

## **The Alaska Railroad Opposes House Joint Resolution 38 for the following reasons**

### **The Federal Government Held and Could Transfer Exclusive Rights in the ARRC Right-of-Way.**

The contention in HJR 38 that the federal government did not have the right to transfer an exclusive railroad right-of-way to the State is not correct. The federal government created the Alaska Railroad right-of-way (ROW) in the 1910s and 1920s from existing federal land, then owned and operated the ROW for the next 60 years. As Congress determined in the early 1980s, when it passed the Alaska Railroad Transfer Act (ARTA), the federal government owned fee simple title to the vast majority of the ROW. In addition, settled law relating to railroad rights-of-way states that even where a railroad lacks full fee simple title in its ROW, it still has full exclusive rights to use the surface of the ROW due to the inherently hazardous nature of railroad operations. When Congress passed ARTA in 1983, therefore, the federal government held fee simple title in most of the ROW and at least an exclusive use easement in all of it. Consequently, the federal government had the right to transfer all of that interest title to the State of Alaska's newly formed publicly owned railroad corporation (ARRC) in 1985.

### **Both the State of Alaska and Congress Recognized that an Exclusive ROW was Essential to Operating the Alaska Railroad Safely and Economically.**

HJR 38 also incorrectly contends that ARTA does not require that the State receive at least an exclusive use easement in the ROW. The truth is precisely the opposite. Both the State and Congress recognized that the Alaska Railroad's exclusive control of its ROW was critical. ARTA explains: "Congress finds that exclusive control over the right-of-way by the Alaska Railroad has been and continues to be necessary to afford sufficient protection for safe and economic operation of the railroad." 45 U.S.C. §1205(b)(4)(A)(ii). That is why the State insisted on a guarantee from the federal government that ARRC's control of the ROW would be exclusive. As a result, ARTA guaranteed that ARRC would receive at least an exclusive use easement allowing it to exclude all others from and/or to fence its ROW, or to allow other parties to use the ROW for a fee. 45 U.S.C. §1202(6). To underscore this guarantee, Congress mandated that the federal government would defend ARRC against any challenge to ARRC's exclusive title in its ROW. 45 U.S.C. §1205(b)(4)(B). If the State had not received a guarantee of exclusive control of the ROW, it would not have purchased the Alaska Railroad.

### **Congress Provided a Process for Adjudicating Any Third Party Claims to the ROW.**

Recognizing the federal government might not own all portions of the ROW in unencumbered fee simple, ARTA included detailed provisions to resolve third-party claims while ensuring that ARRC could operate a railroad on its ROW without interference. 45 U.S.C. § 1205(b)(2) required the U.S. Department of Interior to resolve any remaining claims of valid existing rights by January 1986. Those provisions were followed and claims were adjudicated. This mechanism provided any adjacent landowners who asserted claims to ownership rights in the ROW a final opportunity to have those claims adjudicated. At the end of this process, ARRC had exclusive control of its entire ROW.

### **The Interim Conveyances Properly Conveyed to ARRC at Least an Exclusive Use Easement.**

HJR 38 incorrectly asserts that interim conveyances and patents given to ARRC by the federal government were improperly granted and accepted. ARTA provided for interim conveyances to the State of Alaska Railroad lands that had not already been surveyed, after which surveys would be conducted and final (cont.)

patents granted. The interim conveyances granted to ARRC in 1985 expressly transferred “not less than an exclusive use easement” and stated that they had the force and effect of a final patent. The final patents also contained ARTA’s guarantee of at least an exclusive use easement. The federal government had an exclusive interest to give and did so, with a guarantee, under ARTA. Neither the federal government nor ARRC did anything improper with respect to granting or accepting the interim conveyances and patents.

**Any Federal Taking Would Not Subject the State to Enormous Liability.**

HJR 38 asserts that if conveyances under ARTA worked a federal taking, the State could be subjected to “enormous liability.” That simply is not true. First, if an act of Congress works a taking, the remedy lies against the federal government, not against the State. Second, the federal government’s guarantee that it will defend ARRC’s title of at least an exclusive use easement shows that the State and ARRC would have recourse to enforce ARTA’s guarantee of exclusive control of the ROW should a neighboring landowner assert ownership rights in the ROW. Either way, the State would not be subjected to great liability. For the reasons discussed above, ARRC does not believe that any such taking occurred.

**ARRC has Not Received Any Federal Land within Municipalities in Violation of AS 42.40.285.**

AS 42.40.285(5), added to the Alaska Railroad Corporation Act (ARCA) in 1999, requires the legislature to find that federal land within a municipality is essential for railroad purposes before ARRC may apply for or accept a grant of that federal land. However, transfers of Alaska Railroad land under ARTA are expressly excepted from that statutory requirement. AS 42.40.285(5)(c). The interim conveyances of the ROW and its later final conveyance via patents were the interim and final steps in transferring those parcels to ARRC under ARTA. As explained above, those conveyances properly gave ARRC at least an exclusive use easement in the ROW, and were thus conveyances of “rail properties of the Alaska Railroad.” Contrary to the contentions in HJR 38, those transfers are therefore not subject to AS 42.40.285(5) per AS 42.40.285(5)(c).

**HJR 38 Threatens the Safety and Economic Viability of the ROW as a Utility Corridor.**

HJR 38 threatens to undermine the critical protections offered by an exclusive ROW. First and foremost, the right to control access to the ROW is critical to the safety of the public, ARRC’s passengers and ARRC employees. The ROW also acts as a buffer to protect adjoining property owners. That buffer enhances ARRC’s economic viability by allowing trains to run safely at faster speeds. Indeed, some aspects of the Alaska Railroad’s commercial operations could be rendered economically infeasible under the slower train speeds that might have to be employed if the ROW was open to unrestricted use by adjoining residents and the public. Exclusive control over access to the ROW is also necessary for ARRC to fulfill its other critical statutory purposes, including its function as a multi-faceted utility corridor to be used for transportation, communication and energy transmission purposes including fiber optic cable, public trails, and pipelines. HJR 38 not only is silent on these critical purposes of the ROW, it threatens to undermine them.