

5/2/83

on Fri 4-29 spoke w O'Leary  
abt many RR transfer  
issues, incldg

potential pro<sup>d</sup> w. N. Altmt<sup>s</sup>  
& fact that I wd be respdg  
to formal op. regist &  
wd. consult w. him prior  
to ans.

also told him we had  
formal op. regist on Chickaloon  
spur issue [Harrison]

talked abt pr. convey<sup>s</sup> - told  
him Bin is going to examine  
deeds where to see if anythg  
grts than ~~and~~ excl. use  
be. rev<sup>d</sup> —



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
ALASKA REGION

701 C Street, Box 34  
Anchorage, Alaska 99513

# FILE

IN REPLY REFER TO:

July 20, 1983

## MEMORANDUM

To: State Director  
Bureau of Land Management  
Alaska State Office

From: Attorney  
Office of the Regional Solicitor  
Alaska Region

Subject: Impact of the Alaska Railroad Transfer Act  
on Native Allotments (960)

### INTRODUCTION

You have requested our opinion on various Native allotment issues which have arisen due to passage of the Alaska Railroad Transfer Act of 1982 (ARTA), P.L. 97-468. For Native allotments which encompass a portion of the railroad right-of-way, the following questions require analysis:

1. Can BLM proceed with adjudication of Native allotments not approved prior to the passage of ARTA?
2. Can BLM presently issue Certificates for Native allotments?
3. What affect does ARTA have on Native allotments which were administratively approved, legislatively approved, or certificated prior to passage of ARTA?

### SHORT ANSWERS

While each of your questions will be discussed in some depth, concise answers are set out in this paragraph. As a beginning point, BLM has both the authority and the duty to

State Director  
Page 2  
July 20, 1983

adjudicate Native allotments. Certificates of Allotment can be issued as long as an appropriate reservation for the railroad right-of-way is made in the Certificate. Previously conveyed and/or approved Native allotments are subject to the exclusive-use easement which must be transferred pursuant to ARTA but, upon transfer, the reservation of a future right-of-way imposed pursuant to 43 U.S.C. 975d will no longer have any viability.

## DISCUSSION

### I.

#### Responsibility and Authority to Adjudicate

Section 606(b)(2) of ARTA not only authorizes the Department of the Interior to adjudicate pending Native allotments but requires that the adjudication be completed within three years. In specific, section 606(b)(2) provides:

The Secretary of the Interior shall have the continuing jurisdiction and duty to adjudicate unresolved claims of valid existing rights pursuant to applicable law and this title. The Secretary of the Interior shall complete the final administrative adjudication required under this subsection not later than three years after the date of enactment of this Act....

The BLM can, consequently, apply its normal procedures to the adjudication of Native allotments potentially encompassing a portion of the Alaska Railroad right-of-way. Where the Native allotment applicant's use and occupancy does not predate the railroad right-of-way, the application can still be granted. While Native allotments are limited to vacant, unappropriated and unreserved lands,<sup>1/</sup> the Alaska Railroad's right-of-way did not appropriate or reserve the fee in such a way as to require exclusion of a strip of land from an allotment. The Alaska Railroad, 65 IBLA 376 (1982).<sup>2/</sup> However, an appropriate

---

1/ 43 CFR 2561.0-3.

2/ The Railroad has requested reconsideration of this decision but, unless and until the decision is reversed, it is binding upon the Department of Interior.

State Director  
Page 3  
July 20, 1983

right-of-way reservation must be made in the subsequent conveyance document.<sup>3/</sup> Id. This same conclusion is reached if the potentially exclusive-use criteria set out at 43 CFR 2561.0-5 is applied. Since a Native allotment applicant's use and occupancy of land encompassing a portion of the Alaska Railroad's right-of-way cannot be "potentially exclusive of others," unless it was initiated prior to the Railroad's location of the right-of-way, the right-of-way interest must necessarily be excluded from the allotment.

## II.

### Issuance of Certificates

Issuance of a Certificate of Allotment, which is the title document for Native allotments,<sup>4/</sup> is also allowed by ARTA. This is most clearly seen in section 606(b)(4)(B) of ARTA where claims of valid existing rights, such as Native allotment applications, are accorded the same protection and treatment as lands already conveyed out of federal ownership. To us, this indicates a congressional recognition that rights to certain land had vested. With Native allotments, rights become vested when the requisite use and occupancy is completed and a timely application is filed. United States v. Donald E. Flynn & Heirs of Henry Orock, 53 IBLA 208 (1981). An even stronger case exists for Native allotments finally approved by the Department prior to passage of ARTA and those Native allotments legislatively approved by section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487 (94 Stat. 2371). As stated in the Regional Solicitor's memorandum of March 10, 1981, "... title passes upon legislative approval, be it equitable title or legal title."

Authority to convey is also implicit in section 606(b)(2) of ARTA. That section, set out above, mandates that the entire administrative adjudication process be completed within three years. Such a process ordinarily

---

3/ The appropriate language for an exclusive-use easement will be set out in the next section.

4/ See, State of Alaska, 45 IBLA 318 which holds that a Certificate of Allotment passes restricted legal title to the allottee.

State Director  
Page 4  
July 20, 1983

includes all necessary adjudication work, administrative appeals and issuance of a title document. Thus, it appears that approval and conveyance of lands under valid existing claims was contemplated in ARTA. Section 605(b)(2) which limits disposition of the Railroad's real property to disposals "required by law," does not, however, have direct bearing on the question of BLM's authority to convey. That section applies to transactions by the Department of Transportation and not the BLM. In any case, conveyance to a Native allotment applicant who has vested a right to a particular tract of land is, in our opinion, "required by law."

While issuance of a Certificate of Allotment is, consequently, proper, the Certificate must expressly reserve a site specific right-of-way to the United States for use by the Alaska Railroad of all existing railroad rights-of-way. The Alaska Railroad, supra. Such a railroad reservation is, by its nature, exclusive of competing or inconsistent uses and appears to be the type of exclusive-use easement which section 606(b)(4)(B) of ARTA delineates as the minimum interest to be transferred under ARTA. Since Congress identified the nature of the Railroad's minimum interest in ARTA as an exclusive-use easement, we suggest that your reservation be worded substantially as follows:

Reserving to the United States an exclusive-use easement for the Alaska Railroad, more particularly described as [give 200-foot width and the appropriate legal description of the railroad right-of-way if one can be obtained].

### III.

#### ARTA's Affect on Previously Conveyed and/or Approved Native Allotments

As already stated, section 606(b)(4)(B) of ARTA provides that if the Alaska Railroad is transferred out of federal ownership, the minimum interest to be conveyed for the railroad right-of-way is an exclusive-use easement. Thus, in every instance where a previously approved or conveyed allotment includes railroad right-of-way, an exclusive-use easement will be transferred and the Native allotment will be subject to the exclusive-use easement even if there is no mention of

State Director  
Page 5  
July 20, 1983

a railroad right-of-way in the approval document or Certificate of Allotment. This is consistent with our view, expressed above, that an allotment applicant could not normally have potentially exclusive use of the railroad right-of-way and would take the allotment subject to the existing right-of-way.

However, the right to an additional right-of-way in the future, pursuant to 43 U.S.C. 975d, dies with the transfer of the Alaska Railroad. Section 615(a)(1) of ARTA specifically repeals 43 U.S.C. 975, et seq. in its entirety and there will, consequently, be no authority for the United States to construct additional railroad rights-of-way in Alaska. In addition, section 609 of ARTA provides that any future right-of-way must be obtained from the current land holder under other applicable laws. For federal lands, the legislative history clarifies that future rights-of-way will be processed under such laws as the Federal Policy and Management Act of 1976, 43 U.S.C. 1701, et seq., and not via use of 43 U.S.C. 975d. Congressional Record, H 10695 (December 21, 1982). Moreover, it is our opinion that the 43 U.S.C. 975d reservations contained in prior conveyances are not transferrable. Thus, if and when the Alaska Railroad is transferred, the 43 U.S.C. 975d reservation will no longer have any viability. Until transfer, BLM should continue to reserve a site specific right-of-way for existing railroad rights-of-way as well as the 43 U.S.C. 975d reservation for future rights-of-way.

#### CONCLUSION

In summary, it is our opinion that BLM can proceed with adjudication and certification of Native allotments provided a site specific, two-hundred-foot, exclusive-use easement is reserved to the United States for the Alaska Railroad. Previously approved and/or certificated Native allotments are also subject to the exclusive-use easement but, once the Alaska Railroad is transferred, the 43 U.S.C. 975d reservation will no longer be viable.

  
Dennis J. Hopewell

cc: Area Director, BIA, JAO  
bcc: Patent Section (965)  
Railroad Project (960)  
Chief, Lands Operations (965)  
Allotment Coordinator (930)

8916

LAW OFFICES OF  
WICKWIRE, LEWIS, GOLDMARK  
& SCHORR

A PROFESSIONAL CORPORATION

500 MAYNARD BUILDING  
SEATTLE, WASHINGTON 98104

(206) 622-9603

THOMAS J. BREWER  
DAVID C. CROSBY  
CHARLES A. GOLDMARK  
JOHN W. HANLEY, JR.  
B. GERALD JOHNSON  
KEVIN F. KELLY  
O. YALE LEWIS, JR.  
WENDY F. LIEBOW  
CHRISTOPHER G. OECHSLI  
GREGORY M. O'LEARY  
JOHN W. PHILLIPS  
JON M. SCHORR  
JAMES WICKWIRE  
PEGGY J. WILLIAMS

September 16, 1983

Mr. Dennis J. Hopewell  
Office of the Solicitor  
Alaska Region  
United States Department of the  
Interior  
701 "C" Street  
Box 34  
Anchorage, Alaska 99513

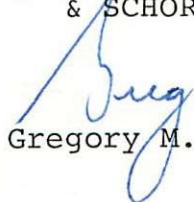
Dear Dennis:

Thanks for forwarding to me copies of the memoranda on § 975d right-of-way reservations and on the impact of the Alaska Railroad Transfer Act on Native allotments. I think the opinion on the non-transferability of the floating § 975d reservation will be particularly useful in removing a cloud from private property in Alaska and averting any wild schemes in the future to exercise the reservation. There are a few minor points in the opinions that I would like to discuss with you next time I am in Anchorage and we have a chance to get together.

I am sorry for the delay in acknowledging receipt of these opinions, but I was on vacation (in France and Italy) for the month of August. Mary is still in Italy doing research for a book and will be back in late October. I do not know when I will be in Anchorage again, but, assuming the railroad issues begin to move after the USRA appraisal is out, I anticipate I will be in Anchorage sometime this Fall and will look you up then.

Regards,

WICKWIRE, LEWIS, GOLDMARK  
& SCHORR

  
Gregory M. O'Leary

GOL:js

RECEIVED  
REGIONAL SOLICITOR (1001)  
SEP 20 1983  
ANCHORAGE, ALASKA