cannot reasonably be interpreted in a manner that contradicts its plain language and its underlying purpose. Appellants' arguments seeking such an interpretation should be rejected.

**d. ARTA's Requirement of an Exclusive Use Easement Clearly Indicates Congress's Intention to Supply the State with an Exclusive Interest.**

Despite ARTA's plain language, Appellants argue that BLM cannot convey an exclusive use easement to ARRC because there is no clear indication such a result was intended.<sup>80/</sup> They rely on the following quote from a California case: "[A]n exclusive easement is an unusual interest in land, amounting almost to a conveyance of the fee; and, therefore, no intention to convey such a complete interest can be imputed . . . in the absence of a clear indication of such an intention."<sup>81/</sup> Even if that passage states a valid legal principle, it is harder to imagine a clearer indication of an intention to convey an exclusive interest in the ROW than ARTA's mandatory requirement to convey an exclusive use easement that is defined in extreme detail in the statute. Simply put, Congress, in passing ARTA, clearly intended to provide the State with a very specifically defined exclusive easement in the ROW.

**2. Alaska Law Pertaining to ARRC's Acquisition and Use of Land are Irrelevant to the Issue of Whether BLM's Decision was Proper**

Perhaps recognizing the fatal flaws in their arguments under ARTA, Appellants attempt to derail the Decision by asserting that ARRC is not eligible to receive a patent to the Property

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<sup>80/</sup> See SOR at 13 (citing state law cases).

<sup>81/</sup> *Id.* (quoting *City of Pasadena v. California-Michigan Land & Water Co.*, 110 P.2d 983,985 (Cal. 1941). *City of Pasadena* actually undermines Appellants' position. That case involved underground water line easements which were clearly non-exclusive by their terms. *Id.* at 984-85. The court distinguished those easements from grants of exclusive surface rights-of-way (such as those at issue here) and noted that the water line easements could have been made exclusive by using clear language to that effect. *Id.* at 986. Similarly unavailing to Appellants is *Myers v. U.S.*, 378 F.3d 696, 702 (Ct.Cl. 1967), which held that absent clear statutory language or legislative intent, a statute repealing an earlier statute did not affect reservations and right-of-way grants under the earlier statute. Here, however, ARTA was clearly intended to grant exclusive use easements in the entire ROW regardless of prior reservations or claims.

because it failed to obtain a State legislative finding that the land is needed for railroad purposes as purportedly required by AS 42.40.285(5).<sup>82/</sup> This argument fails for several reasons.

Most importantly, ARRC's eligibility to receive the Property is irrelevant to BLM's Decision. ARTA requires BLM to patent to ARRC the entire federal interest in the Property. Nothing in ARTA conditions that obligation on ARRC's eligibility under Alaska law to own the Property. Even if ARRC was ineligible to receive the Property under state law, which is not the case, any remedy presumably would lie under Alaska law following the issuance of the patent. Because ARRC's eligibility under Alaska law to receive the Property is irrelevant to BLM's duty to transfer under ARTA, Appellants' attempt to defeat the Decision on that grounds must fail.

In addition, Appellants' assertion that ARRC must obtain a legislative finding before obtaining transfer of the Property is legally incorrect. Transfers of Alaska Railroad land under ARTA are expressly excepted from the statutory requirement that ARRC obtain a legislative finding before acquiring land in a municipality.<sup>83/</sup> The proposed transfer of the Property to ARRC is expressly being made under ARTA, meaning that ARRC is eligible for the Proposed Patent.

An assertion made by Appellants' in conjunction with their AS 42.40.285(5)(c) argument should be mentioned to eliminate any potential confusion. Appellants postulate that ARTA provides for conveyance of "two different types of easements"; they assert that 45 U.S.C. § 1202(6) provides for grants of exclusive use easements, while 45 U.S.C. § 1202(10) provides for grants of "1914 easements."<sup>84/</sup> They go on to argue that BLM mistakenly based its conveyance decision on subsection 1202(6) instead of on subsection 1202(10).<sup>85/</sup> These

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<sup>82/</sup> See SOR at 6-7.

<sup>83/</sup> See AS 42.40.285(5)(c).

<sup>84/</sup> See SOR at 6-7. The latter assertion apparently is intended to mean that subsection 1202(10) provides for easements based on the Act of 1914.

<sup>85/</sup> See *id.*

assertions are nonsensical. Nothing in Section 1202, which is the definitions section of ARTA, provides for grants of easements. Subsections 1202(6) and 1202(10), respectively, define "exclusive use easement" and "rail properties of the Alaska Railroad." As definitions, neither subsection is - or could be - authority for creating or conveying easements.<sup>86/</sup>

In any event, BLM did not cite either subsection of Section 1202 as authority for the conveyance. Instead, BLM properly cited three other provisions of ARTA as bases for its decision to convey the Property: 45 U.S.C. § 1203(b)(2), 45 U.S.C. § 1203(b)(3) and 45 U.S.C. § 1205(b)(4)(B).<sup>87/</sup> Those subsections set out the process for issuing interim conveyances and patents to Alaska Railroad lands under ARTA, require conveyance of at least an exclusive use easement in the ROW, and guarantee that the federal government will defend the title conveyed.<sup>88/</sup> Notwithstanding Appellants' erroneous assertions regarding ARTA's definitions, the ARTA provisions cited by BLM provide a valid basis for the Decision.

**3. Even if the United States Does Not Hold Exclusive Rights to the Property, it Must Nevertheless Convey an Exclusive Use Easement to ARRC**

As explained above, the United States holds an exclusive interest in the ROW that BLM is obligated by ARTA to convey to ARRC. But even if the United States' interest in the Property was less than an ARTA exclusive use easement - which it is not - that would not change DOI's obligation to convey to ARRC at least an exclusive use easement.

ARTA unambiguously requires BLM to convey to ARRC not less than an exclusive use easement in the Property because it is located in the ROW. That obligation exists regardless of the United States' legal interest in the Property.<sup>89/</sup> Congress underscored the guarantee of

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<sup>86/</sup> The only reference to the 1914 Act in subsection 1202(10) is a proviso that unexercised reservations in favor of the U.S. under that Act are excluded from "rail properties."

<sup>87/</sup> See App. Ex. 1, at 1, 4, 5.

<sup>88/</sup> See *supra* Section II.A.2.

<sup>89/</sup> See App. Ex. 12, at 4.

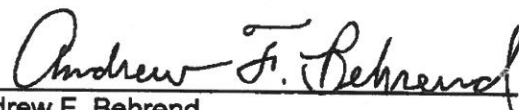
conveyance of at least an ARTA exclusive use easement by requiring the federal government to defend ARRC's title against claims that it owns less than such an interest in the ROW.

If BLM needs to acquire an additional interest in the Property to effectuate ARTA's exclusive use easement requirement, then ARTA would function to effect an inverse condemnation of any additional interest necessary to meet that requirement. Such an inverse combination might require the United States to compensate Appellants for the difference, if any, between the values of an ARTA exclusive use easement in the Property and the interest conveyed to the federal government by the Jarvi Deed. Even if that happened, the ultimate result would be the same: BLM would convey to ARRC via patent at least an exclusive use easement in the Property.

**V. CONCLUSION**

For the foregoing reasons, BLM's Decision was proper as a matter of law and ARRC respectfully requests that the Board affirm it and allow the Proposed Patent to become final.

DATED this 11th day of March, 2014.



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**CERTIFICATE OF FILING AND SERVICE**

I certify that on March 11, 2014, I filed and served this Intervenor Alaska Railroad Corporation's Answer to Appellants' Statement of Reasons, as indicated below, on:

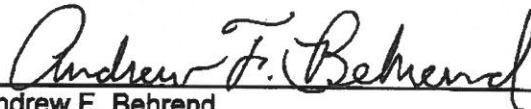
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