ALASKA RAILROAD TRANSFER COMMITTEE REPORT

Anchorage, Alaska

Jan 10, 2023

The Committee

The Alaska Railroad Transfer Committee is a successor organization to the Railroad Committee of the Old Seward/Ocean View Community Council[1], (OS/OVCC), a member of the Federation of Community Councils.[2] The Railroad Committee was created by the OS /OVCC following public concern over the implementation of the Residential Right-of-Way Use Policy (RRUP) of the Alaska Railroad in 2010, and the claim of the railroad to an exclusive use of the railroad easement traversing the Council area.[3]

The Committee is a research and public advocacy group. The Committee has conducted an extensive historical research of original documentation of the ARTA[4] transfer at the University of Alaska Consortium Library (Alaskana Section) and with State of Alaska Archives.

The Committee has gathered documents from the BLM and the Dept of the Interior related to the 1982 transfer.

Members have presented to other affected Community Councils, the local assemblies of affected communities, and the Alaska legislature. The group provided research for the HJR Overview and Backdrop which supported House Joint Resolution 38 (HJR 38)[5] and later HB 263 in the Alaska legislature.[6]

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[1] https://communitycouncils.org/OSOVCC

[2] https://communitycouncils.org/servlet/content/1545.html

[3] https://www.alaskarailroad.com/sites/default/files/akrr_pdfs/2013_11_12_Brd_Policy_Residential_ROW_Use_CORP.pdf

[4] 45 USC 1201 et seq.

[5] https://www.railroadedalaska.com/_files/ugd/ffac37_2ae85512620c4c129ecc507c75b008b0.pdf

[6] https://www.akleg.gov/basis/Bill/Detail/30?Root=HJR%2038

In addition to the several hundred property owners who have had their property interests taken, up to 300,000 utility rate payers within the "rail belt"[7] and those seeking access to public lands[8] are also affected.[9]

The ARTA 2006 patent[10] is one of 38 Alaska Railroad Transfer Act (ARTA) patents covering the track easement beginning in the Anchorage railyard and proceeding south toward Seward Alaska. Several Anchorage Alaska Community Councils are affected by the two ARTA patents covering Anchorage.

The Report

The Alaska Railroad[11] was owned by the federal government from 1923 through 1982. The assets of the railroad, including the easement for the track were transferred to the state beginning in 1983.

Since 1983 the state of Alaska and the Alaska Railroad have intentionally or inadvertently used the transfer to convert private property rights to their own use, while simultaneously keeping this transition largely secret from the private property owners adversely affected by this shift of property rights. This issue directly concerns the mainline easement which crosses private property owned by hundreds of private property owners and municipalities. The transition began on January 14, 1983, the effective date of the Alaska Railroad Transfer Act which transferred the federal Alaska Railroad to the state of Alaska.

An easement is regularly recited in Federal land patents over which the easement passes between Seward in Fairbanks Alaska. The easement also crosses both federal and state land. In all of the process of transferring the easement the state and the federal government have abused private property owners while advancing their own interests.

The original Alaska Railroad easement was reserved in 43 US 975d for "railroad telegraph and telephone purposes". The Alaska Railroad Corporation now

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[7] That area of the easement between Anchorage and Fairbanks where private property is concentrated.

[8] "Unlike most states, where the majority of land is privately owned, less than one percent of Alaska is held in conventional private ownership." https://rdc.memberclicks.net/assets/Resource-Reviews/rr.se.whoownsalaska.2009.pdf

[9] Through trailhead and boat launch closures among others. https://www.adn.com/anchorage/article/alaska-railroad-requires-fence-new-road-near-anchorage-estuary/2015/11/07/ and https://www.adn.com/opinions/2021/11/19/getting-the-alaska-railroad-back-on-track/

[10] https://www.railroadedalaska.com/_files/ugd/ffac37_f991710b7eab422cbdc0acc0f8cbadb9.pdf

[11] Now an instrumentality of the state of Alaska, See: AS 42.40.010.

contends that the railroad easement is an "exclusive use easement" which allows the railroad to bar any other users and fence off the easement. This is despite such terms of exclusion not being recited in the patents.

In 1982 the state and the federal railroad were engaged in an administrative proceeding with the Department of the Interior in which the state took the "simple easement" position, while the federal railroad took the position that the "easement" was actually owned by the federal government and that it should be withheld from the state selection. The position taken there by the state, and the Dept. of the Interior was correct.[12] In both state-selections and private land patents the railroad interest is a simple common law easement.

In reference to the 1875 General Railroad Act which uses the same "railroad, telegraph and telephone" easement language the Supreme Court of the U.S. in Brandt Revocable Trust v U.S.[13] said the same thing the state and the DOI said in 1982. It is an easement which allows the property owner use of his property burdened by the easement as long as the owner does not interfere.

The state of Alaska through the Alaska Railroad[14] now takes the reverse position and has adopted the position taken by the federal railroad in 1982. Using language from a transfer provision dealing with native claim issues the state claims that "railroad, telephone and telegraph" has been converted to "exclusive use", which operates like ownership, or alternately that the pre-transfer easement was the same as the post-transfer easement of exclusive use, although the pre-transfer language does not say that.

Logic must have its day here. If it were the same, the Alaska Railroad would rely on the original language and not try to change it. The railroad takes this position because an increase in the burden of the easement would be unconstitutional.[15] The ARC has the authority to condemn property. It has not done so because it does not have to do so since it gets what it wants without paying compensation.

No other railroad in the U.S. makes a claim similar to the ARRC/state. It is completely unnecessary for railroad operations. Approximately 68% of all track in the U.S. operates under the 1875 General Railroad Act which has the "railroad, telegraph and telephone" language. They operate very well.

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[12] The Alaska Railroad, 81 IBLA (July 20, 1982)
[13] Brandt Revocable Trust v U.S. (https://www.law.cornell.edu/supct/cert/12-1173)
[14] AS 42.40.010
[15] Cedar Point Nursery v Hassid (https://www.law.cornell.edu/supremecourt/text/20-107

Exclusive use is unnecessary and against the public and private good. It is simply a property grab which allows the railroad to raise money.

Imposition of exclusive use was done without notice to the private property owners who were affected by this shift. Modern railroad easements, after 1871, allow the holder of the easement, the railroad, to pass over property of another, leaving the property owner with non-interfering uses in the portion of the easement not presently used by the railroad.[16] This common -sense approach, inferentially supported by the state in 1982, is now opposed by the railroad. In "exclusive use" the railroad has the unilateral right to fence off the easement and bar any other users, including the property owner. Some earlier railroads actually owned the track area. But these occurred in the 1860's. Most track easement in the US is the simple easement variety.

This attempted property shift allows the railroad to charge others, as property owners found out in Anchorage in 2010 when the railroad imposed the Residential Right of Way Use Policy (RRUP). It allows the railroad the opportunity to make money off of property interests of others, an opportunity not held by a normal easement holder. The shift affects not only the property owner but utilities and even third parties attempting to cross the railroad tracks to enjoy public property. For example, the railroad has closed off access to boat launch at Trail Lake, closed off access to the Lost Lake Trail near Seward, has fenced off a prominent hiking trail in Anchorage and has attempted to boost charges made to utilities in the easement.

Is an "exclusive use" easement the same as ownership? Last year the railroad solicited and received an appraisal of the easement with the assumption that it owns the easement in "fee simpleSee: RFP Jan. 7, 2020 and addendum Jan 24, 2020 in answer to Question 1:

"The property rights being appraised in this report are to be based on a fee simple estate. Fee simple is defined by the dictionary of Real Estate Appraisal, Third Edition, copyright 1993, page 140, by the Appraisal Institute as being: "absolute ownership unencumbered by any other interest or estate, subject only to the limitation imposed by the governmental powers of taxation, eminent domain, police power and escheat" [17]

[16] Brandt, fn 12
[17] link

SCOTUS in Brandt states as to "railroad, telegraph and telephone", "[a]pter words to indicate the intent to convey an easement would be difficult to find," and, the phrase is "'wholly inconsistent with the grant of a fee interest"[18] and yet, the state/ ARC claim just the opposite. (This paragraph makes no sense to this reader)

The Committee believes that the railroad position is arbitrary and capricious, in that it attempts to shift the fee interest from the vested property owner to the easement holder (ARRC). By so doing, it bolsters the value of the ROW interest. This not only artificially inflates the value of ARRC assets, but also provides ARRC additional leverage when dealing with property owners, utilities, and the public by requiring permits and fees for non-interfering uses of the ROW.

Synopsis of The Confusion

The state, the ARC and the DOI were perhaps confused about Congressional intention in the transfer. Normally, a buyer and seller know what is being transferred, set a price, and transfer the assets. Instead, this transfer became confused. And, in the process, private property owners were harmed, intentionally or through inadvertence.

The Alaska Railroad Corporation Act[19] authorizes the railroad to accept, hold, and operate certain property. But the statute lacks clarity. AS 42.40.350 states that the railroad may receive and hold title to all "rail property" transferred under 45 USC 1201-1214. But "rail property" is limited to "all right title and interest" in the definition section of the Act: ARTA 1202(10). AS 42.40.250 says that the ARC may accept and hold "all right title and interest" previously held by the federal government for the railroad, as directed in ARTA 1203(a) rather than some rights "concocted" elsewhere in the Transfer Act. This correctly states exactly what the Department of the Interior and the state should have transferred in the 1982 ARTA[20] transfer: exactly and only the rights the U.S. owned at that time.

Somewhat consistently with section 350, but not consistent with the other statutes, the ARC claims that its rights in transfer derive not from ARTA 1203(a) as it should, but from ARTA 1205(b)(4)(b), a provision in a section dealing with resolving native claims pending in 1982. The Committee finds this to be a misapplication of the transfer provisions. Committee interviews with such as the

[18] Brandt at
[19] AS 42.40
[20] 45 USC 1201, et. seq.

late Congressman Don Young, and basic knowledge about the Alaska congressional delegation, are directly contrary to the position taken by the ARRC. It is unlikely that any involved would have intended the outcome that the railroad has achieved for the simple reason that none of them would have survived the next election, if for no other reason.

The legislature also has issues with the exclusive use claim in excess of ARTA 1203(a) where exclusive use is most troublesome: metropolitan areas. AS 42.40.285 was amended in 2001 to limit the ARC to receiving only the "all right title and interest" of ARTA 1202(10) without legislative approval.[21] This mirrors AS 42.40.250. Rather than following this clear direction by the legislature, the railroad pushed to receive further transfer patents, which it did in 2005 and 2006 without required legislative approval. The Committee is distressed to report that the railroad does not follow legislative instructions.

In 2018, in another attempt to "rein-in" the Railroad, the Alaska House of Representatives passed HJR 38.[22] This passed by a vote of 38-2. It states that only the pre-transfer easement should have been transferred to the Alaska Railroad and the state. Rather than accepting that guidance, the Alaska Railroad filed suit against the Flying Crown Homeowners Association in an attempt to validate its claimed exclusive use privilege by quiet title action.

Without notice to the property owners or the Alaska Legislature, the ARRC exceeded its authority to accept and operate transfers even after being instructed not to do so and even though private property rights were adversely affected.

Throughout the entire past four decades, property owners were not consulted or notified of the claims made by the ARRC/State of Alaska. ARTC is distressed to report that the State, which superficially stands firmly on private property rights, operates, in fact, as described here.[23]

Public concern extends beyond this Committee, and that of the Alaska State House of Representatives. Other policy studies have also criticized the ARRC/State position.[24]

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[21] A direction promptly ignored by the ARC when it accepted the two Anchorage patents in 2005 and 2006.
[22] https://www.railroadedalaska.com/_files/ugd/ffac37_2ae85512620c4c129ecc507c75b008b0.pdf

[23] E.g. Alaska Constitution Art. I Sec. 7
[24] https://www.apeonline.org/2021/06/18/alaska-railroad-akrr-court-opinions/

Synopsis of the Shift

A brief review of the history of the "transition" from a simple easement to ownership for the state of Alaska and the railroad follows. At each step the railroad and the State had the opportunity to notify private property owners. It didn't, and it has not done so to this date. Only a small number of the approximately 1200 property owners know anything about the assault on their property rights. Because of the way that the State of Alaska indexed the 1983 transfer, the easement is separated from the property over which it traverses. The patent for the traversed property will show the original easement. The Department of Natural Resources, which runs the recorder's office, indexed the easement as a separate parcel. Therefore, the search of private property crossed by the easement will not show the competing post-transfer easement.

The late Congressman Don Young wrote a letter which correctly points out that the 1982 congressional delegation had no intention to do with the Alaska Railroad and the State claims was done in the transfer. Don Young was a homesteader. Governor Jay Hammond, at the time, had been a homesteader. Senator Stevens was a champion of private property rights. It is inconceivable, as Don Young points out in his letter, that Congress could have intended the result reached by the Department of the Interior and the State of Alaska in the transfer.

Missed Opportunities for the State and ARRC to Notify Private Owners

No attempt was ever made to notify or engage the private owners affected by the easement change. The State and the ARRC,either by design, mistake or oversight, failed to inform property owners of an inadvertent, or intentional, incremental attack on private property rights. This has resulted in a major failure of the public to mobilize against this incursion. Section 1212(b) of the Transfer Act from the Administrative Procedure Act which would have provided notice to individuals who could be adversely affected by the transfer. The committee interviewed Congressman Don Young on the subject and he confirmed that the exemption was placed in the act because there was no intention to adversely affect any property owner. So, property owners were not notified. At some point in time when property owners were adversely affected someone with common sense should have notified them. There was no due process.

a) Hearings were conducted in August 1982 in Fairbanks and Anchorage Alaska regarding the proposal to transfer the railroad to the state. Attending

were representatives of the state, the federal government, the federal railroad, certain agencies of the federal and state government, and a variety of native representatives. These issues, of course do not involve the typical private property owner, as his property does not involve any of these native claims. ARTA is not subject to the Administrative Procedure Act which would have provided notice to private property owners if the intention were to adversely affect their interest.[25]

b)

For decades before and after the transfer the Dept of the Interior has displayed what might be described as a less than prompt and efficient handling of public lands in Alaska and particularly the native issues. For example, 1906 native allotment claims numbered over 9000. Some are not resolved to this date. ARTA 1205 attempted to accelerate the process for the railroad transfer in 1982, (including the ANCSA(3)(e) and allotment issues in 1205(b)(4)(B)). See the exchanges among the attorneys for the railroad and the DOI,[26] and the reports to Congress for the proper use of (b)(4)(B)[27] in resolving these technical native-related issues within 43 CFR 2655 and other similar regulations. Nothing there should have affected anything else. The Alaska Policy Forum, a local policy think tank has expressed concern over this very issue.[28]

Not apparently understanding the difference between a federal land patent which is final and a claim of "valid existing rights" over which the department has discretion, the DOI/BLM misapplied "exclusive use" to previously patented land under (b)(4)(B). The Committee feels that had this application of a section designed to clean up native -related issue to vested patents been made public before the interim conveyance in 1985, property owners affected would have complained. Congressman Don Young and others in the delegation would have called a halt to the misguided agency.[29]

Even after the transfer act in 1982 the department has been inefficient and slow, resulting in further congressional prodding.[30] Private property owners should have been informed if this process was to adversely affect them.

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[25] ARTA 1212(b)
[26] https://www.railroadedalaska.com/_files/ugd/ffac37_355a233b1cca46b6a8eebaa832ff49c1.pd
[27] https://www.railroadedalaska.com/_files/ugd/ffac37_bb23f04bfdb74d0d98ad04d37421c283.pdf
[28] Alex Gimarc https://www.apeonline.org/2021/06/18/alaska-railroad-akrr-court-opinions/

[29] https://www.railroadedalaska.com/_files/ugd/ffac37_f03ff0177e23436a888ac1266ca1a4f2.pdf
[30] Alaska Land Transfer Acceleration Act, of 2003, Pub L. 108-452 (12/10/2004)

c) During the transfer "transition period" there were certain reports prepared by the state and the federal government regarding the nature of the assets being transferred, including the easement, and there was an appraisal of these interest following the procedure. Both acknowledge private property patents and adjusted the value of the ROW accordingly. Vested property owners were not consulted during this process.

d) The Alaska Railroad Corporation Act [31] is a state statute contemporaneous with the 1982 Transfer Act.[32] Without consideration of private property rights it declares, that the easement is a "utility corridor" rather than simply an easement for railroad, telegraph, and telephone as reserved in previously issued patents. Landowners were not consulted about this presumptuous declaration.

e) A Memorandum of Understanding was required during the transfer to protect vested native rights from impairment during resolution of native claim issues and the transfer. No direct protections were offered to private property owners in this document, and the owners were not notified of that fact.

f) As late as 1985 the US and the state were uncertain that they correctly transferred the "rail property". In a Protocol the state and the US agreed that they would adjust the ledger if too much or too little was transferred. Not a thought of concern for the many adversely property owners potentially affected by the transfer.

g) In 1996 the railroad attorney, Phyllis Johnson, appeared before the Alaska legislature which inquired as to the progress made under the Transfer Act. She described the exclusive use of the transfer act as being rights not known in property law. She described this interest as a "concoction" and indicated broadly that the railroad was aware that private property rights had been affected adversely. She indicated that the railroad was reaching out to private property owners to work out accommodations and that private property owner should sue the federal government if not satisfied. But there was no outreach. There was no notice.

[31] AS 42.40
[32] 45 USC 1201 Et. seq.

h) Following a dispute between the railroad and the city of Whittier, the legislature in 2001 amended the Alaska Railroad Corporation Act to prevent the railroad from accepting any further transfers of "exclusive use" under the transfer act. Yet this was ignored in 2005 and 2006 when the railroad accepted two patents from the DOI covering previously patented land in Anchorage. Again, there was no notice of this event given to affected property owners.

i) The 2005 and 2006 Department of the Interior patents in Anchorage purport to convey exclusive use. By accepting them without legislative approval,ARRC did exactly what the legislature said not to do several years before. As stated previously, there was no notice to affected property owners. As of this date, there still has been no notice provided.

j) An easement is a non-possessory burden on property owned by another. It is not ownership, but an interest in property owned by another. It allows the property owner to use the area of the easement not used by the easement holder so long as the owner does not unreasonably interfere with the operations of the easement holder. When the easement is abandoned the burden disappears. This was recognized in the 1982 transfer act in Section 1209. If the state abandon the easement, the adjacent property owner would reassume all fee simple ownership at that point. In 2003 the Alaska Railroad approached Congress to repeal section 1209.

   This was the last step in a total replacement of a simple easement with ownership for the State. And, as usual, no property owner was notified. In a letter to homesteader Bonnie Wolstad, ARC President John Binkley suggests that the railroad is not in a position to address the reversion issue for the reason that the easement is actually a state, not a railroad, asset.

k) In 2010 the Alaska Railroad announced in Anchorage that it was implementing the Residential Right- of -Way Policy (RRUP), which policy required permits and payment to the railroad for lawns and gardens in the peripheral areas of the easement not used by the railroad.[33] This policy was applicable to the entire easement. However, it was only implemented in Anchorage. Had it been implemented statewide in one step the public could have been better informed about the intentions of the railroad to exercise its exclusive use easement throughout the easement.

[33] RRUP link see fn 3

Following pressure from the Alaska legislature in the form of House Joint Resolution 38[34] and others, the policy has been withdrawn. Significantly, property owners were still not generally notified.

l) The interim conveyances began before 1985. Patent conveyances after survey were completed in Anchorage in 2005 and 2006. The Department of Natural Resources runs the recorder's office. Several years ago, members of the Committee alerted the department to the fact that a title search of property in Anchorage does not reveal a connection between the interim conveyance and the patent with the associative property over which it passes. The DNR responded that there had been a "mis- indexing". The DNR issued a notice "To Whom it May Concern" which discusses the mis-indexing, but to this date this notice has not been circulated to private property owners.[35]

m) In 2013-14 the ARRC joined with the Dept of the Interior is supporting the view that regardless of the nature of the interest in the easement actually held by the federal railroad that the 1982 transfer act required the Department to convey exclusive use. This is illogical since one cannot transfer what one does not own.[36] Few among the hundreds of affected property owners actually affected by the position are aware of this administrative decision. Again, there was no notice.

n) In 2020 the railroad published a request for proposal for an appraisal of the easement to determine land value for calculating "fair" fees for permits and leases. The assumption stated that the interest of the railroad was "fee simple". Thus the appraised value (and fees subsequently collected) were, by design, artificially high. No notice of this request was sent to property owners.

o) ARC sued the Flying Crown Homeowners Association, seeking, apparently for favorable court rulings which they will now use to further their interests as the other property owners. In the same fashion, the public has not been notified of this litigation which affects their property rights.

These have been manymissed opportunities for the state of Alaska / ARRC to inform private property owners and the public. Whether intentional or otherwise,

[34] Overview and Backdrop link
[35] https://www.railroadedalaska.com/_files/ugd/ffac37_b3a976dbd556404eb7f44e84c2913fc2.pdf
[36] U.S. Const. Fifth amendment

the Committee respectfully suggests that the State of Alaska give proper notice to affected property owners at the earliest opportunity.

More details; at this site: ***Further Committee Notes and Findings***