TED STEVENS FOUNDATION ARCHIVES ALASKA RAILROAD TRANSFER ACT – RESEARCH REPORT

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TED STEVENS FOUNDATION ARTA ARCHIVES – 1976

No documents were found with apparent relevance to the Alaska Railroad Transfer Act.

TED STEVENS FOUNDATION ARTA ARCHIVES - 1978

- **DOCUMENT**

  October 23, 1978, correspondence from John Katz, Counsel to the Federal State Land Use Planning Commission for Alaska, to Curtis McVee, State Director of the Federal Bureau of Land Management.

  Memo focuses on the interrelationship between the Alaska Railroad Enabling Act and the Settlement Act (ANCSA) and between various provisions of the latter legislation. See attached.

- **OVERVIEW**

  The Bureau of Land Management was adjudicating a conflict where the Alaska Railroad top filed land withdrawals on Eklutna village corporation ANCSA land claims. This memo is a statement of legal conclusions by the Federal State Land Use Planning Commission for Alaska to the Bureau of Land Management upon which FSLUPC recommendations in this case were premised.

- **NOTE**

  Section 3 – See reference to the authority of the Secretary of Interior under the Alaska Native Claims Settlement Act to withdraw a corridor for utility and transportation purposes across public lands.

  Section 6 – Katz states Eklutna or any other private owner which owns lands adjacent to the Railroad right-of-way may well have the same interest as does the Railroad in attracting revenue producing enterprises which are dependent upon rail transportation.

- **LEGAL CONCLUSIONS OF FEDERAL STATE LAND USE PLANNING COMMISSION**

  1. Lands withdrawn for the use of the Alaska Railroad are not "lands withdrawn or reserved for national defense purposes." The Alaska Railroad is not a National Defense Agency. So, lands withdrawn for Railroad use are not exempt from the statutory withdrawals effected by Section 11(a)(1) of the Settlement Act. Therefore, Railroad lands may be selected by the village corporation for Eklutna.

  2. Section 17 (b) of the Settlement Act cannot be used to protect the withdrawals in question, except as specifically provided in regulations now being promulgated by the Department of Interior. These regulations, which are the outgrowth of the decision of the U. S. District Court for Alaska in Calista v. Andrus, do not provide for the reservation of easements for gravel extraction or dynamite storage and

generally do not permit the registration of easements based on possible future use.

3. Section 17(c) of the Settlement Act which authorizes the Secretary of the Interior to withdraw a corridor for utility (emphasis added) and transportation purposes across public lands, was never used by the Secretary, nor did Congress so intend, to withdraw the lands in question for the use of the Alaska Railroad.

4. Where the village corporation for Eklutna has made an otherwise valid selection, the Alaska Railroad may not retain such lands if the case for retention is premised on future use rather than actual use as of December 18, 1971. Section 3(e) of the Settlement Act (ANCSA) defines "public lands" available for Native selection to include “all Federal lands and interests therein located in Alaska except “the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation.” To the extent that a conflict between the Alaska Railroad Enabling Act and ANCSA is deemed to exist, Section 26 of ANCSA resolves such conflict in favor of ANCSA. The key issue here is factual, that is, how much acreage was actually utilized.

5. If other statutory criteria are met, lands utilized by the Alaska Railroad for gravel extraction can qualify as a Federal installation under Section 3(e) of the Settlement Act.

   Use of a small portion of a withdrawal for gravel extraction does not necessarily justify retention in Federal ownership of the entire tract. If use of a small portion of a Federal withdrawal, without more, could justify the retention of all the lands so reserved, the objectives of Section 3(e) would be thwarted. In our opinion, the Secretary, as the decision maker under Section 3(e), should establish a reasonable standard (for actual use of gravel extraction sites) that considers the pattern of use existing on and before December 18, 1971, and other relevant factors. This standard should be applied uniformly to situations where the actual use of a gravel pit is at issue.

6. The Alaska Railroad cannot justify its retention of lands in Federal ownership solely on the basis that such lands are encompassed within a lease issued by the Railroad. Section 14(g) of the Settlement Act specifically protects valid existing rights, including leases, contracts, and permits issued by the Federal government. The Railroad, with one possible exception, leases lands to derive revenue. In making lands available for Native selection, the Settlement Act does not give any special status to this entrepreneurial function other than to protect the leaseholder's valid existing rights. Moreover, it is worth noting that except for the rentals which the Railroad derives from leasehold interests, Eklutna or any other private owner which owns lands adjacent to the Railroad right-of-way may well

have the same interest as does the Railroad in attracting revenue-producing enterprises which are dependent upon rail transportation.

7. Railroad lands held for future leasing may not be retained in Federal ownership under Section 3(e). This is so because such lands would not constitute "lands actually used. . ." (See previous discussion) In our opinion, the Railroad's use of lands as part of its rate base for determining tariffs is not an "actual use" cognizable under Section 3(e).

TED STEVENS FOUNDATION ARTA ARCHIVES - 1979

- **DOCUMENT**
  February 5, 1979, correspondence from attorney and former U.S. Congressman Lloyd Meeds to David Roderick, Alaska Railroad Chief Counsel.

  Lloyd Meeds's letter states he is responding to the January 24, 1979, Alaska Railroad letter soliciting his advocacy and legal services to represent (lobby) Alaska Railroad interests and concerns in D.C. about interpretations of ANCSA on Alaska Railroad lands. Meeds recites his legislative experience as a Member of the U.S. House of Representatives that drafted and passed ANCSA, and as a member of the Conference Committee that resolved differences between the House and Senate versions of the bill.

  Meeds states his belief there has been a "clear misunderstanding of the intent and purpose of the original Alaska Native Claims Settlement Act" and says, "It is clearly my recollection that there was no intention to deprive the Alaska Railroad of any of its land either actual or potential." He then outlines the strategy he would use to defeat administrative and legislative action contrary to this view. Meeds concludes by saying he has enclosed his application for employment with the Railroad and that he hopes to be under contract with them very soon.

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- **DOCUMENT**
  October 11, 1979, correspondence from U.S. Senator Howard Cannon of NV to U.S. Senator Henry "Scoop" Jackson of WA endorsing a DOT amendment to S. 9 withdrawing all Alaska Railroad lands from ANSCA selection.

  A request from Senator Cannon, Chair of the Commerce, Science, and Transportation Committee to Senator Jackson endorsing an amendment to Senate Bill 9 which would exempt Alaska Railroad property from the operation of the Alaska Native Claims Settlement Act and urging favorable consideration by the Energy Committee, chaired by Senator Jackson.

- **OVERVIEW**

  Senate Bill 9, amending ANCSA, was currently in the Committee on Energy and Natural Resources. Senator Cannon states the amendment is being formally requested by the Secretary of Transportation and says it will help resolve an incorrect interpretation of ANCSA which has resulted in claims being filed and approved against existing Railroad right-of-way lands used to operate and maintain the Railroad, leased lands which generate freight traffic and income, and the Railroad's numerous gravel reserves used for maintenance and construction needs.

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- **DOCUMENT**

  November 19, 1979, memo from Mark Aron, Deputy General Counsel, U.S. Secretary of Transportation, to Frank Gregg, Director of the Bureau of Land Management, Department of Interior.

  Mr. Aron outlines "serious concerns" of the U.S. Department of Transportation with the U.S. Department of Interior's proposed regulations to implement Section 3(e) of the Alaska Native Claims Settlement Act.

- **NOTE**

  A discussion of *easements* is highlighted in this memo. See page 15 of 21 discussion on easements in the attached document. The Secretary of Interior's view was the Alaska Railroad right-of-way could be reserved as an easement, rather than a fee title. The Secretary of Transportation requested DOI regulation language be deleted that reflected DOI's "easement" view of the right of way.

- **OVERVIEW**

  Mr. Aron states Section 3(e) exempts public lands from Native selections that are "actually used" in connection with the administration of any Federal installation. He is concerned about DOT properties in Alaska, specifically, that of the Alaska Railroad (an agency of DOT), and that the proposed regulations have an unnecessarily narrow view of what constitutes "actual use" by a federal agency which could damage the Alaska Railroad's economic viability, threaten its continued operation, and increase costs of operation to the U.S. government. He identifies three groups of Alaska Railroad land holdings DOT is concerned will be lost to Native selection: rights-of-way, gravel reserves, and leased lands.

  Mr. Aron outlines two (2) general concerns. The first, that the Alaska Railroad be allowed to operate as a "commercial enterprise" (private business), not reliant on government subsidy like other federal entities; that all Alaska Railroad landholdings are business assets necessary to keep the Railroad self-sustaining; and that failure to do so would "destroy normal business incentives to operate efficiently".

The second, public lands that formed part of the revenue base of the Alaska Railroad on December 18, 1971, should be considered as “actually used” whether they were in active use in 1971 or held for future needs.

Mr. Aron discusses four categories of public lands exempt from Native selection, subject to the “actual use” definition in the DOI regulations -

1. *"Lands necessarily used for prudent and reasonable action in support of a federal agency program on December 18, 1971" –*

   Mr. Aron argues the statutory mission of an agency should be considered a valid and necessary basis on which to judge “actual use” of its lands; and that “actual use” should include the amount of land the Railroad held on December 18, 1971, that was needed on a “prudent and reasonable” standard to support its statutory mission, as opposed to the DOI regulation standard requiring the “least amount” of land be excluded from Native selection.

2. *"Lands necessary to provide a reasonable buffer zone with respect to adjacent properties" –*

   Mr. Aron says the provision would require the Railroad to justify the width of its right-of-way at each location of the railbelt where a Native claim is filed and asked for a revision to include the existing Railroad right-of-way as an example of land that is “actually used” as a buffer zone. He argues a statutory and practical basis for recognizing the existing 200-foot right-of-way as an example of “buffer zone” under this category, and that failure to revise the language will result in operational and safety difficulties.

3. *"Lands used by a non-governmental entity or private person for a use that has a direct and necessary connection to the mission of the Federal agency" -*

   Mr. Aron states his concern that DOI does not include in this category any Railroad leased lands that are used solely to generate income nor any leased land that had a gap in its lease or a changed use during the selection period. He pushes back on DOI prejudgment that the Alaska Railroad's leasing of land to obtain revenue is not an *actual use* and requests this category be revised to reflect the uniqueness of the Alaska Railroad by recognizing that leased lands are an important source of lease revenue.

4. *"Lands used on December 18, 1971, and continued in use as a source of gravel or other materials used by the Federal installation but not where the gravel or other material is sold to produce revenue" –*

Mr. Aron outlines his concern that DOI considers gravel reserves as *actually used* only to the degree they are needed by the agency in the immediate future and says this provision would not allow an agency to retain gravel reserves for long-term needs. He argues DOI is using an unreasonably narrow interpretation of Section 3(e). The purpose of a gravel reserve is to provide material for future needs, and it is impossible to know when or where gravel will be needed. He asks DOI to treat land held on December 18, 1971, as gravel reserves as land *actually used* for a gravel reserve.

Mr. Aron concludes the memo outlining three specific Department of Transportation concerns with provisions of Department of Interior regulations.

1. ***Lands Subject to Actual Use Determination –***

   Mr. Aron states DOI regulations allow withdrawal and selection of *actually used* land that was intended by section 3(e) of the Act to be excluded from the withdrawal and selection process. He requests DOI regulations be revised to state that federal agency land is not withdrawn for selection until it has been determined to be public land under Section 3(e). He states the current regulations create an impossible situation for the Alaska Railroad, which is required to use the proceeds from its land holdings to cover operating expenses.

2. ***Easements –***

   Mr. Aron says DOT questions the authority of the Secretary of Interior to determine that an agency may retain only an easement instead of full fee title to land that it *actually uses.* He argues there is no authority under section 3(e) for the Secretary to determine that the agency actually uses a lesser interest in land than its present rights to that land. He states DOI regulations allow the Secretary of Interior to convey title to land even after the land had been determined to be *actually used* leaving the agency with only an easement across the land. He requests regulation language allowing the Secretary of Interior to designate an easement be deleted, and new language added to ensure that the United States will retain full fee title to any land that is actually used by an agency.

3. ***Regional Corporation Selections Subject to Section 3(e) Determination –***

   Mr. Aron states DOT concern that the DOI regulations are vague as to the relationship between the 3(e) determination process and the selection pool authorized by P.L. 94-204 for the Cook Inlet Region Corporation. He requests and offers new language to be added to clarify this relationship.

Finally, Mr. Aron attaches DOT-recommended changes/edits to the DOI regulations. Significantly, one of the DOT edits requested is for DOI to delete the regulation language on railroad right-of-way easements where DOI says the Director of the Bureau of Land Management may reserve an easement rather than full fee title where an easement provides adequate protection of the right of way, is customary for the particular use of the right of way at that location, and will further the objectives of the Alaska Native Claims Settlement Act.

TED STEVENS FOUNDATION ARTA ARCHIVES - 1980

- **DOCUMENT**
  November 20, 1980, memo from U.S. Secretary of Transportation Neil Goldschmidt to U.S. Secretary of Interior Cecil Andrus.

  DOT Secretary Goldschmidt petitions DOI Secretary Andrus for reconsideration of the Final Rule published by the Department of the Interior on October 22, 1980, to implement Section 3(e) of the Alaska Native Claims Settlement Act (ANCSA).

- **NOTE**
  This memo reflects the tension and disagreement within the Reagan Administration's Cabinet over whether the Alaska Railroad should be operated under a public "common carrier" transportation model, or as a private commercial enterprise.

- **OVERVIEW**
  Secretary Goldschmidt (DOT) bases his petition on a concern that the Final Rule will adversely affect the Alaska Railroad, an agency of DOT, "by allowing Native selection of significant portions of the land holdings needed for the Railroad to continue operating as an economically viable rail carrier." Secretary Goldschmidt states the Alaska Railroad is structured as a business enterprise, with its land holdings as part of its economic base, which are used in the same way a private rail carrier uses its lands to support operations, provide revenue, and supply materials for maintenance.

  Goldschmidt says unlike other federal agencies, the Railroad does not receive an appropriation to pay its normal operating costs. Therefore, Alaska Railroad's economic survival requires its lands (rights-of-way, leases, and gravel reserves) to be ineligible for Native selection under section 3(e) of ANCSA.

  Goldschmidt says he believes the Final Rule represents a misunderstanding of the legislative history of ANCSA, that it will result in an incorrect and harmful application of ANCSA to the Alaska Railroad and provides several quotes from the Congressional Record to argue Congress did not intend for Alaska Railroad land holdings to be available for Native lands selection.

Goldschmidt states the Final Rule would force the Railroad to curtail services and change its character from a self-sustaining business enterprise to a subsidized activity which would destroy normal business incentives to operate efficiently and require progressively greater government subsidies in the future.

Goldschmidt concludes the memo stating that the Final Rule does not become effective until November 21, 1980, and urges Secretary Andrus to withdraw the Final Rule and issue an amended rule that will not adversely affect the Alaska Railroad.

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- **DOCUMENT**
  December 10, 1980, memo from David Roderick, Chief Counsel of the Alaska Railroad to Special Assistant to the Chief Counsel for the Federal Railroad Administration.

  Mr. Roderick outlines concerns of the Alaska Railroad that the Bureau of Land Management was preparing to convey Railroad lands to the Eklutna Village Corporation that Eklutna had selected under ANCSA and that the federal Department of Interior was giving authority to the state director of Interior to grant either a fee or an easement right of way for the Railroad.

- **NOTE**
  This memo highlights the conflicting views of DOT and DOI concerning the Alaska Railroad right-of-way being held as an easement or a fee.

- **OVERVIEW**
  In the memo, Mr. Roderick states two points of concern: that Eklutna Village Corporation had selected lands that were unutilized Railroad “gravel reserves” under the Alaska Native Claims Settlement Act, and that the Department of Interior had given the state director of Interior the authority to decide that any (emphasis added) Alaska Railroad right-of-way could be held as an easement, rather than in fee, and that such determination would effectively take away all ability of the Railroad to control the right-of-way.

  Mr. Roderick urges the Federal Railroad Administration (FRA) and the Department of Transportation (DOT) to take the position that Railroad easements (in Alaska) need to be defined by BLM with input from the Federal Railroad Administration and Alaska Railroad.

  Mr. Roderick encloses a "Motion for Remand and Dismissal" drafted by counsel for the Bureau of Land Management (BLM) that he urges FRA and DOT share with the staffs of Senator Stevens, Senator Murkowski, and the Energy and Commerce Committee “to show them that Interior intends to take away the Railroad's gravel reserves and to force on the Railroad an easement which…would force the Railroad to pay for perturbations of

vegetation, presumably including weeds, or for the use of any gravel (emphasis added)."*

*NOTE: This is exactly what the Alaska Railroad attempted to force upon every private landowner along the Railroad right-of-way through its Residential Right of Way Use Permit (RRUP) program it disbanded after political intervention by the Alaska Legislature in 2017.

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- **DOCUMENT**
  December 22, 1980, memo from U.S. Secretary of Interior Cecil Andrus to U.S. Secretary of Transportation Neil Goldschmidt.

  Secretary Andrus denies Secretary Goldschmidt's November 20, 1980, petition for reconsideration of the final rulemaking published by the Department of the Interior on October 22, 1980, implementing section 3(e) of the Alaska Native Claims Settlement Act (ANCSA).

- **NOTE**
  In his denial of DOT Secretary Goldschmidt's petition, DOI Secretary Andrus makes a significant statement with respect to the Alaska Railroad right-of-way saying *the conveyance of lands to the Native corporations with a reservation of an easement for the railroad is consistent with standard practices in all other types of conveyance.*

- **OVERVIEW**
  Secretary Andrus denies DOT's petition in a brief memo stating that extensive discussions took place throughout the entire rulemaking process between the Department of Transportation and the Department of the Interior on all the information contained in DOT's petition for reconsideration; that the provisions of ANSCA section 3(e) apply to all Federal agencies except national park and national defense lands; and that there are no exceptions in the language of section 3(e) which specifically exempt Alaska Railroad land.

  Secretary Andrus states the railroad right-of-way will be protected as a section 17(b) easement on Native conveyances. He says ANCSA does not provide DOI with the authority to specifically reserve a right-of-way under the Railroad Enabling Act of March 12, 1914, but the reservation under the section 17(b) easement provision will protect the railroad's interest. He concludes by saying the conveyance of lands to the Native corporations with a reservation of an easement for the railroad is consistent with standard practices in all other types of conveyance.

TED STEVENS FOUNDATION ARTA ARCHIVES - 1981

- **DOCUMENT**
  April 7, 1981, correspondence from Drew Lewis, U.S. Secretary of Transportation, to James Watt, U.S. Secretary of Interior asking for a review of former Interior Secretary Andrus's denial of DOT's November 20, 1980, petition asking for reconsideration of the Final Rule published by the Department of the Interior on October 22, 1980, to implement Section 3(e) of the Alaska Native Claims Settlement Act (ANCSA).

- **NOTE**
  Secretary Lewis continues to advance his DOT predecessor's view that the Alaska Railroad has a fee interest in the right-of-way, as opposed to an easement interest that former Interior Secretary Andrus believed the Railroad was entitled to possess.

- **OVERVIEW**
  Secretary Lewis states his concern that the Department of Interior Regulations for Native selection of Federal agency lands in Alaska will adversely affect the Alaska Railroad by allowing Native selection of Railroad land holdings that are needed for its continued operation as an economically viable rail carrier. He says his predecessor (Secretary Goldschmidt) and Watt's predecessor (Secretary Andrus) were unable to reach an agreement on the appropriate application of the Alaska Native Claims Settlement Act, (ANCSA), to the land holdings of the Alaska Railroad, which includes rental lands, gravel reserves, and right-of-way lands.

  Secretary Lewis concludes by urging Secretary Watt to begin a prompt reexamination of the standards contained in the DOI Regulations and reiterates his position that the Alaska Native Claims Settlement Act should not be interpreted to allow the conveyance of important Railroad support lands.

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- **DOCUMENT**
  May 29, 1981, correspondence and analysis from William Coldiron, Department of Interior Solicitor, to Legislative Counsel (legal counsel to Congress) on the draft bill providing for the transfer of the Alaska Railroad from federal ownership to State of Alaska ownership.

- **NOTE**
  Mr. Coldiron is the Solicitor General for the Department of Interior. He states that "valid existing rights" apply to Railroad lands and that a Constitutional 5th Amendment "taking" would occur with ARTA unless the transfer made it explicitly clear that all Alaska Railroad lands were subject to "valid existing rights". He also reiterates an important legal principle that once a land patent has been issued, it stands as the highest evidence of legal title, and even the U.S. government can't undo a patent it has issued.

- **OVERVIEW**

  Mr. Coldiron states the issue is whether the bill draft could constitute a "taking" under the 5th Amendment to the Constitution in that it would extinguish certain claims of Alaska Natives under ANCSA to lands that have been withdrawn for the use of the Alaska Railroad, a federally created, owned, and operated entity. He discusses the historical application of “aboriginal title” to Native lands, the background of the Alaska Railroad Enabling Act of 1914, the application of ANCSA to railroad lands and other public lands, and how to avoid a constitutional 5th Amendment “taking” problem.

  Mr. Coldiron concludes that Alaska Natives and others have “valid existing rights” to Railroad lands under a variety of scenarios that pre-date the Alaska Railroad Transfer Act. He recommends a solution to avoid a “taking” of these rights is to make the grant of the Alaska Railroad subject to valid existing rights.

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- **DOCUMENT**

  August 3, 1981, memo from David Roderick, Alaska Railroad Chief Counsel, to Michael Whitehead, Special Assistant to Governor Jay Hammond.

  Mr. Roderick summarizes for Mr. Whitehead several challenges the Alaska Railroad is facing with state agency (DNR) interpretation of its property interest in the right-of-way. Mr. Roderick asks for help from the Governor of Alaska, whom he states has remained silent in the controversy over the nature of the Alaska Railroad property interest in the right-of-way.

- **NOTE**

  Mr. Roderick outlines negative consequences of the state’s view saying that if the Railroad does not possess a fee interest in the right-of-way, the current practice of the Alaska Railroad to permit utility (gas lines, communication lines, etc.) access and use of the right-of-way would be “unlawful”. Incidentally, this is one of the legal arguments of Flying Crown HoA– How can the Alaska Railroad “permit” access to or use of property it does not lawfully own?

- **OVERVIEW**

  Mr. Roderick highlights two areas along the right-of-way where Railroad right-of-way property ownership is under dispute: Lost Slough, and the Tanana River Railroad. He states that in both these cases the crux of the problem is that the Railroad believes it has a fee interest in the right of way, and the State of Alaska (DNR) believes the Railroad possesses “merely an easement”.

  He outlines a second problem where Railroad lands in Seward, Whittier and Valdez are being requested by Chugach Natives, Inc., and states the Railroad has kept control of these portions adjacent to tidewater, primarily to keep the Interior rivers of Alaska open to the Southcentral ports of Alaska.

Mr. Roderick then asks for help from the Governor with the Eklutna Village Council and states that federal lands (including the Railroad right-of-way) within the Eklutna Village area are subject to Native claims and, if granted, would cause significant operational problems for the Railroad. Finally, he asks the Governor for help with the ANCSA section 3(e) determination process to protect Railroad lands from being claimed by Natives.

He concludes by stating the current situation will not allow the Railroad to be transferred to the state intact, and if the State has any interest in a complete transfer of the existing structure of the Railroad, action is imperative.

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- **DOCUMENT**

  August 14, 1981, correspondence from Alaska Attorney General Wilson Condon (drafted by Assistant AG Tom Meacham) to U.S. Senator Ted Stevens citing State of Alaska concerns with draft ARTA legislation, including existing claims to Alaska Railroad real property and how ANCSA would be applied to ARTA.

  This letter to Senator Ted Stevens is a summary of the State of Alaska's concerns regarding the relationship between the proposed legislative transfer to the State of the Alaska Railroad and pending ANSCA and other claims against some of the Railroad's real property.

- **NOTE**

  Notably, Alaska AG Condon recognizes that “vested legal rights” to Railroad properties can’t be undone by subsequent legislation, and includes those rights that are less than a land patent, less than fee, and have not yet received formal distinction or recognition.

  OVERVIEW

  AG Condon’s summary of concerns about ARTA draft language relates to the involvement of Alaska Railroad real property in the ANCSA land selection and conveyance process in Section 3(e)(1) of ANCSA, which defines the term "public lands", and by Section 11 of that Act, which makes "public lands" within certain designated and withdrawn townships available for Native selection. He states, *“Section 3(e) defines "public lands" as. . . all Federal lands and interests therein located in Alaska except 1) The smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any federal installation…”.*

  Section 5 concerns - AG Condon is concerned that Section 5(a) of the draft of ARTA revokes valid claims against rail properties of the Alaska Railroad *" . . . for which legal title has not vested with the claimant”*. AG Condon rejects the assumption that valid Native land selections of Alaska Railroad properties subject to Section 3(e) determinations may be revoked by the Secretary of the Interior simply because “legal title has not vested with the claimant”. In other words, a patent has not yet been issued.

Condon acknowledges the bill language was drafted based on conclusions reached by the Justice Department's Office of Legislative Affairs and the Department of Transportation. He states his belief that the conclusions are legally incorrect, that Section 5(a) misinterprets public land law principles, and that if the bill is enacted in its present form, the State of Alaska would be subject to lengthy, involuntary litigation regarding equitable property interests which have vested in Native corporations, and which the federal courts will be constitutionally required to protect.

AG Condon states it appears that section 5(b)(1) *suffers from the same constitutional infirmity* as 5(a). is intended to define "public lands" *nunc pro tunc* (retroactively), to exclude from transfer under ANCSA all Railroad properties, whether or not they constitute the "smallest practicable tract". He says he views this language as constitutionally unsound.

AG Condon highlights a concern that Section 5(b)(2) may unconstitutionally limit CIRI's ability to make Native land selections. He argues that CIRI has a statutory (ANCSA) vested right to select Railroad lands which subsequent legislation (ARTA) cannot undo.

AG Condon states Section 5(b)(3) (impacting Eklutna Village) seeks to exclude Alaska Railroad lands from selection under ANILCA, but as written does not appear to contravene the 5th Amendment to the United States Constitution. He states Section 5(b)(4) (affecting Chugach Region Natives) also does not appear to have constitutional infirmity.

AG Condon concludes with the State of Alaska's recommended language to resolve the constitutional concerns identified in Sections 5(a), 5(b)(1), and 5(b)(2) of S. 1500 (ARTA draft). He suggests Section 5(a) be amended by deleting the phrase *" . . . for which legal title has not vested with the claimant"* and inserting the phrase *"subject to valid existing rights".* Condon further suggests that paragraphs 5(b)(1) and 5(b)(2) be deleted. He says by making the changes, *"valid, vested Native selections under Sections 3(e) and 1 of ANCSA and any valid, vested selections of land under the Cook Inlet Land Exchange would be protected as "valid existing rights".*

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- **DOCUMENT**

  August 19, 1981, letter from Alaska Attorney General Wilson Condon (drafted by Assistant AG Tom Meacham) to Seattle attorney James Wickwire whose firm regularly represented Alaska Native Regional and Village Corporation interests.

  AG Condon says he is enclosing for Mr. Wickwire's review and feedback a copy of a draft response to the congressional delegation concerning the treatment of Native lands issues in the proposed Alaska Railroad transfer legislation, and that he would like to

integrate it into Mr. Wickwire's submission to the delegation on all aspects of the S. 1500 (transfer legislation).

- **NOTE**

  AG Condon expresses real concern over a potential conflict of interest for the Secretary of Transportation, a problematic reversionary clause forcing the state to defend claims against the United States, improper treatment of valid existing rights (including unpatented mining claims), and the threat of taking homesteader property rights without compensation.

- **OVERVIEW**

  Section 4 concerns – AG Condon outlines a potential conflict of interest for the Secretary of Transportation in the proposed legislation. The Alaska Railroad is an agency of DoT, and the extent of Railroad property is central to both the 3(e) determinations required under ANCSA and the extinguishment of "unvested" or "valid existing rights". AG Condon says the bill should clearly state that Section 4 does not contemplate that the Secretary of Transportation would assume the role presently filled by the Department of the Interior in making 3(e) determinations under ANCSA, or that DoT would otherwise determine the existence and extent of valid existing rights asserted under the general public land laws or special statutory land grants.

  Section 7 concerns – AG Condon is concerned the proposed legislation imposes a reversion clause upon Railroad real property transferred to the State and says the breadth of this reversion clause would appear to require the State to defend claims against Railroad real property which are later adjudicated pursuant to the section 3(e) requirements of ANCSA, whether or not the State felt justified to do so on the facts. He says if the reversion clause in Section 7 remains, it must be coordinated with the treatment of "valid existing rights" and vested Native selections, to ensure that lands determined to be outside the protection of Section 3(e) of ANCSA, and thus conveyable to selecting Native corporations, do not pose a monetary liability upon the State.

  U.S. Senator Stevens concerns of taking without compensation are justified – AG Condon says it appears Senator Stevens' concerns regarding homesteaders and other occupants who have acquired title to federal lands since 1914 may have substantial basis because while no specific right-of-way has been reserved, the general federal statutory right-of-way reservation for "pipelines, ditches, canals, and railroads" … has been routinely included in most federal patents to public lands in Alaska. Condon states this general reservation would appear to permit the unbuilt portions of the Railroad to extend in any direction over former federal lands which have been patented into private ownership, without payment for compensation for either improvements or the underlying land.

  Unpatented mining claim concerns – AG Condon states he has recently learned that the Alaska Railroad right-of-way may be subject to many unpatented mining claims which were located prior to the date of withdrawal of the Railroad. He considered these

unpatented claims to be valid existing rights that must not be precluded by the legislation.

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- **DOCUMENT**

  August 20, 1981, Resource Development Council "member action alert" was provided to U.S. Senator Ted Stevens by Mr. James "Jim" Messer of Fairbanks. The alert claims S.B. 1500 (transfer legislation) will seriously limit the expansion of the Railroad in Alaska. On November 3, 1981, Senator Stevens replies to Mr. Messer and makes it explicitly clear he is not backing away from his position that the private land of homesteaders needed for Railroad purposes must be compensated to the landowners.

  This Alaska Resource Development Council member alert condemns the idea of compensation to private landowners under the right-of-way and "urgently" asks members to contact Senator Stevens office and insist that S.B. 1500 be amended to protect the further expansion of the Alaska Railroad.

- **NOTE**

  This RDC member alert shows U.S. Senator Ted Stevens, author and prime sponsor of ARTA, wanted to protect the property rights of homesteaders and others who owned lands transferred to them by a federal patent that contained Alaska Railroad right-of-way.

  Senator Stevens believed the land patent holders under the right-of-way held the fee interest, and the Railroad held an easement. As long as the land was still in federal ownership, the Railroad owned it outright, but if it was sold and transferred via federal land patent to a private party, the Railroad only maintained permission to cross the landowner's property. If the Railroad wanted a fee interest on these private properties, they had to buy it.

- **OVERVIEW**

  The key portion of the member action alert states –

  Senator Stevens insists that rights-of-way on patented land be excluded from the transfer so that Alaskans owning these lands can be paid for the rights-of-way. This is an outright gift to these landowners at the expense of all other Alaskans if the state must buy back the access rights the federal government already owns.

  To provide the State of Alaska less power than the Federal Government had will permanently consign the railroad to its present size and scope.

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- **DOCUMENT**
  August 27, 1981, letter from Mr. B.J. Whitley of Tenneco Inc, a major energy producer, and transporter based in Houston, Texas, to U.S. Senator Ted Stevens.

  Mr. Whitley is contacting Senator Stevens based on the RDC "member action alert" of August 20, 1981. His arguments are the same as those put forward in the RDC alert. He is concerned that S.B. 1500 does not provide for the expansion of railroad rights-of-way across federal and private lands and will give the State of Alaska less power than the Federal Government had prior to ARTA, thus consigning the railroad to its present size and scope.

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- **DOCUMENT**
  September 18, 1981, letter from Alaska Governor Jay Hammond to Mr. David Roderick, Alaska Railroad Chief Counsel. The letter is a response to Mr. Roderick's correspondence of August 3, 1981, to Special Assistant Michael Whitehead.

  Governor Hammond acknowledges the fundamental legal question of concern to the Alaska Railroad (Mr. Roderick) and the State of Alaska, whether or not the Alaska Railroad possessed a fee interest or an easement in the railroad right-of-way. He states the two pending land appeals of the Alaska Railroad (Lost Slough and Tanana River Railroad) would most likely be determined by the Interior Board of Land Appeals.

- **NOTE**
  In general, this is a strong rebuke by Governor Hammond to the Alaska Railroad of their view of property rights pertaining to Railroad lands. In 1982, the IBLA ruled against the Alaska Railroad in an appeal of the Railroad claiming the State of Alaska could not make Alaska Statehood Act lands selections of Railroad right-of-way lands because the Railroad already owned the fee. IBLA ruled the Railroad did not own a fee interest, only an easement, and that the right-of-way selections by the State of Alaska were lawfully made.

- **OVERVIEW**
  Governor Hammond begins by dismissing the Railroad's claim that if it didn't own a fee interest in the right-of-way then all the uses of the right-of-way it had been permitting would be unlawful. He states that whatever interest the Railroad held in the right-of-way and the land under it would become the property of the State, and that any possible "unlawful" authorized compatible uses of the right-of-way for utility lines, etc., regardless if the Railroad exceeded its ownership interest, would no longer be an issue because the State would now own the land and the right-of-way.

  With respect to the tidewater Railroad lands in Seward, Whittier, and Valdez, Governor Hammond says the state has not reached a "firm position" regarding the possibility of

transfer of any Alaska Railroad lands to Chugach Natives, Inc., but offers that the State will likely insist that those lands remain as a part of the Railroad.

Concerning federal lands of concern to the Railroad within the Eklutna Village area Governor Hammond says that he saw no unilateral authority for any of the four members of the Eklutna-State agreement provision of ANILCA (Eklutna Village Council, Cook Inlet Region, Inc., the State of Alaska, and the Municipality of Anchorage) to unilaterally dispossess the Railroad of their lands. He says the state's view is that no change in the status of the land by any of the parties to the agreement can occur without there having first been a determination by the United States that the land covered by the agreement (i.e., Railroad lands for railroad purposes) is no longer needed for federal purposes.

Governor Hammond makes it clear he and the Alaska Attorney General strongly disagree with the Department of Justice that Native land selections which have not yet received full legal title (via patent or interim conveyance) may be revoked by legislation, stating the Justice opinion was not based upon recognized public land law principles. He continues, saying the Alaska Native corporations have vested property rights in otherwise valid land selections meeting the Section 3(e) criteria, whether or not the Department of Interior has made final 3(e) determinations. Further, these vested property rights may not be revoked without payment of compensation, pursuant to the Fifth Amendment to the United States Constitution.

Governor Hammond concludes the memo to Mr. Roderick saying the State will urge the bill to be amended to protect existing vested property rights, that he did not believe the U.S. Bureau of Land Management was creating any new vested property rights in Railroad lands that Native corporations did not already possess and that the State would not attempt at that time to identify every other vested property right as it would delay the transfer process.

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- **DOCUMENT**
  September 21, 1981, letter to Howard Harlson, president of B.F. Walker, Inc., a trucking company providing extensive oilfield hauling services, from U.S. Senator Ted Stevens.

- **NOTE**
  Numerous letters of concern from land and sea transportation companies worried about unfair competition from the Alaska Railroad were written to Senator Stevens.

- **OVERVIEW**
  Mr. Harlson has a concern that the Alaska Railroad will operate in possible competition with trucking companies. Senator Stevens responds by saying the transfer legislation includes an agreement by the State to operate the railroad as a rail carrier subject to the

Interstate Commerce laws, and that it will not become a water or motor carrier but must have the flexibility to contract with other carriers.

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- **DOCUMENT**
  September 23, 1981, internal memo from Senate staffers Mark Schneider and Bill Phillips to their boss, Senator Ted Stevens concerning the Alaska Railroad right-of-way.

- **NOTE**
  In this brief memo, Senator Stevens' staff affirm Senator Stevens was correct about several areas of concern, including "taking without compensation" under federal ownership of the right-of-way; that the 1914 reservation did not apply to lands conveyed to Native corporations under ANCSA; that all patents (mining claims, homesteads, homesites) that might cross a future right of way would include general reservation language; and that they were working with the State of Alaska and federal agencies to come up with a solution that would ensure future railroad right-of-way expansion.

- **OVERVIEW**
  "Taking without compensation" under Federal ownership of the Alaska Railroad was possible, but the transfer legislation would prevent the State from extending unbuilt portions of the Railroad right-of-way across privately patented lands without just compensation being paid to the landowners.

  The 1914 reservation did not apply to lands conveyed to Native corporations under ANCSA. See *Alaska Public Easement Defense Fund v. Andrus*, 435 F. Supp. 664 (1977). The case was not appealed. The court held that ANCSA preempted prior statutory authority when they conflict. In this case, the two floating easements in question (Acts of 1890 and 1914) directly conflicted with section 17 (b)1 of ANCSA and were repealed as to ANCSA lands.

  All other patents including mining claims, homesteads, homesites, etc. that might traverse a future right of way would be included in the general reservation language in each patent.

  Schneider and Phillips were working with the State, Interior, Agriculture, and Transportation to fashion an adequate solution for right-of-way expansion; along the lines of ANILCA with procedural improvements.

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- **DOCUMENT**
  September 30, 1981, letter to Mr. Robert "Bob" Atwood, Editor of the Anchorage Times, from U.S. Senator Ted Stevens. Senator Stevens asks Mr. Atwood to run the letter as an editorial due to widespread interest in the Alaska Railroad Transfer Act and a "great deal of misunderstanding" about the issue.

- **NOTE**

  Senator Stevens appeals to Mr. Atwood to understand that while he wants the railroad extended (from its current 500 miles of track), he does not wish to do so at the expense of homesteaders giving up rights-of-way across their lands without compensation, when "everyone else" will be compensated.

- **OVERVIEW**

  Senator Stevens clarifies the history and use of the 1914 Alaska Railroad Act, stating the Act provides a reservation (a right of the Federal government to use lands patented to individual citizens, for pipelines, ditches, canals, and railroads…up to 100 feet on either side of the centerline of the road) in land patents. He states the Act has rarely been used for railroad right-of-way purposes, with the Federal and later State governments preferring to negotiate with private landowners to acquire private land.

  Senator Stevens says the Federal District Court in Alaska has ruled that the 1914 Act and all other floating easements do not apply to Native lands. And that to attempt to use the 1914 reservation to acquire lands in private ownership for railroad purposes would result in a wrongful taking of privately owned land without compensation. He states the Federal Land Policy and Management Act does grant the State a way to obtain right-of-way access across Federal lands in Alaska.

  Senator Stevens says that, if necessary, the State should acquire rights-of-way across privately owned lands for the Alaska Railroad the same way it acquires rights-of-way for highways, where the State exercises eminent domain powers of private land for fair compensation.

  Senator Stevens then highlights specific areas of concern he has for developed residential areas like Oceanview (Flying Crown Homeowners Association), South Addition, Forest Park, and Turnagain which are now subdivided. He says that allowing the 1914 Act to permit the State to acquire lands for railroad purposes would impose a great hardship on those who built homes in those areas.

  He concludes his note by saying he strongly hopes and desires that the state will extend the Alaska Railroad but maintains his position against "taking without compensation" saying "For myself, I just cannot believe it is good public policy to allow privately owned land to be taken by the State for public use without compensation."

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- **DOCUMENT**

  October 1, 1981, memo from David Roderick, Alaska Railroad Chief Counsel, to Wilson Condon, Attorney General for the State of Alaska. This memo is in response to Governor Hammond's September 18, 1981, letter to Mr. Roderick.

This correspondence thinly veils the strong emotion of Mr. Roderick who is clearly upset with the legal views of the Governor and Attorney General of Alaska.

- **NOTE**

  Perhaps more than any other Ted Stevens Foundation archival record pertaining to the Alaska Railroad Transfer Act, this memo highlights the level of discord between the federally-owned Alaska Railroad and the Executive branch of the State of Alaska. The State was concerned about protecting the vested property rights of all claimants along the Railroad right-of-way. The Railroad was concerned about possessing a fee interest in the right-of-way.

- **OVERVIEW**

  Mr. Roderick's first sentence declares "the Railroad has a fee interest in its right-of-way". His second sentence states that "the Governor's letter is off the mark..." and later claims the Governor is using "cute arguments" that are not applicable to or show a lack of understanding of the issues at hand.

  Mr. Roderick states the transfer legislation may be interpreted to view the Railroad's property interest in the right-of-way as less than what the Railroad thought it owned and therefore it was important what property interest the State believed the Railroad possessed in the right-of-way, a fee, or an easement. Mr. Roderick postulates that the Governor has not considered the Railroad right-of-way traverses private land in many areas and if the Railroad has less than a fee interest, the State would get very little in the transfer.

  Mr. Roderick addresses the question of the Railroad "unlawfully" exceeding its authority (if it does not possess a fee interest) in allowing various uses of the right-of-way. He says *the facts are that none of these things took place because the Railroad owns a fee in the right-of*-way and that he only used the argument so the State would accept the Railroad possessed a fee interest in order to present a united front on the bill.

  Mr. Roderick then issues a demand, stating "*Right now (emphasis added) the Railroad needs to know whether or not the State is prepared to accept the Railroad's analysis that our Railroad right-of-way is in fact a fee interest. If the state is not prepared to do so then the Federal Railroad Administration and the U. S . Department of Transportation want to know just that prior to the passage of SB 1500*.

  Mr. Roderick states that in spite of the Governor's analysis to the contrary, the Railroad continues to believe it remains in danger of losing essential lands to Eklutna Village. Referencing the Governor's 3(e) discussion, Roderick says the Railroad takes "sharp exception" to his analyses, stating that a Native village filing on Federal land does not automatically prevail. He brings up a hypothetical where a Native village or corporation filed on land in excess of their allotment.

Finally, Mr. Roderick says he hopes the Governor's analysis that the U.S. Bureau of Land Management cannot convey more property rights to Native corporations is correct, but that if he is incorrect, then the BLM can establish new rights and give away essential Railroad lands. He concludes by saying the BLM has ceased activity on review of Section 3(e) requests so their question on this issue is now moot.

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- **DOCUMENT**
  October 26, 1981, letter from U.S. Senator Ted Stevens to Mr. Albert Reyerse of Galena, Alaska, who had contacted Senator Stevens office in response to the Alaska Resource Development Council member action alert.

- **NOTE**
  Senator Stevens says a provision in the transfer legislation (S. 1500) would repeal a cloud on all patents issued for homesteaded land in Alaska that allow land to be taken by the federal government without providing compensation. He says, "*I feel very strongly that if the State required additional private land for railroad expansion, it should pay for the lands.*

- **OVERVIEW**
  Senator Stevens assures Mr. Reyerse that nothing in the transfer legislation will require the State to pay for rights-of-way the federal government already uses for the operation of the Alaska Railroad. He then says the State would only be required to buy rights-of-way if additional rights-of-way are needed in the homestead areas.

  In support of his position, Senator Stevens says that mortgage bankers in Alaska have told him that if lands were taken without compensation, the cloud on title would eliminate financing for lands near the railroad right-of-way which he considered to be most unfortunate. He says he will continue to support the elimination of federal powers to take private land without payment.

  He concludes by assuring Mr. Reyerse he will continue to support a fair right of access for the Railroad to expand its right-of-way.

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- **DOCUMENT**
  October 27, 1981, letter from U.S. Senator Ted Stevens to Mr. B.J. Whitley of Tenneco in response to his letter of August 27, 1981, outlining concerns based on the RDC "member action alert".

  This letter is essentially identical to the October 26, 1981, letter to Mr. Albert Reyerse of Galena, Alaska.

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- **DOCUMENT**
  October 27, 1981, letter from U.S. Senator Ted Stevens to Glenn and Mary Lou Briggs of Eagle River, Alaska.

  This letter is essentially identical to the October 26, 1981, letter to Mr. Albert Reyerse of Galena, Alaska.

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- **DOCUMENT**
  November 3, 1981, correspondence from U.S. Senator Ted Stevens to Mr. James Messer of Aurora Motors in Fairbanks, Alaska. The letter was a response to the RDC member action alert that Mr. Messer sent to Senator Stevens on August 20, 1981.

  This letter is essentially identical to the October 26, 1981, letter to Mr. Albert Reyerse of Galena, Alaska.

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- **DOCUMENT**
  An undated draft letter, apparently written in late December 1981 or early 1982, from William Horn, Deputy Under Secretary of Interior, to Senator Jay Kerttula, the Alaska State Senate President, in response to a letter Senator Kerttula wrote to the Under Secretary on December 17, 1981.

  Under Secretary Horn advises Senator Kerttula that as a result of an earlier meeting with Senator Kerttula and other state senators, and later discussions with U.S. Senator Stevens he is persuaded that the Native claims and rights-of-way issues can be resolved in a manner to facilitate transfer of the railroad to the State.

  Horn says it appears that native corporations may have a maximum entitlement to approximately 4200 acres of railroad lands pursuant to Section 3(e) of the Alaska Native Claims Settlement Act (ANCSA), and that DoI is prepared to adjudicate these claims within the year.

  Horn concludes by saying Interior is examining the "warranty deed" concept under which the Federal government would convey its interests, subject to valid existing rights, to the State but would warrant the conveyance, and that this approach appeared to protect valid existing rights and ensure the interests the state would receive would not be diminished.

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- **DOCUMENT**
  December 31, 1981, letter from Tim Wallis, President of Doyon, Ltd., to U.S. Senator Ted Stevens.

- **OVERVIEW**
  Mr. Wallis thanked Senator Stevens for his promise at the recent December 1981 Alaska Federation of Natives convention to get the ANCSA Section 3(e) adjudication process moving again for Native selections on Alaska Railroad land saying it was good news to all in attendance at the meeting and to the Native community as a whole.

TED STEVENS FOUNDATION ARTA ARCHIVES - 1982

- **DOCUMENT**
  January 12, 1982, memo to U.S. Senator Ted Stevens from his staff member, Mark Schneider, asking for direction from Senator Stevens on how he wished to proceed with the ANCSA Section 3(e) determination issues that were part of the ARTA.

- **OVERVIEW**
  Schneider says he spoke with Under Secretary Horn regarding the 3(e) issues and that Horn is willing to press forward and claims it would take about 1 year to process the claims. He states the Department of Transportation has requested Horn to hold up processing 3(e) determinations of Native land claims until the resolution of the transfer issue and Governor Hammond's staff have made a similar request.

  Schneider recommends two approaches:

  1) Expediting the process to allow for final determination of Railroad land status which would remove a prime argument from the Alaska State Legislature, or

  2) Slow the process which would remove the pressure off Native groups to support any transfer legislation with the 3(e) process taken care of and because 3(e) adjudication would take much longer than one year because of the certainty of appeals.

  Schneider states existing regulations are loose and provide no assurance of a desired outcome, and that Deputy Under Secretary Horn says the State will lose about 4200 acres in the 3(e) determination process, 1700 to Eklutna. He says there is no legal guarantee the State will have a say in the process.

  Schneider concludes by stating he and Bill (Phillips) recommend the best approach is to hold off on 3(e) determinations until the transfer legislation is passed because it would provide guidance to Interior and allow the State into the adjudication process. He attaches a draft of a letter Deputy Under Secretary Horn previously sent to Alaska State Senator Jay Kerttula.

  At the bottom of the memo is a handwritten note from Senator Stevens' Chief of Staff Bill Phillips telling Horn to "go on 3(e)", apparently indicating Senator Stevens had chosen to expedite the 3(e) process.

- **DOCUMENT**
  August 13, 1982, internal memo from William Horn, Deputy Under Secretary of Interior, to Carol Dennis, DoI employee, in response to an August 2, 1982, memo requesting Interior's position on the House and Senate versions of the Alaska Railroad Transfer legislation.

- **NOTE**
  This is apparently a draft memo, with handwritten comments from an unknown person. Significantly, Deputy Under Secretary Horn clearly states the Interior's legal view that the Alaska Railroad only possesses an easement interest in the right-of-way, not a fee interest. The memo further highlights this opinion is consistent with Governor Hammond's view of the Railroad's property interest in the right-of-way.

- **OVERVIEW**
  Deputy Under Secretary Horn says the State should be given full operational rights to the Railroad as soon as an agreement with DOT can be reached on what is necessary for the State to begin operating the Railroad. Additional comments of DOI are as follows -

  The Federal Government can begin the process of conveying to the State, Natives, and other parties lands that have gone through the negotiation or adjudication process. As the status of individual tracts is resolved, the title can then be conveyed by a patent, and by this process, the United States can assure the quality of the title conveyed.

  DOI suggests a two-track process for settling title issues and resolving Native claims where both negotiations and the section 3(e) adjudication process would begin at the same time, under a 3-year time limitation. This approach recognizes that protracted litigation is both costly and contrary to the best interests of the Natives and other parties in interest. It also would ensure the avoidance of delays and potential liability of the United States, arising out of conveyances of more than the United States owns.

  Specific DOI comments on the issues are outlined below.

  No Cost Transfer
  The Department of Interior supports a no-cost transfer because it is in the federal government's interest to do so. The federal government pays a lot of money to operate the Alaska Railroad, the burden would be shifted to the State of Alaska. Further, the Railroad cannot be expanded from its current size under Federal ownership but can be built out further under State ownership.

  Warranty Deed
  This is the basic issue of this legislation. What interests are to be transferred to the State, and how is the transfer to be accomplished? Neither bill is clear on these points, and either may result in serious problems and delays.

With the modifications suggested, we concur in the use of patents or quitclaim deeds to transfer interests in Alaska Railroad lands, once adequate descriptions of the landholdings and other assets have been developed.

We strongly recommend that the bill be specific as to which lands, interests and improvements are to be conveyed to the State of Alaska, or that the legislation provide a mechanism…for identifying and conveying these lands, interests, and improvements by quitclaim deed at a later date. The present language of S. 1500 fails to provide the necessary specificity.

Section 4 of S. 1500 requires that the United States "warrant" fee simple title to the right-of-way for the main line and branch line tracks. We do not believe this approach is necessary or appropriate. It is not necessary because the railroad is clearly capable of - operating on the less-than-fee right-of-way interest it now uses. It is not appropriate because the United States itself does not own the entire fee simple estate in much of the land occupied by the right-of-way, and thus cannot convey the fee without first taking it and compensating the present owner (emphasis added). If a taking is intended, it should be expressly required, rather than implied.

The section also requires that the United States warrant fee simple title to all lands not determined to be equitably owned by a third party. However, because of the short time provided in the bill for delivery of the deed, it will be necessary to issue the deed before a determination of equitable ownership can be made.

Considering the definition of "rail properties," which is very broad, and the problems cited above, the United States would be warranting a conveyance of very nonspecific lands and interests in lands. If the United States warrants a title that is successfully challenged through the courts, it would be obligated to pay the State, Native group, or other party for the property lost.

In addition, we do not believe a warranty deed will give the State what it actually wishes to acquire, which is secure title of assured quality in the properties needed for railroad purposes. A warranty deed will not guarantee this because it does not resolve title conflicts or address the question of which properties are actually needed.

Finally, Section 4 also requires that the transfer be accomplished in one deed. We do not believe the bill provides sufficient time to permit the Secretary of Transportation to do all the work necessary to prepare a single document that, includes all (and only those) properties contemplated under the bill.

Resolution of Native Claims

S. 1500 recognizes Native claims arising under section 3(e) yet precludes consideration of Native rights under other legislation cited in section 6(a)(2)-(4) and does not address

Native allotments. Some, but not all, Native interests carry forward. In each instance where a valid existing right is not recognized, a taking occurs, subjecting the United States to litigation and liability.

A taking may also result from section 6(b)(2)(A)'s requirement that a fee interest in railroad lands be transferred to the State. The Department's regulations under section 3(e) provide that the United States need only reserve from Native ownership (and here, convey to the State) an easement, when the tract is used primarily for such purposes as rights-of-way.

In fact, the grant of a right-of-way only, and not a fee, is customary under 43 U.S.C. Section 934 (1976) for railroad purposes. It is thus possible that an action could be maintained against the United States for taking the full fee when only an easement was necessary under established practice (emphasis added).

CIRI Amendments
Outline of several DOI concerns with CIRI amendments to S. 1500.

Future Rights-of-Way
DOI has no objection to the State's proposed expansion of rail service in Alaska but believes that new authority is neither necessary nor desirable. DOI will process any State application in accordance with the process provided under Title V of the Federal Land Policy and Management Act and Title XI of ANILCA. The Secretary has already told Governor Hammond that the Department is ready to begin the process of conveying rights-of-way across Federal lands in the State. Thus, no special or new authority is needed.

The directions and mandates of the proposed legislation governing the issuance of rights-of-way for future expansion of the railroad appear to go far beyond the concepts of a standard right-of-way. A right-of-way does not normally convey land or give a leasehold interest, as suggested by subsection 9 (a)(3) of S. 1500, nor do rights-of-way usually grant exclusive use rights. Additionally, since the State is willing to accept only a right-of-way interest for future expansion, we feel it is inconsistent for it to demand fee simple ownership of the existing railroad right-of-way (emphasis added).

Paragraphs 9(a)(I)-(6) of the Senate bill (S. 1500) establish a set of superseding requirements that are inconsistent with the principal provisions of FLPMA.
Paragraph (1) exempts the Railroad from cost reimbursement and bonding requirements otherwise allowed or imposed under FLPMA sections 504(g) and 504(i).

Paragraph (2) establishes a minimum right-of-way width, unlike FLPMA section 504(a).

Paragraph (3) automatically includes extra width for communication lines whenever requested.

Paragraph (4) requires a grant to the State of exclusive use and enjoyment of both the surface and subsurface and effectively requires the grant of a fee interest.

Paragraph (5) gives the State the power to authorize additional uses in the right-of-way, in contrast to FLPMA section 503, which reserves this power to the United States.

Paragraph (6) grants the State the right to extract and use construction materials in the right-of-way, unlike FLPMA section 504(f).

Employment
DOI comments on labor provisions.

Federal Law Applicable to Rail Carriers
43 U.S.C. 912 (abandonment and reversion; relocation of rail lines) and 43 U.S.C. 934 (conveyance of rights-of-way) generally apply to issues of the kind raised here. We believe the bill or its legislative history should clearly reflect Congress' intent as to whether existing law or the Alaska Railroad transfer legislation is to have priority in cases of conflict.

Land Transfers to DOI and DOA
DOI states concerns about the legislation clearly articulating a plan for Federal agency access to the right-of-way once it is owned by the State of Alaska.

Statutory Presumption for 3(e)
DOI states in S. 1500 they prefer there not be a statutory presumption for 3(e) and that Interior be permitted to apply existing regulations. Otherwise, DOI believes it would increase the uncertainties surrounding the outcome of judicial proceedings.

DOI would prefer to work with Congressional committees to assure a mutually satisfactory interpretation of section 3(e). DOI reiterates its belief that the one-year adjudication period provided by the House and Senate transfer legislation is too short and should be increased to three years.

Date of Transfer
DOI is concerned this date is ambiguous to determine within the bill language.

Denali National Park
DOI is concerned that neither the House nor Senate bills properly recognize the need of the Department of the Interior for access and crossing privileges on the right-of-way. DOI asks why there are two reversion standards, one for within Denali Park if the railroad right-of-way is abandoned, and one for outside Denali Park if the railroad right-of-way is converted to a use that would prevent the railroad from continuing to operate.

IBLA Decision on the Alaska Railroad (IBLA 81-246, decided July 20, 1982)
DOI says this Interior Board of Land Appeals decision reaffirms their conclusion that the Alaska Railroad has had administrative jurisdiction over only a right-of-way, not a fee interest in lands(emphasis added).

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- **DOCUMENT**
  August 24, 1982, memo to Bill Phillips from Mark Schneider outlining modifications to lands provisions within S. 1500 (Alaska Railroad Transfer Act).

- **NOTE**
  The suggested modification of language addressing the Railroad right-of-way specifically states *no fee interest would be granted in future right-of-ways but exclusive rights to use the right-of-way for transportation, communication, and transmission purposes would be preserved. This provision is still an expansion of existing law.*

  If this was an expansion of existing law, was granting "exclusive use" a "taking without compensation"?

- **OVERVIEW**
  Schneider outlines four (4) modifications to land provisions within ARTA –

1. **Modification in the Method of Transfer to the State**
   In deference to federal agency requests, section 4 of the legislation will be changed to require, a) an initial deed of interim conveyance to the state of rail properties plus transfer of all authority to manage and operate the railroad, and b) within a fixed amount of time Interior shall conduct surveys, and where required, adjudicate to allow issuance of patent on all railroad properties. This approach would provide quality title to the State by employing regular Interior land conveyance methods.

2. **Modification of Treatment of Valid Existing Rights**
   To accommodate concerns expressed by federal agencies, Alaska Native Corporations, and the State of Alaska, section 6 of S. 1500 would be changed to require the Secretary of Interior to adjudicate all claims of valid existing rights and issue a patent within two (2) years of the date of enactment of S. 1500. 3(e) claims will receive priority adjudication. Lands subject to 3(e) claims will be held in escrow under conditions that ensure existing uses by Railroad. Railroad right-of-way across 3(e) selections will be granted with deference to ANCSA.

3. **Modification of Right-of-way Language**
   The Department of the Interior has frequently objected that section 9 of S. 1500 is broadly expanding existing federal law, and the State has testified it has no interest in expanding upon existing law to obtain rights-of-way. To address concerns section 9 would be modified to preserve existing law regarding compensation by the State for

rights-of-way and payment of administrative fees and costs. No fee interest would be granted in future right-of-ways, but exclusive rights to use the right-of-way for transportation, communication, and transmission purposes would be preserved. This provision is still an expansion of existing law (emphasis added).

4. **Modification of Language in S. 1500 Dealing with Reversion**
   Federal agencies, native corporations, and private landholders have expressed concern that abandonment or misuse of the federal right-of-way would not be redressed by this legislation. S. 1500 would be modified to provide for reversion to all abutting land owners in cases of express abandonment or discontinuance of use of the right-of-way for transportation, communication, or transmission purposes for 18 years, a reasonable period for presumptive abandonment. Consolidation of land ownership patterns would be guaranteed under this provision by requiring the Secretary of the Interior to convey abandoned right-of-way lands to abutting state, federal, or private landowners.

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- **DOCUMENT**
  January 27, 1983, memo to U.S. Senator Ted Stevens from staff member Mark Schneider.

- **OVERVIEW**
  Schneider advises Senator Stevens that Vern Wiggins*, Bill Horn**, and Curt McVee*** are "here" to talk about the Railroad legislation and that they have a number of complaints, most of which are "not rational" but related to the timing of certain duties required in ARTA. He then outlines several bureaucratic complaints of workload that are being brought to Senator Stevens to resolve.

  ** Vern Wiggins, Federal Co-Chairman of the Alaska Land Use Council, and later Deputy Under Secretary of Interior.*

  *** Bill Horn, Deputy Under Secretary of Interior.*

  **** Curt McVee, Alaska State Director of the federal Bureau of Land Management*.