THE STATE of ALASKA
STATE LEGISLATURE

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HJR 38 Overview and Backdrop

Historical Background of Railroad Easements

The Alaska Railroad primarily operates along a 200-ft-wide "easement" established to support the railroad and collocated above-ground utilities. Over time, greater or lesser interests could have been negotiated with owners of the underlying estate, including the federal government and private parties, but the initially reserved interest was limited.

Most railroads in the U.S. were created in accordance with the General Railroad Act of 1875 which, unlike previous "land grant" railroads, established a "right- of- way" (ROW) for the "railroad, telegraph and telephone." Today, this limited interest ROW provides the foundation for approximately 80% of all track mileage in the nation.

Using principles established in the 1875 Act, including the limited interest ROW, the Alaska Railroad Act of 1914 authorized the creation of the Alaska Railroad. In 1982, when a dispute arose between the Alaska Railroad, the State, and the U.S. Department of the Interior (DOI) concerning the nature of the ROW, the Interior Board of Land Appeals (IBLA) ruled that the 1914 ROW was like a simple easement.[1]

The IBLA relied on the U.S. Supreme Court's reasoning in Great Northern Railway,[2] a pivotal 1942 case where the Court found the interest held in a ROW under the 1875 Act is an easement and not fee ownership of the land. This key finding has been confirmed by the Judiciary many times, including recently in a 2014 Supreme Court case.[3]

These and numerous other cases confirm that railroad rights-of-way established in accordance with the 1875 Act should be recognized as easements, which constitute the right to occupy and cross land owned by another party. Those other parties frequently retain the right to occupy and use the area within the easement, so long as it does not interfere with the vested rights of the railroad.[4] In any situation, however, the precise nature of the Alaska Railroad ROW in a given location can only be determined on a parcel-by-parcel basis.

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1 The Alaska Railroad, 65 IBLA 376, 378-79 (1982) (affirming patent reservations for the Alaska Railroad of an easement, and not of fee ownership, is most consistent with the intent of the 1914 Act), *available at* https://www.oha.doi.gov/IBLA/Ibladecisions/065IBLA/065IBLA376.pdf.

2 315 U.S. 262 (1942)

3 Brandt Revocable Trust v. U.S., 134 S. Ct. 1257 (2014) (discussing the nature and interest created in a railroad right-of-way), *available at* https://www.supremecourt.gov/opinions/13pdf/12-1173_nlio.pdf.

4 *See* Reeves v Godspeed L.L.C., No. S-15461 (Jan. 26, 2018), where the Alaska Supreme Court confirmed "'the servient estate owner has a right to use the area in question to the extent that such use does not unreasonably interfere with the easement holder's rights. This allows for maximum value to come from the easement."

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The 1982 Transfer Act and the Transfer Process

The federal government owned and operated the Alaska Railroad until 1982, holding the ROW easement as one of its assets. In accordance with the 1914 Alaska Railroad Act, this easement was reserved (where applicable) in all federal patents, such as those issued under the Homestead Act of 1862. Inclusion of these reservations over privately held patents began in 1914 and ended when the Homestead Act was repealed in 1976.

Under the authority of the Alaska Railroad Transfer Act of 1982 (ARTA), the Alaska Railroad was sold to the State of Alaska.[5] ARTA directed the federal government to transfer "all right, title and interest *of the United States* [in certain real and personal properties] as of January 14, 1983" (emphasis added).[6] In transferring railroad assets, the DOI inexplicably and indefensibly ignored established federal patents reserving the standard railroad ROW easement under ARTA, issuing a new series of patents granting "exclusive use" rights to the Alaska Railroad. The federal government deliberately did not ascertain whether it owned those rights or otherwise had authority to grant them.

While ARTA contemplates the transfer of an "exclusive use" easement, it only does so where the federal government unequivocally owned the fee interest in the underlying lands, such as through Denali National Park and Preserve and over federal lands with unresolved Native land claims.[7] This capacity for transfer was misapplied to interests in lands that had been previously patented to other parties, where the federal government did not retain a sufficient interest in the property to grant exclusivity.

Significantly, the new patents granting the railroad "exclusive use" were issued without notifying or compensating affected landowners, stripping them of vested property rights without due process of law in violation of the Alaska and United States Constitutions. Compounding the problem, the land surveys conducted and used to describe these patents were indexed in such a way that makes it extremely difficult to correlate the conflicting patents, creating an untenable cloud on title for all parties.

The ARTA Process as Explained by the Railroad

On June 25, 1996, the attorney for the railroad, Ms. Phyllis Johnson, Esq., appeared before the Joint Committee on Legislative Budget and Audit, explaining, in general, that the asset for "exclusive use" does not exist in real property law, that it is a "concocted" term, and that the rights of third parties should be considered.[8]

According to the transcript of that proceeding, referring to conveyances under ARTA:

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5 Pub. L. 97-468, Title VI, 96 Stat. 2556 (Jan. 14,1983), *available at* https://www.law.cornell.edu/uscode/text/45/1201.

6 45 U.S.C. §1202(10).

7 *See* 45 U.S.C. §§1202(6) (defining an "exclusive use easement"), 1203(b) (requiring the Secretary, in transferring the railroad, to convey rail properties, meaning those rights, titles and interests owned by the federal government, as well as "any interest in real property" unless "subject to unresolved claims of valid existing rights[,]" an "exclusive license granting the State the right to use all rail properties" pending formal conveyance and an "exclusive-use easement for that portion of the right-of-way of the Alaska Railroad within the Denali National Park and Preserve"), 1205(b) (identifying those with "valid existing rights" as Alaska Native Village Corporations).

8 Joint Committee on Legislative Audit 1996

"The documents received so far, and ones to be received in the future, all guarantee to the state-owned railroad whatever interest the federal government owned in the right-of-way, called an exclusive-use easement; that was a term concocted for the transfer that she doesn't believe exists elsewhere in real property law."

"In places like the Eielson branch, and several other places scattered along the railroad, adjoining interests may claim they were there first, or may have some reason to believe that the federal government didn't own all that it thought it owned there. In those cases, Ms. Johnson said they have tried to look at the histories of those adjoining owners' property rights to see how they acquired the property, whether they really homesteaded it or what the competing equities are. Then they can say, "OK, this is the technical legal answer, but we recognize you were there first and we'll work something out." She doesn't know all of the histories, and she hasn't finished all the title research yet, but she is working on it."

Although the statements suggest the federal government may have possessed an exclusive use easement, as Ms. Johnson points out, the federal government may not have owned "all that it thought that it owned" and each parcel's history needed to be researched to ascertain the extent of rights transferred. Regardless, DOI erroneously awarded – and the railroad accepted – exclusive use easements over existing patents without the due diligence required to establish federal ownership and ability to convey.

These "concocted" rights were transferred in the absence of legal authority. Clearly, only "all right, title and interest of the United States" was subject to transfer.[9] One may not transfer what it does not own. ARTA language misapplied by the railroad and the DOI irrevocably harms affected property owners, well beyond the intent of Congress.

Further, such adjudication involves notification to affected parties. Despite the railroad attorney's statements in 1996, no landowners were advised that their property rights were being diminished to support the unlawful transfer of an "exclusive use" easement.

Why the Need for HJR 38?

The difference between those rights actually held by the federal government and those "concocted" rights is stark and troublesome, for property owners, the public at large and for the Alaska Railroad. The cloud on title created by conflicting land patents, and the potential total loss of access and compatible use, severely diminishes property values. Participating in the unlawful annexation of private property rights without due process of law further creates the potential for enormous liability to the State of Alaska.

An "exclusive use" easement allows the railroad rights that would directly infringe on the rights of an owner of land burdened by a standard railroad easement. For example, it allows the railroad to bar the owner from any use of the easement area, even if the owner's use does not interfere with safe railroad operations.[10] If the federal government did not own, reserve, purchase, or otherwise withhold the right to do this, or other rights

[9] 45 U.S.C. §1202(10).
[10] *See supra* note 6

purportedly associated with an "exclusive use" easement, such authority could not be constitutionally transferred to the State and was further not authorized under ARTA.

The easement additions prompted by the DOI's misapplication of ARTA substantially undermine well-understood principles of property law.

ARTA was to have been a "transfer of assets" from the federal railroad to the State of Alaska. These assets were defined in ARTA as "all right, title and interest" held or validly claimed by the United States, including the right-of -way reserved in homestead and other land patents, machinery contracts, etc. An easement is an "interest" in land and, in the case of the 1914 Act right-of -way reserved in patented land for railroad use, it is likely to be the only "interest" held by the federal government and is thus the only railroad asset authorized or available for transfer.

From the interim conveyance under ARTA in 1983 (recorded in 1985) to the present day, the Alaska Railroad Corporation has increasingly bought into and advanced a claim of "exclusive use" along the railroad ROW. The effect of this was investigated by the State Ombudsman in 1988 and, on November 16, 1989, he issued a Special Report detailing some of the problems in this approach, including difficulty with road crossings, shared costs, etc. However, he did not apparently realize the source of the problem was the "exclusive use" claim, an interest akin to fee ownership and something the railroad may never have actually possessed.

The Alaska Railroad Corporation continues to demonstrate its intention to exclude others from use of the ROW regardless of the impact to rail operations, if any, and regardless of the authority actually granted under ARTA. For instance, it has fenced off access to the Fish Creek estuary in the Turnagain area, forced a utility to erect a $114,000 fence near Westchester Lagoon as a precondition to entering and repairing sewer mains, installed concrete barricades and steel posts blocking access to the ROW in the Oceanview area, and attempted to require permits and fees through a Residential ROW Use Policy (RRUP). Through these and other efforts, it seeks to monetize its perceived interest in the ROW by charging unreasonable fees and unduly restricting access by others, including underlying land owners exercising vested property rights preserved under ARTA and the Constitution.

Legislative Action Relating to Railroad Interaction with Others

Claims of "exclusive use" affect the relationship between the railroad and everyone, not just private property owners. Various requests for legislative help have been forthcoming from the public, including the Denali Borough and the City of Palmer.

In 1999, apparently following a dispute in Whittier, the legislature amended Alaska Statute 42.40.285 to prohibit certain acquisition of or claim to properties in a municipality without legislative approval. An exception provided in AS 42.40.285(5)(C) allowed the railroad to apply for and receive a grant under ARTA §1202(10) – defined as "all right,

title and interest" owned by the federal government at the time of transfer, which could include the ROW easement reserved in previous land patents. In attempting to assert an "exclusive use" easement where not conclusively owned by the federal government, however, the railroad claimed and accepted grants that were not within this exception without notifying or requesting legislative approval, in direct violation of state law.

1982 Congressional Delegation Intentions regarding ARTA

Representatives of the Old Seward/Ocean View Community Council, along with representatives of the Offices of the Governor and Senator Murkowski, met with Congressman Don Young in his Anchorage office on December 27, 2015 to hear his views on the possibility that the 1982 congressional delegation intended to change existing property rights under ARTA. In addition to stating that such was not the case, the Congressman went on to say, "an ARTA transfer that changed existing property rights would not have passed Congress in 1982."

Congressman Young, a homesteader himself, was correct. ARTA did not contemplate changing any "vested" rights, not even those claimed by Alaska Natives. In initiating the review and adjudication process of pending claims by Village Corporations under ARTA §1205, the State, Federal Railroad Administration, affected Native Corporations, and Governor Hammond entered into a Memorandum of Understanding, finalized in early 1983, stating those whose vested rights had been established by final DOI action (such as by federal homestead patent) were not to be affected.

Governor Hammond, another homesteader, agreed in maintaining the status quo. In a letter to Congress in the spring before ARTA became law, the Governor called the 1914 Act ROW for "railroad, telegraph and telephone" the "standard" railroad easement in Alaska, and he requested that this be the style of the easement in further expansions. Governor Hammond's contemporaneous assurances should not have been ignored.

Instead, the DOI misapplied unrelated provisions of ARTA to lands that had previously been patented, and did so without due process of law. Affected individuals were not notified, likely since ARTA was exempt from providing ordinary notices required under the Administrative Procedure Act. Since no change in vested rights was contemplated, those affected had no reason to expect either notification or the unlawful conveyance of their established property interests.

Landowners Support Safe Railroad Operations

Those whose rights have been impaired by the mistakes made in the administration of ARTA do not claim that there is no lawful easement or ROW. To the contrary, they acknowledge and respect that the ROW exists. But the only interest in land that could have transferred under ARTA was that which was owned by the federal government. What the federal government owned at the time of transfer can only be established by detailed review of each parcel's ownership history. No such analysis was performed in the blanket transfer of an "exclusive use" easement erroneously authorized by the DOI.

Moreover, the claim or grant of an interest in the ROW in municipal areas beyond “all right, title and interest of the United States” without legislative approval was prohibited by the plain language of AS 42.40.285. In claiming and accepting any interest in an “exclusive use” easement which was not conclusively owned by the United States, the Alaska Railroad violated this provision, albeit potentially unwittingly given the DOI’s willful misapplication of ARTA. Regardless, intent is irrelevant to the determination that such transfers, by their own terms, violate state law.

The 1914 Act ROW for “railroad, telegraph and telephone” enjoyed by roughly 80% of U.S. railroads allows for safe and efficient railroad operations, as well as collocated above-ground utilities. A claim of “exclusive use” or any interest beyond the 1914 Act ROW should not be necessary to support continued operation of the Alaska Railroad. Like any other easement holder, the Alaska Railroad Corporation may enjoin competing and interfering uses. Its recourse in the event of such conflicts is therefore with the Judiciary, a point made and confirmed by many courts, including those in Alaska.