Further Committee Notes and Findings

Some have "informed" the Committee that the Dept. of the Interior and the BLM must know best. However, had Congress intended to alter the terms and conditions of the patent in a way that was pushing constitutional boundaries it would have used clear language to do so.[1] Agency action which raises serious constitutional issues is accorded no deference.[2]

Does Congress not know the difference between a patent and a claim of valid existing rights? Alaska Congressman Don Young knows…[3] Congress does not retroactively change the terms and conditions of a federal patent once it is issued.

A Piecemeal Approach to Property Acquisition

ARTA conveys only the "rail properties" held by the U.S. for the Railroad.[4] And, the State statutes limit acceptance accordingly.[5] "Rail property" is "all right title and interest" in lands,[6] something expected in an asset transfer, and what Congress can do constitutionally as to the easement.[7]

In 1982 the State position was that the railroad interest was an easement.[8] Now the ARC argues that it should have essentially what the federal Railroad wanted in 1982. [9] This shift in legal position as to the nature of the pre-transfer easement is inconsistent, self-serving, although perhaps not arising to the imposition of judicial estoppel.[10]

"Exclusive use"[11] has the effect of fee title: the essence of ownership being the right of exclusion.[12] But for reversion, exclusive use is tantamount to ownership.

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[1] Williams v Babbitt 115 F3d. 657, 662 (9th Cir. 1997)
[2] id
[3] https://www.railroadedalaska.com/_files/ugd/ffac37_f03ff0177e23436a888ac1266ca1a4f2.pdf

[4] 45 USC 1203(a)
[5] AS 42,40.250
[6] ARTA 1202(10)
[7] Wilcox v Jackson 38 US 498(1839)
[8] 65 IBLA 4376 (July 20, 1982)
[9] The only difference between exclusive use and fee is the right of reversion.
[10] Cf. Harbor Breeze V. Newport Landing Sportfishing No 19-56138 (9th Cir. Mar. 7, 2022)
[11] ARTA 1202(6)
[12] Cedar Point Nursery v Hassid https://www.law.cornell.edu/supremecourt/text/20-107

If the ARTA 1205(b)(4)(B)/1202(6) theory of transfer prevails the only remaining interest held by the property owner was the right of reversion,[13] recognized initially in ARTA 1209. At the request of the ARRC this was repealed by Congress in 2003.[14] The Alaska legislature reinStated the right of reversion to the Eielson Spur Line north of Fairbanks in 2011[15] apparently believing that this facet of property ownership is important, but not understanding that reversion is not optional but instead merely the result of the easement burden lapsing.[16]The restoration was not, however, made State-wide.[17]

The ARTA transfer was not to have adversely affect any vested rights, native or otherwise. Protection even as to vested Native rights is set out in the Memorandum of Understanding required in 1205.[18] These vested third-party rights are referenced by Railroad attorney Phyllis Johnson in 1996 with the comment that the railroad is in the process of recognizing the same.[19]

This is not discretionary for the railroad. ARTA does not change vested rights. Two matters are actually addressed in 1205(b)(4)(B): ANCSA 3(e) and third parties holding less than vested interests. In neither was the vested right of a third party to be affected.

Johnson also explains that the US may not have had the property interests that the ARRC believes were transferred[20] and offended property owners should sue the federal government.[21] Recognition that the US transferred assets that he did not own should be followed by a return of those assets, not a lawsuit against either the U.S. or the present litigation.

Native Interests Impact the Proposed Transfer

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[13] See:Brandt fn 4 for criticism of the term

[14] Pub.L. 108-7, Div. I, Title III, §345(5), Feb. 20, 2003, 117 Stat. 418 , the legality of which is doubtful.

[15] https://www.akleg.gov/PDF/27/Bills/HB0146Z.PDF Legislation replaced the reversionary property rights of abutting landowners along the abandoned Eielson spur line portion of the Alaska Railroad right of way.

[16] Id fn 1, See Brandt fn 4

[17] https://www.newsminer.com/eielson-spur-railroad-bill-advances-to-house-floor-amid-ire-changes/article_82fa05b6-f6fd-5f09-a737-ce268f4ee961.html

[18] https://www.railroadedalaska.com/_files/ugd/ffac37_fcb3b4f408ff4394b390b5e875666f13.pdf

[19] https://www.railroadedalaska.com/_files/ugd/ffac37_4c38ceb1e73146129269a8ed55b2d15c.pdf?index=true

[20] See USRA Report p.36 - ARTA provides that the State will only receive an "exclusive use easement" to certain portions of the right-of-way.

[21] https://www.railroadedalaska.com/_files/ugd/ffac37_4c38ceb1e73146129269a8ed55b2d15c.pdf?index=true

President Reagan was prepared in 1982 to simply close the federal Alaska Railroad[22] but Alaska wanted the Railroad.[23] Records of Alaska Railroad assets before the transfer indicate limited information was available.[24] Further, the real eState assets were heavily affected by conflicting Native claims.[25] Dr. William Woods, a prominent Alaskan political figure, referred to the railroad as a "gift horse".[26] The Alaska delegation urged an uncompensated asset transfer to the State of Alaska. Senator Metzenbaum of Ohio objected to the lack of compensation and requested a GAO report of assets. At p. 4 the report indicates native and other third -party interests and "narrow standards" for determining the federal facility interest under ANCSA(3)(e) in areas of village corporation selection. [27]

The quality of the real eState holdings was also impacted by the 1906 Native Allotment Act and the 1971 Alaska Native Claims Settlement Act,[28] mostly in the areas of Nenana and Eklutna, Alaska.[29]

A significant problem throughout the passage of ARTA, the transition period, and the conveyancing is that the federal government had only a vague idea about the real property interests of the Railroad for transfer[30] and in a parallel fashion the State had little idea about what it was purchasing for $22 million. In fact, at the time of closing the transaction in January 1985, it was necessary to enter into a

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[22] https://www.nytimes.com/1985/01/06/us/alaska-is-buying-federal-railroad.html
[23] https://www.csmonitor.com/1985/0207/ztrain.html
[24] See USRA Report p.35
[25] See USRA Report p. 37
[26] Hearings on S 1500 conducted in Fairbanks and Anchorage Alaska Aug 10-11, 1982 p 114. https://books.google.com/books?id=8Z7-49PY7rEC&pg=PA112&lpg=PA112&dq=D.+william+Wood+Alaska+railroad&source=bl&ots=qS8Ov4f8JZ&sig=ACfU3U0jFCPn6MB64t2fcL6r-7nmS9nEoQ&hl=en&sa=X&ved=2ahUKEwjvpsTEp4TmAhW1ITQIHREYA7QQ6AEwAXoECAoQAQ#v=onepage&q=D.%20william%20Wood%20Alaska%20railroad&f=false

[27] See: November 24, 1982 GAO report discussing the 1906 allotment and ANCSA claims at https://www.gao.gov/assets/rced-83-61.pdf
Also posted on website…
https://www.railroadedalaska.com/_files/ugd/ffac37_b39179b5cd4b4891add7b88621897ffb.pdf

[28] 43 CFR 2561 regulations apply, particularly 2561.0-5(c). See also 35 CFR 9597: www.federalregister.gov/citation/35-FR-9597 and https://www.ecfr.gov/current/title-43/subtitle-B/chapter-II/subchapter-B/part-2560
[29] ARTA 1205 (b)(3) See: Sept 23, 1983, USRA Report to Congress, Appendix A ,and May 1984 DOI Report.
[30] See: Reports referenced above and Nov. 1982 GAO Report to Sen. Metzembaum.

"Protocol". The U.S. and the State of Alaska agreed that if there is found to be an over-conveyance or under-conveyance the parties will get together and resolve the matter in good faith.[31]

The Alaska Policy Forum article[32] alludes to significant native claim issues requiring resolution during the transfer. Section 1205 deals with the native claims. That selection deals with this matter rather harshly, but it does separate claims that had not become vested and patented interests. Once the federal government divests itself of property (via patent), it cannot reach back and change the terms and conditions of the transfer. However, the situation is different regarding pending claims which have not become final. Section 1205 first calls for negotiations. If then requires the village corporations to relinquish pending claims not settled or in the alternative the transfer would occur vacating these claims. That, in fact, Congress can do constitutionally since the Secretary of the Interior always has discretion to apply terms and conditions to the convenience of being made, of course, within the law.
However, prior to January 14, 1982, the effective date of the Transfer Act, some properties had already been conveyed to the village corporations. These required what is called "3(e)" determinations and resolution of pending third-party interests such as 1906 native allotment claims, mining claims, townsites and others. The Department of the IInterior had been slow in conveying and in making these determinations. In fact, the third-party claims were delegated to the village corporations for resolution in the future. This did not fit the intention of the transfer act to set a price and convey more certain and definite interests to the State. 1205(b)(4)(B) addresses both of the issues: it removes secretarial discretion and in ARTA 1202(6) definitions makes more certain the types of terms and conditions that the secretary would ordinarily attach to both the 3E and allotment determinations. In fact, there is a direct inquiry from the Alaska Railroad attorney in 1983 on this subject, and a response from the solicitor for the department of the Interior indicating that allotments are treated under(b)(4)(B).[33] The House committee on Interior and insular affairs retained supervisory jurisdiction over the transfer act. In May 1984 the committee had inquired of the department and the department responded indicating, in part, that it was awaiting justifying material from the Alaska Railroad to establish the 3E determination under the same provision and under 43 CFR 2655.

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[31] Protocol of Jan 5, 1985 Art. III (1) p 262, Attachment C.
https://www.railroadedalaska.com/_files/ugd/ffac37_e9ed8af787b74ea3b077f762ea44d9df.pdf
[32] https://www.apeonline.org/2021/06/18/alaska-railroad-akrr-court-opinions/
[33] https://www.railroadedalaska.com/_files/ugd/ffac37_355a233b1cca46b6a8eebaa832ff49c1.pdf

This rather firmly establishes the purpose of this sub -sub -section. However, the Solicitor and others have applied this provision to patented property such as that involved in the lawsuit of ARRC versus Flying Crown Homeowners Association.

Mr. Slaiby, our neighbor, in discussions about this matter applicable to his house described the agency process which uses this sub- sub- section as "**fly specking**" which he meant to indicate that the provision was being taken out of context. It was.

How this mistake occurred is not known to the Committee. Regardless, the mistake should be corrected.

The Reports Required in ARTA[34]

These reports provide for understanding the proper and limited application of (b)(4)(B) and 1202(6). The IBLA in Slaiby bemoaned the fact that this information was not in the record. Had it been, the IBLA might have understood the transfer to the point of disagreement with the Solicitor's blanket application of exclusive use, and may have correctly understood, as well, the intended purpose of ARTA 1205(b)(4)(B).

During the transition period of ARTA 1204 the State angled for maximum rights and minimum payment.

The Alaska Railroad Transfer Report, July 14, 1983

ARTA 1204(a) requires a State/ federal report of real eState assets being transferred, and a report thereof as a foundation for an appraisal by the United States Railway Association (USRA). [35]

After reviewing the dismal situation relative to the quality of the real property interests of the Railroad, the Alaska Railroad Transfer Report suggests that the purchase price should be reduced to reflect the possibility that the interest in the easement is not homogeneous and that the portion on private property might be determined to be only an easement interest.[36] Uncertainty concerning the federal interest but positioning for a lower price is found extensively in the report.

[34] Missing in the Slaiby case.
[35] Alaska Railroad Transfer Report - https://www.railroadedalaska.com/_files/ugd/ffac37_462cb2ffe33149bdaa26a8c8ed844297.pdf
[36] Report Appendix L at p 5 and 10-11.

For example, Appendix L of the report evidences substantial uncertainty concerning the nature of the interests actually held by the U.S. for the Railroad.

"The nature of the State's interest in the right -of -way will not be uniform…. These include the following…(c) Other patented lands…. the Act provides that the State shall receive the full Federal interest in the right -of -way passing through lands that are now in private hands." [37]

This happens to be correct, but is immediately confused in the Report with other interests and the fact that the existing easement of 43 USC 975d is not actually recited in a number of patents.[38]

"Similarly, if it should turn out that the railroad has only an easement interest in patented lands over which its right-of-way now passes, these lands, too, would not be eligible to be placed in the land disposal bank." [39]

Other researchers have referred to similar report language. Mr. Alex Gimarc writing in the Alaska Policy Forum notes:

"Most notable of these questions is the definition of exactly what rights will ultimately be conveyed to the State of Alaska. Depending on future adjudication or negotiation, there are many instances where the State may receive less than fee title to portions of the Alaska Railroad's real eState, particularly its right-of-way. Exhibit 1 to the 605(a) Report summarizes existing claims against the property. According to that exhibit, prepared by the Anchorage office of the Bureau of Land Management, **more than half of the Alaska Railroad's right-of-way passes through lands which were patented to private parties or to the State without a specific reservation for the Railroad's right-of-way**. In a limited number of areas, **mining claims have also been filed which are near to or encroach upon the right-or-way**. Further, in other locations, **ARTA provides that the State will only receive an "exclusive use easement" to certain portions of the right-of-way**.

[37] July 1983 Report Appendix L, p L-4
[38] 1203(c)(1) transfers the existing easement and covers instances of non-recitation
[39] July 1983 Report Appendix L, p L-11

… Further, because clear title existed for very little of the right-of-way, Jackson-Cross was also instructed not to consider "corridor value" for the Alaska Railroad's right-of-way in its alternate use determination.

Additionally, **significant portions of the right-or-way, as well as certain parcels of land adjacent to or away from the right-of-way, are subject to claims under the Alaska Native Claims Settlement Act of 1971 (ANSCA) and the 1906 Allotment Act**. These claims will not have been settled prior to the issuance of this report." [40]

The July 20, 1982, IBLA decision declares the easement reserved in State selections to be just that - an easement - exactly like the one reserved in private patents,[41] the interest supported by the State in the IBLA proceeding.

While it is possible that the drafter of the report was not aware of the 1982 IBLA proceeding[42] it is evident that the State was aware of the possibility that the interest was an easement just as the IBLA had ruled and yet angled for blanket application of exclusive use.

The July 14, 1983 Report recites that (b)(4)(B) provides for the conveyance of exclusive use wherever land has been conveyed out of federal ownership[43]while acknowledging that where the easement crosses private property the State receives by patent all right title and interest" in "reservations"(like the 975d reservation) previously made for the railroad and subject to "other patents", meaning such as the Sperstad patent, and other vested interests.[44] This goes on to distinguish vested interests and those interests which are claims of valid rights not yet vested, as to which exclusive use attaches. The text references Ex 1, which describes the real properties "to the extent possible" and by the "best available descriptions" while reflecting on the congressional "difficulties" regarding and "adequate description" of the Alaska Railroad lands. Report Ex 1, p.1. Report goes on to State: "the level or nature of title the State will receive with an interim conveyance or patent of real properties is not defined by this exhibit". The report goes on to State "Generally, unless otherwise specified, the State will receive with an interim convenience or patent all title of the United States in the real property conveyed, but not less than an exclusive use easement in the right of way lands." EX. 1 p.1-2.

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[40] Alex Gimarc https://www.apeonline.org/2021/06/18/alaska-railroad-akrr-court-opinions/
[41] https://www.oha.doi.gov/IBLA/Ibladecisions/065IBLA/065IBLA376.pdf
[42] The Alaska Railroad IBLA 81-426(July 20, 1982)
[43] July, 1983 Report p 34.
[44] July, 1983 Report, appendix C, p C-2

The transfer of lands and interests in lands not subject to unresolved claims are to be by interim conveyance or patent depending on the survey status. Report Ex.1, p. 7-8 which includes "other patents" add page 1- 8, item 9. Indeed, ARTA 1203(c)(1) does seem to suggest the transfer of the existing easement where it exists in a patent.

ARTA allowed operation by the railroad of contested lands through a license procedure which is described at Ex I p.-8-9. Note the list of interests at 1-9 concerning the right of way. This includes native matters, allotment, mining claims and everything else that is involved with section 1205 of the transfer at, and particularly 1205(b)(4)(B). This listing, however, it does not include patented property for the simple reason that such are not involved in the 1205 process. And, these are separately listed at Ex 1 p 1-12.

The State did not assert in the July report that exclusive use applies to patents. At Appendix C, p C-1 it is represented that the ARTA patent conveys " all right title and interest of the U.S. and that is subject to "5. Those further matters set forth in Exhibit 1 identified as "other patents"...".

Using the fact that the State would receive only a limited easement in some areas, such as "other patents", the State argued in this report for a lower price.

The nearly contemporaneous DOI Solicitor Memo of July 20, 1983 seems to make the same distinction. However, somewhere between the July Report and drafting of the conveyance documents the distinction between claims of valid existing rights and vested patents was lost, although an exchange between the Solicitor and the railroad attorney in 1983 seems to recognize the distinction. [45]

The State got what it was angling for in September of 1983 as to price, as seen below.

Had the State or railroad bother to include private property owners in the discussion it is possible that a deviation from the intention of the transfer act could have been avoided.

[45] https://www.railroadedalaska.com/_files/ugd/ffac37_355a233b1cca46b6a8eebaa832ff49c1.pdf

The September USRA Report[46]

ARTA 1204 required an appraisal to be done by USRA,[47] Jackson-Cross was the appraiser.[48]

The resulting (USRA) September 23, 1983, report to Congress of the fair market valuation of the Alaska Railroad follows suit. Appendix A provides a list of the properties subject to 1205.

The Sept 23, 1983, USRA Report gives the State the lower price. It assigned no value for a utility corridor[49] and discounted for the possibility that in litigation the village corporations would win in litigation on their claims.[50]

Prior to the either report the State had enacted the Alaska Statute 42.40 which is the Alaska Railroad Corporation Act.[51] The State declared the easement to be a "utility corridor" without any recognition of the differences in the property interests on public lands compared to the interests reserved on private property in 975d,[52] [53] and of course without consultation with affected property owners and apparently without the benefit of reading the July 20, 1983 IBLA decision regarding the nature of the easement on State selection lands.[54] The die was cast. The State through the Alaska Railroad Corporation has maintained its position at the expense of private property owners ever since.

Post -Transfer Uncertainty

Uncertainty about the assets being transferred continued after the transfer to the State was "completed".

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[46] ARTA 1204 (a) and (d) require such a report and appraisal by the United States Railway Association - https://www.railroadedalaska.com/_files/ugd/ffac37_3d687d74932f48aca11a5d60c5f93578.pdf

[47] 1204(b) USRA valuation of Alaska Railroad is required….

[48] USRA Report - https://www.railroadedalaska.com/_files/ugd/ffac37_3d687d74932f48aca11a5d60c5f93578.pdf

[49] Despite this, the state has proclaimed the easement to be a "utility corridor", unpaid for or not. AS 42.40.350.

[50] USRA Report Pages 36 through 41, especially page 39.

[51] Alaska Railroad Corporation Act - https://www.alaskarailroad.com/sites/default/files/Communications/2019_ARCA_Revised_March.pdf

[52] AS 42.40.350

[53] USRA Report pgs. 36-41

[54] https://www.oha.doi.gov/IBLA/Ibladecisions/065IBLA/065IBLA376.pdf

"Protocol"[55] Attachment "C", Art. III, paragraph 2.4 concerns Erroneous Conveyances to the Alaska Railroad Corporation: If *"..the United States inadvertently conveys to the corporation real property that is not among the "rail property" of the United States"*… then the State is to reconvey that back to the U.S. at the request of the Secretary of the Interior.[56] An exclusive use easement as to Sperstad is not among rail properties held by the U.S.. while one remedy would be the return of the same to the U.S. for proper transfer of the existing rights, another approach would be to recognize the transfer under ARTA 1203(c)(1) contrary recitations in the interim conveyance and patent being considered void.

Reversion Removal?

What is reversion? All easements create a burden on property owned by another person. When the easement is abandoned the burden of the easement is released and the property owner now owns full title without the burden.[57]

The only remaining property right retained, on paper, by private property owners by 1996 was a statutory right of reversion in ARTA 1209.[58] This specifically "reverted" the easement to private property owners. The connection between the easement and the owner was well known.

In 2003 the Railroad approached Congress to repeal ARTA 1209 based on the need to realign a segment of track on federal land.[59] See letter of then ARC President John Binkley.[60] In 2011, the Alaska legislature restored a statutory right of reversion to the abandoned Eileson Spur, apparently believing that reversion to the abutting landowners is optional after abandonment.[61] It isn't.

Removal of the ARTA 1209 reversion completes the transition from a simple easement to ownership and monetization for the Alaska Railroad.[62] Given the fact that Senator Stevens and the Railroad's own attorney recognized private property

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[55] https://www.railroadedalaska.com/_files/ugd/ffac37_e9ed8af787b74ea3b077f762ea44d9df.pdf
[56] If ARTA 1203(c)(1) is not self -executing and if the interim conveyance and patent convey interests not among the rail property of the U.S., the state should reconvey to the U.S. so that the paperwork may be corrected.
[57] Brandt Revocable Trust v U.S. fn 4 provides a discussion. https://supreme.justia.com/cases/federal/us/572/93/
[58] ARTA 1209
[59] ARTA 1209 repealed - Pub.L. 108-7, Div. I, Title III, §345(5), Feb. 20, 2003, 117 Stat. 418
[60] https://www.railroadedalaska.com/_files/ugd/ffac37_8d22dbe014ca4e0b9390af86a492a6a8.pdf

[61] The legislature did not have the benefit of the Brandt decision and may have believed that reversion depends upon acquiescence by the state.
[62] RRUP and fees

rights in State Legislative hearings in 1996, it cannot be said that the removal of reversion and the entire transition from a simple easement to total ownership was inadvertent by the Railroad.[63] It was simply incremental.

The shift in the right of exclusion from owner to railroad adversely affects private property owners.[64] The railroad charges owners,[65] rents the easement on private property to utilities, and attempted to raise rates in one area by over 400%. This is the effect of the right to exclude, or "exclusive use". See ARTA 1202(6)(d).

Whether or not Congress can remove the common law right of reversion by repealing section 1209 is uncertain. The congressional delegation of Alaska should move immediately to restore reversion.

Mis-Indexing of the Transfer Conveyances

The DNR[66] mis-indexed the transfer conveyances so that a title search of FCHA property does not, and still does not, reveal the ARTA conveyances.[67] This is true, also, as to all other federally patented property. As a result, the cloud caused by the ARTA conveyance recitation of exclusive use does not appear in a title insurance report to the date of this brief. Recent title searches have not revealed the conflict between the "railroad telegraph and telephone" easement recited in the patent and the ARTA conveyances which cover the same area. There are, now, two recorded and inconsistent easements about which private property purchasers and sellers have no knowledge. The Committee believes that this is a disservice both on the part of the State of Alaska and the Department of Natural Resources. The failure of the public in general to be notified as resulted in a less than effective front against this assault on private property rights. Whether or not keeping a public in the dark on this issue is inadvertent is one that the reader can consider.

Committee Conclusion

[63] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC534568/

[64] Raising serious constitutional issues. See: Cedar Point Nursery v Hassid. These issues are easily avoided if the ARC position on the effect of ARTA 1205(b)(4)(B) is incorrect, as it is.

[65] RRUP cited in Overview, see fn 3.

[66] The Dept of Natural Resources is the operator of title records in Alaska. http://www.ptialaska.net/~aspls/docs/recorders.pdf.

[67] https://www.railroadedalaska.com/_files/ugd/ffac37_b3a976dbd556404eb7f44e84c2913fc2.pdf

The Supreme Court of the United States has correctly Stated the relationship between the property owner and a railroad holding a modern-era railroad easement. The easement requires the owner not to interfere with the railroad operation, while allowing non-interfering uses.[68]

The language of the transfer act does not support changing existing patented rights. However, the ARTA transition has resulted in an attack on property rights.

Lastly, as though Congress anticipated that the Secretary of the Interior would continue to fail to properly administer native -related issues, Congress sought to protect private property interests from this very transition. Referring to the "enactment" of ARTA, "actions taken during the transition" and the "transfer" itself, "such events shall not constitute or cause the revocation"…of the existing 975d easement reserved in patents.[69]

And, in the clearest possible language, which was ignored by the Secretary of the IInterior and the Solicitor, Congress sought to directly transfer the 975d easement, unchanged. This is section 1203 (c)(1): " [ARTA conveyances] shall confirm, convey and vest in the State all reservations… made or required be… 43 US 975d." The committee finds this language to be clear.

Between section 1212 and section 1203 the Solicitor was directed to transfer the existing rights without change.

Jan 5, 2023

[68] See Marvin M. Brandt Revocable Trust v. United States - https://supreme.justia.com/cases/federal/us/572/93/
[69] https://www.law.cornell.edu/uscode/text/45/1212