THE STATE of ALASKA

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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.

Memorandum of Understanding follows

Note: Executed Dec 1982 – Feb 1983
Recorded January 1985

Memorandum of Understanding

among

The Federal Railroad Administration

and

The State of Alaska

and

Eklutna, Inc.

and

Cook Inlet Region, Inc.

and

Toghotthele Corporation

Purpose: The purpose of this Memorandum of Understanding is to implement section 606(b)( ) of the Alaska Railroad Transfer Act of 1982 ("Act") by establishing the rights and obligations of the parties concerning the use of the Alaska Railroad land described in selections, including amendments thereto, filed in the offices of the Bureau of Land Management, United States Department of Interior by Alaska Native Village Corporations under the Alaska Native Claims Settlement Act, pending settlement or adjudication and conveyance of these selections.

Under the Act, rail properties which are the subject of Village selections would be administered as provided herein to preserve the interests of the Native Corporations and the Alaska Railroad ("Railroad") according to the terms of this Memorandum. The Memorandum of Understanding is an agreement intended to apply to the operation of the Railroad by the Federal Railroad Administration prior to the transfer of the Railroad to the State of Alaska and to the operation of the Railroad by the State or the State-owned Railroad after the transfer but prior to the settlement or adjudication and conveyance of Village selections.

Period of Agreement: This Memorandum of Understanding shall be in effect commencing on the date of enactment of the Alaska Railroad Transfer Act of 1982 ("Act") until the status of the lands subject to this agreement has been settled or adjudicated and the land has been conveyed to the State or the Village Corporation pursuant to the Act or the Alaska Native Claims Settlement Act, or in the event that the Railroad is not transferred to the State, until three years after enactment of the Act.

Lands Subject to Agreement: This Memorandum of Understanding applies to those rail properties of the Alaska Railroad which were described in selections, including amendments thereto, timely filed in the offices of the Bureau of Land Management,

United States Department of Interior by Village Corporations under the Alaska Native Claims Settlement Act. (Affected Lands).

Administration of Agreement: The Administrator of the Federal Railroad Administration shall be responsible for ensuring that the Railroad is being administered in accordance with the terms of the Agreement until transfer of the Railroad to the State. After transfer, responsibility shall be assumed by the Governor of the State of Alaska or his designee.

Uses of Affected Lands: During the term of this Memorandum of Understanding, the Affected Lands shall be administered in accordance with the following conditions:

1. Leases

   (a) Leases, contracts, construction contracts, permits, licenses or other agreements, or extensions thereof, or any other direct or indirect use by the Railroad, which would permit the alteration of the physical condition or degradation of the Affected Lands shall not be entered into or undertaken without the prior written consent of the affected Native Corporations, which consent shall not be unreasonably withheld;

(b) Leases, contracts, construction contracts, permits, licenses or other agreements, or extensions thereof, may not be entered into for a term of more than two years without the consent of the affected Native Corporations which consent shall not be unreasonably withheld.

2. Gravel and Rock Areas

(a) There shall be no extractions of gravel and rock from any new gravel pit or rock quarry not in existence on the date of enactment or from new pits on sites with current extraction activities, except with the written consent of the affected Native Corporation.

(b) Mining or extraction of gravel at the Eagle River gravel site shall be restricted to an annual amount not to exceed 80,000 cubic yards of extracted material; provided that: the existing cleared and grubbed areas shall not be expanded unless necessary to enable the railroad to extract the amounts agreed to in this sentence. Should additional clearing or grubbing be required, the Railroad shall first consult with the Governor of the State of Alaska and Eklutna, Inc.

Existing Land; Existing Agreements: The purpose of this Memorandum of Understanding is to facilitate the transfer of the Railroad to the State of Alaska and to expedite the settlement or adjudication of Village Corporation selections pursuant to the Alaska Native Claims Settlement Act. Nothing in this Memorandum of Understanding shall be construed to validate or invalidate any third party interest claimed to be in existence prior to the date of the Act; nothing in this Memorandum of Understanding shall be construed to deny, enlarge, impair or otherwise affect any valid existing right or claim of a valid existing right or the applicability or effect of any existing law or regulation respecting any such right of claim.

Assignment: The provisions of this Memorandum of Understanding shall bind the agents and assigns of the State, the Administrator and the affected Native Corporations.

Enforcement: The provisions of this Memorandum of Understanding shall be enforceable in the United States District Court for Alaska.

Other Affected Village Corporations: Non-execution of this Memorandum of Understanding by other Village Corporations which filed selections (or their successors in interest) shall not preclude such Village Corporations from enforcing the terms of this agreement with respect to their selections.

Amendments: This Memorandum of Understanding may be amended by agreement of the affected parties in writing.

Date: July 20, 1983
FEDERAL RAILROAD ADMINISTRATION

By: Thomas A. Till
Its: _____

Date: December 31, 1982
TOGHOTTHELE CORPORATION

By: Minnie B. Steward
Its: Chief Exec Officer

Date: Dec. 31, 1982
EKLUTNA, INC.

By: David Alex
Its: President

Date: January 28, 1983
STATE OF ALASKA

By: Larry D Crawford
Its: Chief of Staff
Office of the Governor

Date: 2/4/83
COOK INLET REGION, INC.

By: Roy M Schulze
Its: President

45 USC Ch. 21: ALASKA RAILROAD TRANSFER

From Title 45—RAILROADS

CHAPTER 21—ALASKA RAILROAD TRANSFER

§1201. Findings

The Congress finds that—

(1) the Alaska Railroad, which was built by the Federal Government to serve the transportation and development needs of the Territory of Alaska, presently is providing freight and passenger services that primarily benefit residents and businesses in the State of Alaska;

(2) many communities and individuals in Alaska are wholly or substantially dependent on the Alaska Railroad for freight and passenger service and provision of such service is an essential governmental function;

(3) continuation of services of the Alaska Railroad and the opportunity for future expansion of those services are necessary to achieve Federal, State, and private objectives; however, continued Federal control and financial support are no longer necessary to accomplish these objectives;

(4) the transfer of the Alaska Railroad and provision for its operation by the State in the manner

contemplated by this chapter is made pursuant to the Federal goal and ongoing program of transferring appropriate activities to the States;

(5) the State's continued operation of the Alaska Railroad following the transfer contemplated by this chapter, together with such expansion of the railroad as may be necessary or convenient in the future, will constitute an appropriate public use of the rail system and associated properties, will provide an essential governmental service, and will promote the general welfare of Alaska's residents and visitors; and

(6) in order to give the State government the ability to determine the Alaska Railroad's role in serving the State's transportation needs in the future, including the opportunity to extend rail service, and to provide a savings to the Federal Government, the Federal Government should offer to transfer the railroad to the State, in accordance with the provisions of this chapter, in the same manner in which other Federal transportation functions (including highways and airports) have been transferred since Alaska became a State in 1959.

(Pub. L. 97–468, title VI, §602, Jan. 14, 1983, 96 Stat. 2556.)

REFERENCES IN TEXT

This chapter, referred to in pars. (4) to (6), was in the original "this title", meaning title VI (§601 et seq.) of Pub. L. 97–468, Jan. 14, 1983, 96 Stat. 2556, known as the Alaska Railroad Transfer Act of 1982, which is classified principally to this chapter (§1201 et seq.). For complete classification of title VI to the Code, see Short Title note below and Tables.

SHORT TITLE

Pub. L. 97–468, title VI, §601, Jan. 14, 1983, 96 Stat. 2556, provided that: "This title [enacting this chapter, amending sections 231, 712, and 802 of this title, sections 305, 3401, 5102, 5342, and 7327 of Title 5, Government Organization and Employees, section 410hh–1 of Title 16, Conservation, section 251 of Title 42, The Public Health and Welfare, section 10749 of Title 49, Transportation, and section 1655 of the Appendix to Title 49, repealing section 353a of Title 16, section 208a of Title 30, Mineral Lands and Mining, sections 975, 975a, and 975c to 975g of Title 43, Public Lands, and section 301a of Title 48, Territories and Insular Possessions, and amending provisions set out as a note under section 1611 of Title 43] may be cited as the 'Alaska Railroad Transfer Act of 1982'."

§1202. Definitions

As used in this chapter, the term—

(1) "Alaska Railroad" means the agency of the United States Government that is operated by the Department of Transportation as a rail carrier in Alaska under authority of the Act of March 12, 1914 (43 U.S.C. 975 et seq.) (popularly referred to as the "Alaska Railroad Act") and section 6(i) [1] of the Department of Transportation Act, or, as the context requires, the railroad operated by that agency;

(2) "Alaska Railroad Revolving Fund" means the public enterprise fund maintained by the Department of the Treasury into which revenues of the Alaska Railroad and appropriations for the Alaska Railroad are deposited, and from which funds are expended for Alaska Railroad operation, maintenance and construction work authorized by law;

(3) "claim of valid existing rights" means any claim to the rail properties of the Alaska Railroad on record in the Department of the Interior as of January 13, 1983;

(4) "date of transfer" means the date on which the Secretary delivers to the State the four documents referred to in section 1203(b)(1) of this title;

(5) "employees" means all permanent personnel employed by the Alaska Railroad on the date of transfer, including the officers of the Alaska Railroad, unless otherwise indicated in this chapter;

(6) "exclusive-use easement" means an easement which affords to the easement holder the following:

(A) the exclusive right to use, possess, and enjoy the surface estate of the land subject to this

easement for transportation, communication, and transmission purposes and for support functions associated with such purposes;

(B) the right to use so much of the subsurface estate of the lands subject to this easement as is necessary for the transportation, communication, and transmission purposes and associated support functions for which the surface of such lands is used;

(C) subjacent and lateral support of the lands subject to the easement; and

(D) the right (in the easement holder's discretion) to fence all or part of the lands subject to this easement and to affix track, fixtures, and structures to such lands and to exclude other persons from all or part of such lands;

(7) "Native Corporation" has the same meaning as such term has under section 102(6) of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3102(6));

(8) "officers of the Alaska Railroad" means the employees occupying the following positions at the Alaska Railroad as of the day before the date of transfer: General Manager; Assistant General Manager; Assistant to the General Manager; Chief of Administration; and Chief Counsel;

(9) "public lands" has the same meaning as such term has under section 3(e) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(e));

(10) "rail properties of the Alaska Railroad" means all right, title, and interest of the United States to lands, buildings, facilities, machinery, equipment, supplies, records, rolling stock, trade names, accounts receivable, goodwill, and other real and personal property, both tangible and intangible, in which there is an interest reserved, withdrawn, appropriated, owned, administered or otherwise held or validly claimed for the Alaska Railroad by the United States or any agency or instrumentality thereof as of January 14, 1983, but excluding any such properties disposed of, and including any such properties acquired, in the ordinary course of business after that date but before the date of transfer, and also including the exclusive-use easement within the Denali National Park and Preserve conveyed to the State pursuant to this chapter and also excluding the following:

(A) the unexercised reservation to the United States for future rights-of-way required in all patents for land taken up, entered, or located in Alaska, as provided by the Act of March 12, 1914 (43 U.S.C. 975 et seq.);

(B) the right of the United States to exercise the power of eminent domain;

(C) any moneys in the Alaska Railroad Revolving Fund which the Secretary demonstrates, in consultation with the State, are unobligated funds appropriated from general tax revenues or are needed to satisfy obligations incurred by the United States in connection with the operation of the Alaska Railroad which would have been paid from such Fund but for this chapter and which are not assumed by the State pursuant to this chapter;

(D) any personal property which the Secretary demonstrates, in consultation with the State, prior to the date of transfer under section 1203 of this title, to be necessary to carry out functions of the United States after the date of transfer; and

(E) any lands or interest therein (except as specified in this chapter) within the boundaries of the Denali National Park and Preserve;

(11) "right-of-way" means, except as used in section 1208 of this title—

(A) an area extending not less than one hundred feet on both sides of the center line of any main line or branch line of the Alaska Railroad; or

(B) an area extending on both sides of the center line of any main line or branch line of the Alaska Railroad appropriated or retained by or for the Alaska Railroad that, as a result of military jurisdiction over, or non-Federal ownership of, lands abutting the main line or branch line, is of a width less than that described in subparagraph (A) of this paragraph;

(12) "Secretary" means the Secretary of Transportation;

(13) "State" means the State of Alaska or the State-owned railroad, as the context requires;

(14) "State-owned railroad" means the authority, agency, corporation or other entity which the State of Alaska designates or contracts with to own, operate or manage the rail properties of the Alaska Railroad

or, as the context requires, the railroad owned, operated, or managed by such authority, agency, corporation, or other entity; and

(15) "Village Corporation" has the same meaning as such term has under section 3(j) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(j)).

(Pub. L. 97–468, title VI, §603, Jan. 14, 1983, 96 Stat. 2556.)

REFERENCES IN TEXT

Act of March 12, 1914 (43 U.S.C. 975 et seq.) (popularly referred to as the "Alaska Railroad Act"), referred to in pars. (1) and (10)(A), is act Mar. 12, 1914, ch. 37, 38 Stat. 305, as amended, which enacted section 353a of Title 16, Conservation, and sections 975 to 975g of Title 43, Public Lands, and which was repealed by section 615(a)(1) of Pub. L. 97–468 effective on the date of transfer of Alaska Railroad to the State [Jan. 5, 1985], pursuant to section 1203 of this title.

Section 6(i) of the Department of Transportation Act, referred to in par. (1), is section 6(i) of Pub. L. 89–670, which was classified to section 1655(i) of former Title 49, Transportation, prior to repeal by Pub. L. 97–468, title VI, §615(a)(4), Jan. 14, 1983, 96 Stat. 2578.

[1] *See References in Text note below.*

§1203. Transfer authorization

(a) Authority of Secretary; time, manner, etc., of transfer

Subject to the provisions of this chapter, the United States, through the Secretary, shall transfer all rail properties of the Alaska Railroad to the State. Such transfer shall occur as soon as practicable after the Secretary has made the certifications required by subsection (d) of this section and shall be accomplished in the manner specified in subsection (b) of this section.

(b) Simultaneous and interim transfers, conveyances, etc.

(1) On the date of transfer, the Secretary shall simultaneously:

(A) deliver to the State a bill of sale conveying title to all rail properties of the Alaska Railroad except any interest in real property;

(B) deliver to the State an interim conveyance of the rail properties of the Alaska Railroad that are not conveyed pursuant to subparagraph (A) of this paragraph and are not subject to unresolved claims of valid existing rights;

(C) deliver to the State an exclusive license granting the State the right to use all rail properties of the Alaska Railroad not conveyed pursuant to subparagraphs (A) or (B) of this paragraph pending conveyances in accordance with the review and settlement or final administrative adjudication of claims of valid existing rights;

(D) convey to the State a deed granting the State (i) an exclusive-use easement for that portion of the right-of-way of the Alaska Railroad within the Denali National Park and Preserve extending not less than one hundred feet on either side of the main or branch line tracks, and eight feet on either side of the centerline of the "Y" track connecting the main line of the railroad to the power station at McKinley Park Station and (ii) title to railroad-related improvements within such right-of-way.

Prior to taking the action specified in subparagraphs (A) through (D) of this paragraph, the Secretary shall consult with the Secretary of the Interior. The exclusive-use easement granted pursuant to subparagraph (D) of this paragraph and all rights afforded by such easement shall be exercised only for railroad purposes, and for such other transportation, transmission, or communication purposes for which lands subject to such easement were utilized as of January 14, 1983.

(2) The Secretary shall deliver to the State an interim conveyance of rail properties of the Alaska Railroad described in paragraph (1)(C) of this subsection that become available for conveyance to the State after the date of transfer as a result of settlement, relinquishment, or final administrative adjudication

pursuant to section 1205 of this title. Where the rail properties to be conveyed pursuant to this paragraph are surveyed at the time they become available for conveyance to the State, the Secretary shall deliver a patent therefor in lieu of an interim conveyance.

(3) The force and effect of an interim conveyance made pursuant to paragraphs (1)(B) or (2) of this subsection shall be to convey to and vest in the State exactly the same right, title, and interest in and to the rail properties identified therein as the State would have received had it been issued a patent by the United States. The Secretary of the Interior shall survey the land conveyed by an interim conveyance to the State pursuant to paragraphs (1)(B) or (2) of this subsection and, upon completion of the survey, the Secretary shall issue a patent therefor.

(4) The license granted pursuant to paragraph (1)(C) of this subsection shall authorize the State to use, occupy, and directly receive all benefits of the rail properties described in the license for the operation of the State-owned railroad in conformity with the Memorandum of Understanding referred to in section 1205(b)(3) of this title. The license shall be exclusive, subject only to valid leases, permits, and other instruments issued before the date of transfer and easements reserved pursuant to subsection (c)(2) of this section. With respect to any parcel conveyed pursuant to this chapter, the license shall terminate upon conveyance of such parcel.

(c) Reservations to United States in interim conveyances and patents

(1) Interim conveyances and patents issued to the State pursuant to subsection (b) of this section shall confirm, convey and vest in the State all reservations to the United States (whether or not expressed in a particular patent or document of title), except the unexercised reservations to the United States for future rights-of-way made or required by the first section of the Act of March 12, 1914 (43 U.S.C. 975d). The conveyance to the State of such reservations shall not be affected by the repeal of such Act under section 615 of this title.[1]

(2) In the license granted under subsection (b)(1)(C) of this section and in all conveyances made to the State under this chapter, there shall be reserved to the Secretary of the Interior, the Secretary of Defense and the Secretary of Agriculture, as appropriate, existing easements for administration (including agency transportation and utility purposes) that are identified in the report required by section 1204(a) of this title. The appropriate Secretary may obtain, only after consent of the State, such future easements as are necessary for administration. Existing and future easements and use of such easements shall not interfere with operations and support functions of the State-owned railroad.

(3) There shall be reserved to the Secretary of the Interior the right to use and occupy, without compensation, five thousand square feet of land at Talkeetna, Alaska, as described in ARR lease numbered 69–25–0003–5165 for National Park Service administrative activities, so long as the use or occupation does not interfere with the operation of the State-owned railroad. This reservation shall be effective on the date of transfer under this section or the expiration date of such lease, whichever is later.

(d) Certifications by Secretary; scope, subject matter, etc.

(1) Prior to the date of transfer, the Secretary shall certify that the State has agreed to operate the railroad as a rail carrier in intrastate and interstate commerce.

(2)(A) Prior to the date of transfer, the Secretary shall also certify that the State has agreed to assume all rights, liabilities, and obligations of the Alaska Railroad on the date of transfer, including leases, permits, licenses, contracts, agreements, claims, tariffs, accounts receivable, and accounts payable, except as otherwise provided by this chapter.

(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, the United States shall be solely responsible for—

(i) all claims and causes of action against the Alaska Railroad that accrue on or before the date of transfer, regardless of the date on which legal proceedings asserting such claims were or may be filed, except that the United States shall, in the case of any tort claim, only be responsible for any such claim against the United States that accrues before the date of transfer and results in an award, compromise, or settlement of more than $2,500, and the United States shall not compromise or settle any claim resulting in State liability without the consent of the State, which consent shall not be unreasonably withheld; and

(ii) all claims that resulted in a judgment or award against the Alaska Railroad before the date of

transfer.

(C) For purposes of subparagraph (B) of this paragraph, the term "accrue" shall have the meaning contained in section 2401 of title 28.

(D) Any hazardous substance, petroleum or other contaminant release at or from the State-owned rail properties that began prior to January 5, 1985, shall be and remain the liability of the United States for damages and for the costs of investigation and cleanup. Such liability shall be enforceable under 42 U.S.C. 9601 et seq.[1] for any release described in the preceding sentence.

(3)(A) Prior to the date of transfer, the Secretary shall also certify that the State-owned railroad has established arrangements pursuant to section 1206 of this title to protect the employment interests of employees of the Alaska Railroad during the two-year period commencing on the date of transfer. These arrangements shall include provisions—

(i) which ensure that the State-owned railroad will adopt collective bargaining agreements in accordance with the provisions of subparagraph (B) of this paragraph;

(ii) for the retention of all employees, other than officers of the Alaska Railroad, who elect to transfer to the State-owned railroad in their same positions for the two-year period commencing on the date of transfer, except in cases of reassignment, separation for cause, resignation, retirement, or lack of work;

(iii) for the payment of compensation to transferred employees (other than employees provided for in subparagraph (E) of this paragraph), except in cases of separation for cause, resignation, retirement, or lack of work, for two years commencing on the date of transfer at or above the base salary levels in effect for such employees on the date of transfer, unless the parties otherwise agree during that two-year period;

(iv) for priority of reemployment at the State-owned railroad during the two-year period commencing on the date of transfer for transferred employees who are separated for lack of work, in accordance with subparagraph (C) of this paragraph (except for officers of the Alaska Railroad, who shall receive such priority for one year following the date of transfer);

(v) for credit during the two-year period commencing on the date of transfer for accrued annual and sick leave, seniority rights, and relocation and turnaround travel allowances which have been accrued during their period of Federal employment by transfered[2] employees retained by the State-owned railroad (except for officers of the Alaska Railroad, who shall receive such credit for one year following the date of transfer);

(vi) for payment to transferred employees retained by the State-owned railroad during the two-year period commencing on the date of transfer, including for one year officers retained or separated under subparagraph (E) of this paragraph, of an amount equivalent to the cost-of-living allowance to which they are entitled as Federal employees on the day before the date of transfer, in accordance with the provisions of subparagraph (D) of this paragraph; and

(vii) for health and life insurance programs for transferred employees retained by the State-owned railroad during the two-year period commencing on the date of transfer, substantially equivalent to the Federal health and life insurance programs available to employees on the day before the date of transfer (except for officers of the Alaska Railroad, who shall receive such credit for one year following the date of transfer).

(B) The State-owned railroad shall adopt all collective bargaining agreements which are in effect on the date of transfer. Such agreements shall continue in effect for the two-year period commencing on the date of transfer, unless the parties agree to the contrary before the expiration of that two-year period. Such agreements shall be renegotiated during the two-year period, unless the parties agree to the contrary. Any labor-management negotiation impasse declared before the date of transfer shall be settled in accordance with chapter 71 of title 5. Any impasse declared after the date of transfer shall be subject to applicable State law.

(C) Federal service shall be included in the computation of seniority for transferred employees with priority for reemployment, as provided in subparagraph (A)(iv) of this paragraph.

(D) Payment to transferred employees pursuant to subparagraph (A)(vi) of this paragraph shall not exceed the percentage of any transferred employee's base salary level provided by the United States as a

cost-of-living allowance on the day before the date of transfer, unless the parties agree to the contrary.

(E) Prior to the date of transfer, the Secretary shall also certify that the State-owned railroad has agreed to the retention, for at least one year from the date of transfer, of the offices of the Alaska Railroad, except in cases of separation for cause, resignation, retirement, or lack of work, at or above their base salaries in effect on the date of transfer, in such positions as the State-owned railroad may determine; or to the payment of lump-sum severance pay in an amount equal to such base salary for one year to officers not retained by the State-owned railroad upon transfer or, for officers separated within one year on or after the date of transfer, of a portion of such lump-sum severance payment (diminished pro rata for employment by the State-owned railroad within one year of the date of transfer prior to separation).

(4) Prior to the date of transfer, the Secretary shall also certify that the State has agreed to allow representatives of the Secretary adequate access to employees and records of the Alaska Railroad when needed for the performance of functions related to the period of Federal ownership.

(5) Prior to the date of transfer, the Secretary shall also certify that the State has agreed to compensate the United States at the value, if any, determined pursuant to section 1204(d) of this title.

(Pub. L. 97–468, title VI, §604, Jan. 14, 1983, 96 Stat. 2559; Pub. L. 108–7, div. I, title III, §345(5), Feb. 20, 2003, 117 Stat. 418; Pub. L. 108–447, div. H, title I, §152(3), Dec. 8, 2004, 118 Stat. 3222.)

References in Text

Act of March 12, 1914, and such Act, referred to in subsec. (c)(1), is act Mar. 12, 1914, ch. 37, 38 Stat. 305, as amended, popularly known as the Alaska Railroad Act, which enacted section 353a of Title 16, Conservation, and sections 975 to 975g of Title 43, Public Lands, and which was repealed by section 615(a)(1) of Pub. L. 97–468 effective on the date of transfer of Alaska Railroad to the State [Jan. 5, 1985], pursuant to this section.

Section 615 of this title, referred to in subsec. (c)(1), means section 615 of title VI of Pub. L. 97–468, Jan. 14, 1983, 96 Stat. 2577. Title VI of Pub. L. 97–468 is known as the Alaska Railroad Transfer Act of 1982 and is classified principally to this chapter. Under section 615, the repeal is effective on the date of transfer to the State of Alaska (pursuant to section 1203 of this title) or other disposition (pursuant to section 1210 of this title), whichever first occurs.

42 U.S.C. 9601 et seq., referred to in subsec. (d)(2)(D), probably means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. 96–510, Dec. 11, 1980, 94 Stat. 2767, as amended, which is classified principally to chapter 103 (§9601 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 9601 of Title 42 and Tables.

Amendments

2004—Subsec. (d)(2)(D). Pub. L. 108–447 added subpar. (D).

2003—Subsec. (b)(1). Pub. L. 108–7 struck out at end: "In the event of reversion to the United States, pursuant to section 1209 of this title, of the State's interests in all or part of the lands subject to such easement, such easement shall terminate with respect to the lands subject to such reversion, and no new exclusive-use easement with respect to such reverted lands shall be granted except by Act of Congress."

Transfer of Alaska Railroad to State of Alaska

The State of Alaska accepted the certification requirements of the Alaska Railroad Transfer Act [this chapter] by 1984 SLA ch. 54, eff. May 19, 1984. Thereafter, by 1984 SLA ch. 153, eff. July 6, 1984, the Alaska Railroad Corporation was established to manage and operate the Alaska Railroad. The transfer of the Alaska Railroad to the State of Alaska was carried out on January 5, 1985.

Denali National Park and Alaska Railroad Corporation Exchange

Pub. L. 110–229, title III, §351, May 8, 2008, 122 Stat. 800, provided that:

"(a) DEFINITIONS.—In this section:

"(1) CORPORATION.—The term 'Corporation' means the Alaska Railroad Corporation owned by the State of Alaska.

"(2) SECRETARY.—The term 'Secretary' means the Secretary of the Interior.

"(b) EXCHANGE.—

"(1) IN GENERAL.—

"(A) EASEMENT EXPANDED.—The Secretary is authorized to grant to the Alaska Railroad Corporation an exclusive-use easement on land that is identified by the Secretary within Denali National Park for the purpose of providing a location to the Corporation for construction, maintenance, and on-going operation of track and associated support facilities for turning railroad trains around near Denali Park Station.

"(B) EASEMENT RELINQUISHED.—In exchange for the easement granted in subparagraph (A), the Secretary shall require the relinquishment of certain portions of the Corporation's existing exclusive use easement within the boundary of Denali National Park.

"(2) CONDITIONS OF THE EXCHANGE.—

"(A) EQUAL EXCHANGE.—The exchange of easements under this section shall be on an approximately equal-acre basis.

"(B) TOTAL ACRES.—The easement granted under paragraph (1)(A) shall not exceed 25 acres.

"(C) INTERESTS CONVEYED.—The easement conveyed to the Alaska Railroad Corporation by the Secretary under this section shall be under the same terms as the exclusive use easement granted to the Railroad in Denali National Park in the Deed for Exclusive Use Easement and Railroad Related Improvements filed in Book 33, pages 985–994 of the Nenana Recording District, Alaska, pursuant to the Alaska Railroad Transfer Act of 1982 (45 U.S.C. 1201 et seq.). The easement relinquished by the Alaska Railroad Corporation to the United States under this section shall, with respect to the portion being exchanged, be the full title and interest received by the Alaska Railroad in the Deed for Exclusive Use Easement and Railroad Related Improvements filed in Book 33, pages 985–994 of the Nenana Recording District, Alaska, pursuant to the Alaska Railroad Transfer Act of 1982 (45 U.S.C. 1201 et seq.).

"(D) COSTS.—The Alaska Railroad shall pay all costs associated with the exchange under this section, including the costs of compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the costs of any surveys, and other reasonable costs.

"(E) LAND TO BE PART OF WILDERNESS.—The land underlying any easement relinquished to the United States under this section that is adjacent to designated wilderness is hereby designated as wilderness and added to the Denali Wilderness, the boundaries of which are modified accordingly, and shall be managed in accordance with applicable provisions of the Wilderness Act (78 Stat. 892) [16 U.S.C. 1131 et seq.] and the Alaska National Interest Lands Conservation Act of 1980 (94 Stat. 2371) [see Tables for classification].

"(F) OTHER TERMS AND CONDITIONS.—The Secretary shall require any additional terms and conditions under this section that the Secretary determines to be appropriate to protect the interests of the United States and of Denali National Park."

[1] See References in Text note below.

[2] So in original.

§1204. Transition period

(a) Joint report by Secretary and Governor of Alaska; contents, preparation, etc.

Within 6 months after January 14, 1983, the Secretary and the Governor of Alaska shall jointly prepare and deliver to the Congress of the United States and the legislature of the State a report that describes to the extent possible the rail properties of the Alaska Railroad, the liabilities and obligations to be assumed by the State, the sum of money, if any, in the Alaska Railroad Revolving Fund to be withheld from the State pursuant to section 1202(10)(C) [1] of this title, and any personal property to be withheld pursuant to section 1202(10)(D) [1] of this title. The report shall separately identify by the best available descriptions (1) the rail properties of the Alaska Railroad to be transferred pursuant to section 1203(b)(1)(A), (B), and (D) of this title; (2) the rail properties to be subject to the license granted pursuant to section 1203(b)(1)(C) of this title; and (3) the easements to be reserved pursuant to section 1203(c)(2) of this title. The Secretaries of Agriculture, Defense, and the Interior and the Administrator of the General Services Administration shall provide the Secretary with all information and assistance necessary to allow the Secretary to complete the report within the time required.

(b) Inspection, etc., of rail properties and records; terms and conditions; restrictions

During the period from January 14, 1983, until the date of transfer, the State shall have the right to inspect, analyze, photograph, photocopy and otherwise evaluate all of the rail properties of the Alaska Railroad and all records related to the rail properties of the Alaska Railroad maintained by any agency of the United States under conditions established by the Secretary to protect the confidentiality of proprietary business data, personnel records, and other information, the public disclosure of which is prohibited by law. During that period, the Secretary and the Alaska Railroad shall not, without the consent of the State and only in conformity with applicable law and the Memorandum of Understanding referred to in section 1205(b)(3) of this title—

(1) make or incur any obligation to make any individual capital expenditure of money from the Alaska Railroad Revolving Fund in excess of $300,000;

(2) (except as required by law) sell, exchange, give, or otherwise transfer any real property included in the rail properties of the Alaska Railroad; or

(3) lease any rail property of the Alaska Railroad for a term in excess of five years.

(c) Format for accounting practices and systems

Prior to transfer of the rail properties of the Alaska Railroad to the State, the Alaska Railroad's accounting practices and systems shall be capable of reporting data to the Interstate Commerce Commission in formats required of comparable rail carriers subject to the jurisdiction of the Interstate Commerce Commission.

(d) Fair market value; determination, terms and conditions, etc.

(1) Within nine months after January 14, 1983, the United States Railway Association (hereinafter in this section referred to as the "Association") shall determine the fair market value of the Alaska Railroad under the terms and conditions of this chapter, applying such procedures, methods and standards as are generally accepted as normal and common practice. Such determination shall include an appraisal of the real and personal property to be transferred to the State pursuant to this chapter. Such appraisal by the Association shall be conducted in the usual manner in accordance with generally accepted industry standards, and shall consider the current fair market value and potential future value if used in whole or in part for other purposes. The Association shall take into account all obligations imposed by this chapter and other applicable law upon operation and ownership of the State-owned railroad. In making such determination, the Association shall use to the maximum extent practicable all relevant data and information, including, if relevant, that contained in the report prepared pursuant to subsection (a) of this section.

(2) The determination made pursuant to paragraph (1) of this subsection shall not be construed to affect, enlarge, modify, or diminish any inventory, valuation, or classification required by the Interstate Commerce

Commission pursuant to subchapter V [2] of chapter 107 of title 49.

(Pub. L. 97–468, title VI, §605(a)–(d), Jan. 14, 1983, 96 Stat. 2562, 2563.)

REFERENCES IN TEXT

Subchapter V of chapter 107 of title 49, referred to in subsec. (d)(2), was omitted in the general amendment of subtitle IV of Title 49, Transportation, by Pub. L. 104–88, title I, §102(a), Dec. 29, 1995, 109 Stat. 804.

CODIFICATION

In subsec. (a), references to section 1202(10)(C) and (D) of this title were in the original references to section 603(8)(C) and (D) of title VI of Pub. L. 97–468, and were editorially translated as section 1202(10)(C) and (D), as the probable intent of Congress, in view of section 1202(8) containing no subpars. (C) and (D) and the subject matter of section 1202(10)(C), which relates to money in the Alaska Railroad Revolving Fund being withheld from the State, and section 1202(10)(D), which relates to personal property being withheld.

Section is comprised of subsecs. (a) to (d) of section 605 of Pub. L. 97–468. Subsec. (e) of section 605 of Pub. L. 97–468 amended section 712 of this title.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 1302 of Title 49, Transportation, and section 101 of Pub. L. 104–88, set out as a note under section 1301 of Title 49. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 1301 of Title 49.

ABOLITION OF UNITED STATES RAILWAY ASSOCIATION AND TRANSFER OF FUNCTIONS AND SECURITIES

See section 1341 of this title.

[1] *See Codification note below.*

[2] *See References in Text note below.*

§1205. Lands to be transferred

(a) Availability of lands among rail properties

Lands among the rail properties of the Alaska Railroad shall not be—

(1) available for selection under section 12 of the Act of January 2, 1976, as amended (43 U.S.C. 1611, note), subject to the exception contained in section 12(b)(8)(i)(D) of such Act, as amended by subsection (d)(5) of this section;

(2) available for conveyance under section 1425 of the Alaska National Interest Lands Conservation Act (Public Law 96–487; 94 Stat. 2515);

(3) available for conveyance to Chugach Natives, Inc., under sections 1429 or 1430 of the Alaska National Interest Lands Conservation Act (Public Law 96–487; 94 Stat. 2531) or under sections 12(c) or 14(h)(8) of the Alaska Native Claims Settlement Act (43 U.S.C. 1611(c) and 1613(h)(8), respectively); or

(4) available under any law or regulation for entry, location, or for exchange by the United States, or for the initiation of a claim or selection by any party other than the State or other transferee under this

chapter, except that this paragraph shall not prevent a conveyance pursuant to section 12(b)(8)(i)(D) of the Act of January 2, 1976 (43 U.S.C. 1611, note), as amended by subsection (d)(5) of this section.

(b) Review and settlement of claims; administrative adjudication; management of lands; procedures applicable

(1)(A) During the ten months following January 14, 1983, so far as practicable consistent with the priority of preparing the report required pursuant to section 1204(a) of this title, the Secretary of the Interior, Village Corporations with claims of valid existing rights, and the State shall review and make a good faith effort to settle as many of the claims as possible. Any agreement to settle such claims shall take effect and bind the United States, the State, and the Village Corporation only as of the date of transfer of the railroad.

(B) At the conclusion of the review and settlement process provided in subparagraph (A) of this paragraph, the Secretary of the Interior shall prepare a report identifying lands to be conveyed in accordance with settlement agreements under this chapter or applicable law. Such settlement shall not give rise to a presumption as to whether a parcel of land subject to such agreement is or is not public land.

(2) The Secretary of the Interior shall have the continuing jurisdiction and duty to adjudicate unresolved claims of valid existing rights pursuant to applicable law and this chapter. The Secretary of the Interior shall complete the final administrative adjudication required under this subsection not later than three years after January 14, 1983, and shall complete the survey of all lands to be conveyed under this chapter not later than five years after January 14, 1983, and after consulting with the Governor of the State of Alaska to determine priority of survey with regard to other lands being processed for patent to the State. The Secretary of the Interior shall give priority to the adjudication of Village Corporation claims as required in this section. Upon completion of the review and settlement process required by paragraph (1)(A) of this subsection, with respect to lands not subject to an agreement under such paragraph, the Secretary of the Interior shall adjudicate which lands subject to claims of valid existing rights filed by Village Corporations, if any, are public lands and shall complete such final administrative adjudication within two years after January 14, 1983.

(3) Pending settlement or final administrative adjudication of claims of valid existing rights filed by Village Corporations prior to the date of transfer or while subject to the license granted to the State pursuant to section 1203(b)(1)(C) of this title, lands subject to such claims shall be managed in accordance with the Memorandum of Understanding among the Federal Railroad Administration, the State, Eklutna, Incorporated, Cook Inlet Region, Incorporated (as that term is used in section 12 of the Act of January 2, 1976 (Public Law 94–204; 89 Stat. 1150)), and Toghotthele Corporation, executed by authorized officers or representatives of each of these entities. Duplicate originals of the Memorandum of Understanding shall be maintained and made available for public inspection and copying in the Office of the Secretary, at Washington, District of Columbia, and in the Office of the Governor of the State of Alaska, at Juneau, Alaska.

(4) The following procedures and requirements are established to promote finality of administrative adjudication of claims of valid existing rights filed by Village Corporations, to clarify and simplify the title status of lands subject to such claims, and to avoid potential impairment of railroad operations resulting from joint or divided ownership in substantial segments of right-of-way:

(A)(i) Prior to final administrative adjudication of Village Corporation claims of valid existing rights in land subject to the license granted under section 1203(b)(1)(C) of this title, the Secretary of the Interior may, notwithstanding any other provision of law, accept relinquishment of so much of such claims as involved lands within the right-of-way through execution of an agreement with the appropriate Village Corporation effective on or after the date of transfer. Upon such relinquishment, the interest of the United States in the right-of-way shall be conveyed to the State pursuant to section 1203(b)(1)(B) or (2) of this title.

(ii) With respect to a claim described in clause (i) of this subparagraph that is not settled or relinquished prior to final administrative adjudication, the 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. Upon failure of the interested Village Corporation to relinquish so much of its claims as involve lands within the right-of-way prior to final adjudication of valid existing rights, the Secretary shall convey to the State pursuant to section 1203(b)(1)(B) or (2) of this title all right, title and interest of the United States in and to the right-of-way free and

clear of such Village Corporation's claim to and interest in lands within such right-of-way.

(B) Where lands within the right-of-way, or any interest in such lands, have been conveyed from Federal ownership prior to January 14, 1983, or is subject to a claim of valid existing rights by a party other than a Village Corporation, the conveyance to the State of the Federal interest in such properties pursuant to section 1203(b)(1)(B) or (2) of this title shall grant not less than an exclusive-use easement in such properties. The foregoing requirements shall not be construed to permit the conveyance to the State of less than the entire Federal interest in the rail properties of the Alaska Railroad required to be conveyed by section 1203(b) of this title. If an action is commenced against the State or the United States contesting the validity or existence of a reservation of right-of-way for the use or benefit of the Alaska Railroad made prior to January 14, 1983, the Secretary of the Interior, through the Attorney General, shall appear in and defend such action.

(c) Judicial review; remedies available; standing of State

(1) The final administrative adjudication pursuant to subsection (b) of this section shall be final agency action and subject to judicial review only by an action brought in the United States District Court for the District of Alaska.

(2) No administrative or judicial action under this chapter shall enjoin or otherwise delay the transfer of the Alaska Railroad pursuant to this chapter, or substantially impair or impede the operations of the Alaska Railroad or the State-owned railroad.

(3) Before the date of transfer, the State shall have standing to participate in any administrative determination or judicial review pursuant to this chapter. If transfer to the State does not occur pursuant to section 1203 of this title, the State shall not thereafter have standing to participate in any such determination or review.

(d) Omitted

(e) Liability of State for damage to land while used under license

The State shall be liable to a party receiving a conveyance of land among the rail properties of the Alaska Railroad subject to the license granted pursuant to section 1203(b)(1)(C) of this title for damage resulting from use by the State of the land under such license in a manner not authorized by such license.

(Pub. L. 97–468, title VI, §606(a)–(c), (e), Jan. 14, 1983, 96 Stat. 2564–2566, 2571; Pub. L. 98–620, title IV, §402(52), Nov. 8, 1984, 98 Stat. 3361.)

REFERENCES IN TEXT

Section 12 of the Act of January 2, 1976, as amended, referred to in subsecs. (a)(1), (4) and (b)(3), is section 12 of Pub. L. 94–204, Jan. 2, 1976, 89 Stat. 1150, as amended, which is set out as a note under section 1611 of Title 43, Public Lands. Section 12(b)(8)(i)(D) of such Act as amended by subsection (d)(5) of this section is the amendment of subsection (b)(8)(i)(D) of section 12 of Pub. L. 94–204 by section 606(d)(5) of Pub. L. 97–468, title VI, Jan. 14, 1983, 96 Stat. 2566.

The Alaska National Interest Lands Conservation Act, referred to in subsecs. (a)(2) and (c), is Pub. L. 96–497, Dec. 2, 1980, 94 Stat. 2371, as amended. Sections 1425, 1429, and 1430 of the Act (94 Stat. 2515, 2531) were not classified to the Code. For complete classification of this Act to the Code, see Short Title note set out under section 3101 of Title 16, Conservation, and Tables.

CODIFICATION

Section is comprised of subsecs. (a)–(c) and (e) of section 606 of Pub. L. 97–468. Subsec. (d) of section 606 of Pub. L. 97–468 amended section 12 of Pub. L. 94–204, which is set out as a note under section 1611 of Title 43, Public Lands.

AMENDMENTS

1984—Subsec. (c)(1). Pub. L. 98–620 struck out provision that required review of agency

action pursuant to this chapter to be expedited to same extent as expedited review provided by section 1108 of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3168).

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–620 not applicable to cases pending on Nov. 8, 1984, see section 403 of Pub. L. 98–620, set out as a note under section 1657 of Title 28, Judiciary and Judicial Procedure.

§1206. Employees of Alaska Railroad

(a) Coverage under Federal civil service retirement laws; election, funding, nature of benefits, etc., for employees transferring to State-owned railroad; voluntary separation incentives

(1) Any employees who elect to transfer to the State-owned railroad and who on the day before the date of transfer are subject to the civil service retirement law (subchapter III of chapter 83 of title 5) shall, so long as continually employed by the State-owned railroad without a break in service, continue to be subject to such law, except that the State-owned railroad shall have the option of providing benefits in accordance with the provisions of paragraph (2) of this subsection. Employment by the State-owned railroad without a break in continuity of service shall be considered to be employment by the United States Government for purposes of subchapter III of chapter 83 of title 5. The State-owned railroad shall be the employing agency for purposes of section 8334(a) of title 5 and shall contribute to the Civil Service Retirement and Disability Fund a sum as provided by such section, except that such sum shall be determined by applying to the total basic pay (as defined in section 8331(3) of title 5) paid to the employees of the State-owned railroad who are covered by the civil service retirement law, the per centum rate determined annually by the Director of the Office of Personnel Management to be the excess of the total normal cost per centum rate of the civil service retirement system over the employee deduction rate specified in section 8334(a) of title 5. The State-owned railroad shall pay into the Federal Civil Service Retirement and Disability Fund that portion of the cost of administration of such Fund which is demonstrated by the Director of the Office of Personnel Management to be attributable to its employees.

(2) At any time during the two-year period commencing on the date of transfer, the State-owned railroad shall have the option of providing to transferred employees retirement benefits, reflecting prior Federal service, in or substantially equivalent to benefits under the retirement program maintained by the State for State employees. If the State decides to provide benefits under this paragraph, the State shall provide such benefits to all transferred employees, except those employees who will meet the age and service requirements for retirement under section 8336(a), (b), (c) or (f) of title 5 within five years after the date of transfer and who elect to remain participants in the Federal retirement program.

(3) If the State provides benefits under paragraph (2) of this subsection—

(A) the provisions of paragraph (1) of this subsection regarding payments into the Civil Service Retirement and Disability Fund for those employees who are transferred to the State program shall have no further force and effect (other than for employees who will meet the age and service requirements for retirement under section 8336(a), (b), (c) or (f) of title 5 within five years after the date of transfer and who elect to remain participants in the Federal retirement program); and

(B) all of the accrued employee and employer contributions and accrued interest on such contributions made by and on behalf of the transferred employees during their prior Federal service (other than amounts for employees who will meet the age and service requirements for retirement under section 8336(a), (b), (c) or (f) of title 5 within five years after the date of transfer and who elect to remain participants in the Federal retirement program) shall be withdrawn from the Federal Civil Service Retirement and Disability Fund and shall be paid into the retirement fund utilized by the State-owned railroad for the transferred employees, in accordance with the provisions of paragraph (2) of this subsection. Upon such payment, credit for prior Federal service under the Federal civil service retirement system shall be forever barred, notwithstanding the provisions of section 8334 of title 5.

(4)(A) The State-owned railroad shall be included in the definition of "agency" for purposes of section

3(a), (b), (c), and (e) of the Federal Workforce Restructuring Act of 1994 and may elect to participate in the voluntary separation incentive program established under such Act. Any employee of the State-owned railroad who meets the qualifications as described under the first sentence of paragraph (1) shall be deemed an employee under such Act.

(B) An employee who has received a voluntary separation incentive payment under this paragraph and accepts employment with the State-owned railroad within 5 years after the date of separation on which payment of the incentive is based shall be required to repay the entire amount of the incentive payment unless the head of the State-owned railroad determines that the individual involved possesses unique abilities and is the only qualified applicant available for the position.

(b) Coverage for employees not transferring to State-owned railroad

Employees of the Alaska Railroad who do not transfer to the State-owned railroad shall be entitled to all of the rights and benefits available to them under Federal law for discontinued employees.

(c) Rights and benefits of transferred employees whose employment with State-owned railroad is terminated

Transferred employees whose employment with the State-owned railroad is terminated during the two-year period commencing on the date of transfer shall be entitled to all of the rights and benefits of discontinued employees that such employees would have had under Federal law if their termination had occurred immediately before the date of the transfer, except that financial compensation paid to officers of the Alaska Railroad shall be limited to that compensation provided pursuant to section 1203(d)(3)(E) of this title. Such employees shall also be entitled to seniority and other benefits accrued under Federal law while they were employed by the State-owned railroad on the same basis as if such employment had been Federal service.

(d) Lump-sum payment for unused annual leave for employees transferring to State-owned railroad

Any employee who transfers to the State-owned railroad under this chapter shall not be entitled to lump-sum payment for unused annual leave under section 5551 of title 5, but shall be credited by the State with the unused annual leave balance at the time of transfer.

(e) Continued coverage for certain employees and annuitants in Federal health benefits plans and life insurance plans

(1) Any person described under the provisions of paragraph (2) may elect life insurance coverage under chapter 87 of title 5 and enroll in a health benefits plan under chapter 89 of title 5 in accordance with the provisions of this subsection.

(2) The provisions of paragraph (1) shall apply to any person who—

(A) on March 30, 1994, is an employee of the State-owned railroad;

(B) has 20 years or more of service (in the civil service as a Federal employee or as an employee of the State-owned railroad, combined) on the date of retirement from the State-owned railroad; and

(C)(i) was covered under a life insurance policy pursuant to chapter 87 of title 5 on January 4, 1985, for the purpose of electing life insurance coverage under the provisions of paragraph (1); or

(ii) was enrolled in a health benefits plan pursuant to chapter 89 of title 5 on January 4, 1985, for the purpose of enrolling in a health benefits plan under the provisions of paragraph (1).

(3) For purposes of this section, any person described under the provisions of paragraph (2) shall be deemed to have been covered under a life insurance policy under chapter 87 of title 5 and to have been enrolled in a health benefits plan under chapter 89 of title 5 during the period beginning on January 5, 1985, through the date of retirement of any such person.

(4) The provisions of paragraph (1) shall not apply to any person described under paragraph (2) until the date such person retires from the State-owned railroad.

(Pub. L. 97–468, title VI, §607, Jan. 14, 1983, 96 Stat. 2571; Pub. L. 100–238, title I, §136(a), Jan. 8, 1988, 101 Stat. 1766; Pub. L. 103–226, §10, Mar. 30, 1994, 108 Stat. 122.)

REFERENCES IN TEXT

The Federal Workforce Restructuring Act of 1994, referred to in subsec. (a)(4)(A), is Pub. L. 103–226, Mar. 30, 1994, 108 Stat. 111. Section 3 of the Act is set out as a note under section 5597 of Title 5, Government Organization and Employees. For complete classification of this Act to the Code, see Short Title of 1994 Amendment note set out under section 2101 of Title 5 and Tables.

AMENDMENTS

1994—Subsec. (a)(4). Pub. L. 103–226, §10(a), added par. (4).

Subsec. (e). Pub. L. 103–226, §10(b), added subsec. (e) and struck out former subsec. (e) which related to continued coverage for certain employees and annuitants in Federal health benefits and life insurance plans.

1988—Subsec. (e). Pub. L. 100–238 added subsec. (e).

ADMINISTRATIVE PROVISION

Pub. L. 100–238, title I, §136(b), Jan. 8, 1988, 101 Stat. 1767, provided that: "Within 180 days after the date of enactment of this section [Jan. 8, 1988], the Director of the Office of Personnel Management shall notify any person described under the provisions of section 607(e)(2)(A) of such Act [45 U.S.C. 1206(e)(2)(A)], for the purpose of the election of a life insurance policy or the enrollment in a health benefits plan pursuant to the provisions of section 607(e)(1) of the Alaska Railroad Transfer Act of 1982 [45 U.S.C. 1206(e)(1)] (as amended by subsection (a) of this section)."

§1207. State operation

(a) Laws, authorities, etc., applicable to State-owned railroad with status as rail carrier engaged in interstate and foreign commerce

(1) After the date of transfer to the State pursuant to section 1203 of this title, the State-owned railroad shall be a rail carrier engaged in interstate and foreign commerce subject to part A of subtitle IV of title 49 and all other Acts applicable to rail carriers subject to that chapter,[1] including the antitrust laws of the United States, except, so long as it is an instrumentality of the State of Alaska, the Railroad Retirement Act of 1974 (45 U.S.C. 231 et seq.), the Railroad Retirement Tax Act (26 U.S.C. 3201 et seq.), the Railway Labor Act (45 U.S.C. 151 et seq.), the Act of April 22, 1908 (45 U.S.C. 51 et seq.) (popularly referred to as the "Federal Employers' Liability Act"), and the Railroad Unemployment Insurance Act (45 U.S.C. 351 et seq.). Nothing in this chapter shall preclude the State from explicitly invoking by law any exemption from the antitrust laws as may otherwise be available.

(2) The transfer to the State authorized by section 1203 of this title and the conferral of jurisdiction to the Interstate Commerce Commission pursuant to paragraph (1) of this subsection are intended to confer upon the State-owned railroad all business opportunities available to comparable railroads, including contract rate agreements meeting the requirements of section 10713 [2] of title 49, notwithstanding any participation in such agreements by connecting water carriers.

(3) All memoranda which sanction noncompliance with Federal railroad safety regulations contained in 49 CFR Parts 209–236, and which are in effect on the date of transfer, shall continue in effect according to their terms as "waivers of compliance" (as that term is used in section 20103(d) of title 49).

(4) The operation of trains by the State-owned railroad shall not be subject to the requirement of any State or local law which specifies the minimum number of crew members which must be employed in connection with the operation of such trains.

(5) Revenues generated by the State-owned railroad, including any amount appropriated or otherwise made available to the State-owned railroad, shall be retained and managed by the State-owned railroad for railroad and related purposes.

(6)(A) After the date of transfer, continued operation of the Alaska Railroad by a public corporation,

authority or other agency of the State shall be deemed to be an exercise of an essential governmental function, and revenue derived from such operation shall be deemed to accrue to the State for the purposes of section 115(a)(1) of title 26. Obligations issued by such entity shall also be deemed obligations of the State for the purposes of section 103(a)(1) ≟ of title 26, but not obligations within the meaning of section 103(b)(2) ≟ of title 26.

(B) Nothing in this chapter shall be deemed or construed to affect customary tax treatment of private investment in the equipment or other assets that are used or owned by the State-owned railroad.

(b) Procedures for issuance of certificate of public convenience and necessity; inventory, valuation, or classification of property; additional laws, authorities, etc., applicable

As soon as practicable after January 14, 1983, the Interstate Commerce Commission shall promulgate an expedited, modified procedure for providing on the date of transfer a certificate of public convenience and necessity to the State-owned railroad. No inventory, valuation, or classification of property owned or used by the State-owned railroad pursuant to subchapter V ≟ of chapter 107 of title 49 shall be required during the two-year period after the date of transfer. The provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and section 382(b) of the Energy Policy and Conservation Act (42 U.S.C. 6362(b)) shall not apply to actions of the Commission under this subsection.

(c) Eligibility for participation in Federal railroad assistance programs

The State-owned railroad shall be eligible to participate in all Federal railroad assistance programs on a basis equal to that of other rail carriers subject to part A of subtitle IV of title 49.

(d) Laws and regulations applicable to national forest and park lands; limitations on Federal actions

After the date of transfer to the State pursuant to section 1203 of this title, the portion of the rail properties within the boundaries of the Chugach National Forest and the exclusive-use easement within the boundaries of the Denali National Park and Preserve shall be subject to laws and regulations for the protection of forest and park values. The right to fence the exclusive-use easement within Denali National Park and Preserve shall be subject to the concurrence of the Secretary of the Interior. The Secretary of the Interior, or the Secretary of Agriculture where appropriate, shall not act pursuant to this subsection without consulting with the Governor of the State of Alaska or in such a manner as to unreasonably interfere with continued or expanded operations and support functions authorized under this chapter.

(e) Preservation and protection of rail properties

The State-owned railroad may take any necessary or appropriate action, consistent with Federal railroad safety laws, to preserve and protect its rail properties in the interests of safety.

(Pub. L. 97–468, title VI, §608, Jan. 14, 1983, 96 Stat. 2573; Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 104–88, title III, §326, Dec. 29, 1995, 109 Stat. 951; Pub. L. 108–447, div. H, title I, §152(1), (2), Dec. 8, 2004, 118 Stat. 3222.)

REFERENCES IN TEXT

The Railroad Retirement Act of 1974, referred to in subsec. (a)(1), is act Aug. 29, 1935, ch. 812, as amended generally by Pub. L. 93–445, title I, §101, Oct. 16, 1974, 88 Stat. 1305, which is classified generally to subchapter IV (§231 et seq.) of chapter 9 of this title. For further details and complete classification of this Act to the Code, see Codification note set out preceding section 231 of this title, section 231t of this title, and Tables.

The Railroad Retirement Tax Act, referred to in subsec. (a)(1), is act Aug. 16, 1954, ch. 736, §§3201, 3202, 3211, 3212, 3221, and 3231 to 3233, 68A Stat. 431, as amended, which is classified generally to chapter 22 (§3201 et seq.) of Title 26, Internal Revenue Code. For complete classification of this Act to the Code, see section 3233 of Title 26 and Tables.

The Railway Labor Act, referred to in subsec. (a)(1), is act May 20, 1926, ch. 347, 44 Stat. 577, as amended, which is classified principally to chapter 8 (§151 et seq.) of this title. For complete classification of this Act to the Code, see section 151 of this title and Tables.

Act of April 22, 1908 (45 U.S.C. 51 et seq.) (popularly referred to as the "Federal Employers' Liability Act"), referred to in subsec. (a)(1), is act Apr. 22, 1908, ch. 149, 35 Stat. 65, as amended, and is classified generally to chapter 2 (§51 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 51 of this title and Tables.

The Railroad Unemployment Insurance Act, referred to in subsec. (a)(1), is act June 25, 1938, ch. 680, 52 Stat. 1094, as amended, which is classified principally to chapter 11 (§351 et seq.) of this title. For complete classification of this Act to the Code, see section 367 of this title and Tables.

Section 10713 of title 49, referred to in subsec. (a)(2), was omitted in the general amendment of subtitle IV of Title 49, Transportation, by Pub. L. 104–88, title I, §102(a), Dec. 29, 1995, 109 Stat. 804. Provisions similar to those in section 10713 are contained in section 10709 of Title 49.

Section 103, referred to in subsec. (a)(6)(A), which related to interest on certain governmental obligations was amended generally by Pub. L. 99–514, title XIII, §1301(a), Oct. 22, 1986, 100 Stat. 2602, and as so amended relates to interest on State and local bonds. Section 103(b)(2), which prior to the general amendment defined industrial development bond, relates to the applicability of the interest exclusion to arbitrage bonds.

Subchapter V of chapter 107 of title 49, referred to in subsec. (b), was omitted in the general amendment of subtitle IV of Title 49, Transportation, by Pub. L. 104–88, title I, §102(a), Dec. 29, 1995, 109 Stat. 804.

The National Environmental Policy Act of 1969, referred to in subsec. (b), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

CODIFICATION

In subsec. (a)(3), "section 20103(d) of title 49" substituted for "section 202(c) of the Federal Railroad Safety Act of 1970 (45 U.S.C. 431(c))" on authority of Pub. L. 103–272, §6(b), July 5, 1994, 108 Stat. 1378, the first section of which enacted subtitles II, III, and V to X of Title 49, Transportation.

AMENDMENTS

2004—Subsec. (a)(5). Pub. L. 108–447, §152(1), inserted ", including any amount appropriated or otherwise made available to the State-owned railroad," before "shall be retained".

Subsec. (e). Pub. L. 108–447, §152(2), added subsec. (e).

1995—Subsecs. (a)(1), (c). Pub. L. 104–88 substituted "part A" for "the jurisdiction of the Interstate Commerce Commission under chapter 105".

1986—Subsec. (a)(6)(A). Pub. L. 99–514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954", which for purposes of codification was translated as "title 26" thus requiring no change in text.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–88 effective Jan. 1, 1996, see section 2 of Pub. L. 104–88, set out as an Effective Date note under section 1301 of Title 49, Transportation.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 1302 of Title 49, Transportation, and section 101 of Pub. L. 104–88, set out as a note under section 1301 of Title 49. References to Interstate Commerce Commission deemed

to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 1301 of Title 49.

ALASKA RAILROAD

Pub. L. 109–59, title IX, §9006, Aug. 10, 2005, 119 Stat. 1925, provided that:

"(a) GRANTS.—The Secretary [of Transportation] shall make grants to the Alaska Railroad for capital rehabilitation and improvements benefiting its passenger operations.

"(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section such sums as may be necessary."

Similar provisions were contained in Pub. L. 105–178, title VII, §7204, June 9, 1998, 112 Stat. 477.

1 So in original. Probably should be "that part,".

2 See References in Text note below.

§1208. Future rights-of-way

(a) Access across Federal lands; application approval

After January 14, 1983, the State or State-owned railroad may request the Secretary of the Interior or the Secretary of Agriculture, as appropriate under law, to expeditiously approve an application for a right-of-way in order that the Alaska Railroad or State-owned railroad may have access across Federal lands for transportation and related purposes. The State or State-owned railroad may also apply for a lease, permit, or conveyance of any necessary or convenient terminal and station grounds and material sites in the vicinity of the right-of-way for which an application has been submitted.

(b) Consultative requirements prior to approval of application; conformance of rights-of-way, etc.

Before approving a right-of-way application described in subsection (a) of this section, the Secretary of the Interior or the Secretary of Agriculture, as appropriate, shall consult with the Secretary. Approval of an application for a right-of-way, permit, lease, or conveyance described in subsection (a) of this section shall be pursuant to applicable law. Rights-of-way, grounds, and sites granted pursuant to this section and other applicable law shall conform, to the extent possible, to the standards provided in the Act of March 12, 1914 (43 U.S.C. 975 et seq.) and section 1202(6) of this title. Such conformance shall not be affected by the repeal of such Act under section 615 of this title.[1]

(Pub. L. 97–468, title VI, §609, Jan. 14, 1983, 96 Stat. 2574; Pub. L. 108–7, div. I, title III, §345(5), Feb. 20, 2003, 117 Stat. 418.)

REFERENCES IN TEXT

Act of March 12, 1914 (43 U.S.C. 975 et seq.), referred to in subsec. (b), is act Mar. 12, 1914, ch. 37, 38 Stat. 305, as amended, popularly known as the Alaska Railroad Act, which enacted section 353a of Title 16, Conservation, and sections 975 to 975g of Title 43, Public Lands, and which was repealed by section 615(a)(1) of Pub. L. 97–468 effective on the date of transfer of Alaska Railroad to the State [Jan. 5, 1985], pursuant to section 1203 of this title.

Section 615 of this title, referred to in subsec. (b), means section 615 of title VI of Pub. L. 97–468, Jan. 14, 1983, 96 Stat. 2577. Title VI of Pub. L. 97–468 is known as the Alaska Railroad Transfer Act of 1982 and is classified principally to this chapter. Under section 615, the repeal is effective on the date of transfer to the State of Alaska (pursuant to section 1203 of this title) or other disposition (pursuant to section 1210 of this title), whichever first occurs.

AMENDMENTS

2003—Subsec. (c). Pub. L. 108–7 struck out subsec. (c) which read as follows: "Reversion to the United States of any portion of any right-of-way or exclusive-use easement granted to the State or State-owned railroad shall occur only as provided in section 1209 of this title. For purposes of such section, the date of the approval of any such right-of-way shall be deemed the 'date of transfer'."

[1] See References in Text note below.

§1209. Repealed. Pub. L. 108–7, div. I, title III, §345(5), Feb. 20, 2003, 117 Stat. 418

Section, Pub. L. 97–468, title VI, §610, Jan. 14, 1983, 96 Stat. 2575, related to reversion from the State of railroad property to the United States.

§1210. Other disposition

If the Secretary has not certified that the State has satisfied the conditions under section 1203 of this title within one year after the date of delivery of the report referred to in section 1204(a) of this title, the Secretary may dispose of the rail properties of the Alaska Railroad. Any disposal under this section shall give preference to a buyer or transferee who will continue to operate rail service, except that—

(1) such preference shall not diminish or modify the rights of the Cook Inlet Region, Incorporated (as that term is used in section 12 of the Act of January 2, 1976 (Public Law 94–204; 89 Stat. 1150)), pursuant to such section, as amended by section 606(d) of this title; [1] and

(2) this section shall not be construed to diminish or modify the powers of consent of the Secretary or the State under section 12(b)(8) of such Act, as amended by section 606(d)(5) of this title.[1]

Any disposal under this section shall be subject to valid existing rights.

(Pub. L. 97–468, title VI, §611, Jan. 14, 1983, 96 Stat. 2576.)

REFERENCES IN TEXT

Section 12 of the Act of January 2, 1976, referred to in pars. (1) and (2), is section 12 of Pub. L. 94–204, Jan. 2, 1976, 89 Stat. 1150, as amended, which is set out as a note under section 1611 of Title 43, Public Lands.

Section 606(d) of this title, referred to in pars. (1) and (2), means section 606(d) of title VI of Pub. L. 97–468, Jan. 14, 1983, 96 Stat. 2566.

[1] See References in Text note below.

§1211. Denali National Park and Preserve lands

On the date of transfer to the State (pursuant to section 1203 of this title) or other disposition (pursuant to section 1210 of this title), that portion of rail properties of the Alaska Railroad within the Denali National Park and Preserve shall, subject to the exclusive-use easement granted pursuant to section 1203(b)(1)(D) of this title, be transferred to the Secretary of the Interior for administration as part of the Denali National Park and Preserve, except that a transferee under section 1210 of this title shall receive the same interest as the State under section 1203(b)(1)(D) of this title.

(Pub. L. 97–468, title VI, §612, Jan. 14, 1983, 96 Stat. 2576.)

§1212. Applicability of other laws

(a) Actions subject to other laws

The provisions of chapter 5 of title 5 (popularly known as the Administrative Procedure Act, and including provisions popularly known as the Government in the Sunshine Act), the Federal Advisory Committee Act (5 U.S.C. App. 1 et seq.), division A of subtitle III of title 54, section 303 of title 49, and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall not apply to actions taken pursuant to this chapter, except to the extent that such laws may be applicable to granting of rights-of-way under section 1208 of this title.

(b) Federal surplus property disposal; withdrawal or reservation of land for use of Alaska Railroad

The enactment of this chapter, actions taken during the transition period as provided in section 1204 of this title, and transfer of the rail properties of the Alaska Railroad under authority of this chapter shall be deemed not to be the disposal of Federal surplus property under sections 541 to 555 of title 40 or the Act of October 3, 1944, popularly referred to as the "Surplus Property Act of 1944" (50 U.S.C. App. 1622).[1] Such events shall not constitute or cause the revocation of any prior withdrawal or reservation of land for the use of the Alaska Railroad under the Act of March 12, 1914 (43 U.S.C. 975 et seq.), the Alaska Statehood Act (note preceding 48 U.S.C. 21), the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), the Act of January 2, 1976 (Public Law 94–204; 89 Stat. 1145), the Alaska National Interest Lands Conservation Act (Public Law 96–487; 94 Stat. 2371), and the general land and land management laws of the United States.

(c) Ceiling on Government contributions for Federal employees health benefits insurance premiums

Beginning on January 14, 1983, the ceiling on Government contributions for Federal employees health benefits insurance premiums under section 8906(b)(2) of title 5 shall not apply to the Alaska Railroad.

(d) Acreage entitlement of State or Native Corporation

Nothing in this chapter is intended to enlarge or diminish the acreage entitlement of the State or any Native Corporation pursuant to existing law.

(e) Judgments involving interests, etc., of Native Corporations

With respect to interests of Native Corporations under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) and the Alaska National Interest Lands Conservation Act (16 U.S.C. 3101 et seq.), except as provided in this chapter, nothing contained in this chapter shall be construed to deny, enlarge, grant, impair, or otherwise affect any judgment heretofore entered in a court of competent jurisdiction, or valid existing right or claim of valid existing right.

(Pub. L. 97–468, title VI, §613, Jan. 14, 1983, 96 Stat. 2577; Pub. L. 113–287, §5(m)(2), Dec. 19, 2014, 128 Stat. 3271.)

REFERENCES IN TEXT

The Administrative Procedure Act, referred to in subsec. (a), is act June 11, 1946, ch. 324, 60 Stat. 237, as amended, which was classified to sections 1001 to 1011 of former title 5 and which was repealed and reenacted as subchapter II (§551 et seq.) of chapter 5, and chapter 7 (§701 et seq.), of Title 5, Government Organization and Employees, by Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 378.

The Government in the Sunshine Act, referred to in subsec. (a), is Pub. L. 94–409, Sept. 13, 1976, 90 Stat. 1241, which enacted section 552b of Title 5, Government Organization and Employees, amended sections 551, 552, 556, and 557 of Title 5, section 10 of Pub. L. 92–463, set out in the Appendix to Title 5, and section 410 of Title 39, Postal Service, and enacted provisions set out as notes under section 552b of Title 5. For complete classification of this Act to the Code, see Short Title of 1976 Amendment note set out under section 552b of Title 5 and Tables.

The Federal Advisory Committee Act, referred to in subsec. (a), is Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix to Title 5.

The National Environmental Policy Act of 1969, referred to in subsec. (a), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

Act of October 3, 1944, popularly referred to as the "Surplus Property Act of 1944", referred to in subsec. (b), is act Oct. 3, 1944, ch. 479, 58 Stat. 765, known as the Surplus Property Act of 1944, which was classified principally to sections 1611 to 1646 of the former Appendix to Title 50, War and National Defense, and was repealed effective July 1, 1949, with the exception of sections 1622, 1631, 1637, and 1641 of the former Appendix to Title 50 by act June 30, 1949, ch. 288, title VI, §602(a)(1), 63 Stat. 399, renumbered Sept. 5, 1950, ch. 849, §6(a), (b), 64 Stat. 583. Sections 1622 and 1641 were partially repealed by the 1949 act, and section 1622 was editorially reclassified and is set out as a note under section 545 of Title 40, Public Buildings, Property, and Works. Section 1622(g) was repealed and reenacted as sections 47151 to 47153 of Title 49, Transportation, by Pub. L. 103–272, §§1(e), 7(b), July 5, 1994, 108 Stat. 1278–1280, 1379. Section 1631 was repealed by act June 7, 1939, ch. 190, §6(e), as added by act July 23, 1946, ch. 590, 60 Stat. 599, and is covered by sections 98 et seq. of Title 50. Section 1637 was repealed by act June 25, 1948, ch. 645, §21, 62 Stat. 862, eff. Sept. 1, 1948, and is covered by section 3287 of Title 18, Crimes and Criminal Procedure. Provisions of section 1641 not repealed by the 1949 act were repealed by Pub. L. 87–256, §111(a)(1), Sept. 21, 1961, 75 Stat. 538, and are covered by chapter 33 (§2451 et seq.) of Title 22, Foreign Relations and Intercourse.

Act of March 12, 1914, referred to in subsec. (b), is act Mar. 12, 1914, ch. 37, 38 Stat. 305, as amended, popularly known as the Alaska Railroad Act, which enacted section 353a of Title 16, Conservation, and sections 975 to 975g of Title 43, Public Lands, and which was repealed by section 615(a)(1) of Pub. L. 97–468 effective on the date of transfer of Alaska Railroad to the State [Jan. 5, 1985], pursuant to section 1203 of this title.

The Alaska Statehood Act, referred to in subsec. (b), is Pub. L. 85–508, July 7, 1958, 72 Stat. 339, as amended, which is set out as a note preceding section 21 of Title 48, Territories and Insular Possessions. For complete classification of this Act to the Code, see Tables.

The Alaska Native Claims Settlement Act, referred to in subsecs. (b) and (e), is Pub. L. 92–203, Dec. 18, 1971, 85 Stat. 688, as amended, which is classified generally to chapter 33 (§1601 et seq.) of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 43 and Tables.

Act of January 2, 1976 (Public Law 94–204; 89 Stat. 1145), referred to in subsec. (b), amended the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.). For complete classification of this Act to the Code, see Tables.

The Alaska National Interest Lands Conservation Act, referred to in subsecs. (b) and (e), is Pub. L. 96–487, Dec. 2, 1980, 94 Stat. 2371, as amended. For complete classification of this Act to the Code, see Short Title note set out under section 3101 of Title 16, Conservation, and Tables.

CODIFICATION

In subsec. (a), "section 303 of title 49" substituted for "section 4(f) of the Department of Transportation Act (49 U.S.C. 1653(f))" on authority of Pub. L. 97–449, §6(b), Jan. 12, 1983, 96 Stat. 2443, the first section of which enacted subtitle I (§101 et seq.) and chapter 31 (§3101 et seq.) of subtitle II of Title 49, Transportation.

In subsec. (b), "sections 541 to 555 of title 40" substituted for "the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 484)" on authority of Pub. L. 107–217, §5(c), Aug. 21, 2002, 116 Stat. 1303, which Act enacted Title 40, Public Buildings, Property, and Works.

AMENDMENTS

2014—Subsec. (a). Pub. L. 113–287 substituted "division A of subtitle III of title 54" for "the National Historic Preservation Act (16 U.S.C. 470 et seq.)".

[1] *See References in Text note below.*

§1213. Conflict with other laws

The provisions of this chapter shall govern if there is any conflict between this chapter and any other law.

(Pub. L. 97–468, title VI, §614, Jan. 14, 1983, 96 Stat. 2577.)

§1214. Separability

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

(Pub. L. 97–468, title VI, §616, Jan. 14, 1983, 96 Stat. 2578.)

1982 IBLA

THE ALASKA RAILROAD

IBLA 81-426 Decided July 20, 1982

Appeal from decision of the Alaska State Office, Bureau of Land Management, tentatively approving State selection application F-024563.

Affirmed.

1. Alaska: Land Grants and Selections: Generally – Alaska: Statehood Act -- State Selections

A selection by the State of Alaska under section 6(b) of the Alaska Statehood Act is limited to public lands which are "vacant, unappropriated, and unreserved." A right-of-way for the Alaska Railroad across the public lands constitutes an easement which does not separate the servient estate from the public domain with the result that the land may be available for selection subject to reservation of a railroad right-of-way in any patent issued to the State.

APPEARANCES: William J. Wong, Esq., Anchorage, Alaska, for appellant; Shelley J. Higgins, Esq., Office of the Attorney General, State of Alaska, for the State.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Alaska Railroad appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated January 30, 1981, tentatively approving State selection application F-024563 in part. The State of Alaska filed its general purposes grant selection application under the provisions of section 6(b) of the Statehood Act of July 7, 1958, P.L. 85-508, 72 Stat. 339,340.

On appeal the Alaska Railroad asserts that the lands in the State selection which were at the time of selection included in appellant's railroad right-of-way were occupied, appropriated, and/or reserved,

and thus, unavailable for State selection. 1/ Therefore, appellant asserts these lands were exempt from State selection and that patents to the State of Alaska should contain exceptions for appellant's right-of-way.

The BLM decision states that on December 11, 1959, the State of Alaska under the provisions of section 6(b) of the Statehood Act filed general purposes grant selection application F-024563 for lands within the W 1/2 of T. 6 S., R. 8 W., Fairbanks meridian. Prior to December 11, 1959, Public Land Order (PLO) No. 553 of February 7, 1949, 14 FR 696 (Feb. 17, 1949), withdrew lands in secs. 27, 28, 32, 33, and 34 of T. 6 S., R. 8 W., Fairbanks meridian, from all forms of appropriation under the public land laws, and reserved them for use of the Alaska Railroad. On February 27, 1959, PLO 1812, 24 FR 1652 (Mar. 5, 1959), revoked PLO 553 insofar as it affected the described lands except for sec. 33 of T. 6 S., R. 8 W., Fairbanks meridian.

The BLM decision concluded that the lands other than sec. 33 applied for by the State of Alaska, subject to certain exceptions not relevant in this case, were proper for acquisition by the State and were tentatively approved. The decision provided that the patent will contain a reservation to the United States of a right-of-way for railroads under the Act of March 12, 1914, ch. 37, 38 Stat. 305.

Section 1 of the Act of March 12, 1914, (codified at 43 U.S.C. §§ 975c and 975d (1976)), provides in part:

> Terminal and station grounds and rights of way through the lands of the United States in the Territory of Alaska are hereby granted for the construction of railroads, telegraph and telephone lines authorized by this Act, and in all patents for lands hereafter taken up, entered or located in the Territory of Alaska there shall be expressed that there is reserved to the United States a right of way for the construction of railroads, telegraph and telephone lines to the extent of one hundred feet on either side of the center line of any such road and twenty-five feet on either side of the center line of any such telegraph or telephone lines, and the President may, in such manner as he deems advisable, make reservation of such lands as are or may be useful for furnishing materials for construction and for stations, terminals, docks, and for such other purposes in connection with the construction and operation of such railroad lines as he may deem necessary and desirable.

The issue raised by this appeal is whether the land within the right-of-way granted to the Alaska Railroad is occupied, appropriated,

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11 State selection is restricted by section 6(b) of the Statehood Act, 72 Stat. 340, to "public lands of the United States in Alaska which are vacant, unappropriated; and unreserved at the time of their selection."

and/or reserved so as to be exempt from State selection. Neither counsel for appellant nor counsel for the State of Alaska have cited any cases on point and this appears to be a case of first impression.

[1] Consideration of the nature of the right-of-way granted by similar statutes provides guidance. The General Railroad Right of Way Act of March 3, 1875, ch. 152, 18 Stat. 482 (1875), 2/ granting a similar right-of-way for railroad across the public lands outside Alaska has been held to convey only an easement and not a fee interest in the land. Great Northern Railway Co. v. United States, 315 U.S. 262 (1942). The Court noted that section 4 of the Act provided in part that all public lands over which such right-of-way shall pass "shall be disposed of subject to such right of way." 315 U.S. at 271 (emphasis added). The Court held that the reserved right to dispose of the lands subject to the right-of-way is inconsistent with the grant of a fee and persuasive that the grant of an easement was the intent of the statute. 315 U.S. at 271. The location of a post-1871 railroad right-of-way across a tract of public land does not separate the servient estate

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Y Section 1 of the Act provides in part as follows:

"[T]he right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

General Railroad Right of Way Act of Mar. 3, 1875, ch. 152, § 1, 18 Stat. 482 (repealed, Act of Oct. 21, 1976, P.L. 94-579, § 706(a), 90 Stat. 2793).

Section 4 of the Act provides as follows:

"Sec. 4. That any railroad-company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

18 Stat. at 483 (repealed, Act of Oct. 21, 1976, P.L. 94-579, § 706(a), 90 Stat. 2793).

from the public domain with the result that title to the servient estate passes without express mention in a subsequent grant by the United States of the traversed tract of public domain. State of Wyoming v. Udall, 379 F.2d 635, 639-40 (10th Cir. 1967), cert. denied, 389 U.S. 985 (1967).

The issue of whether a railroad right-of-way grant under a different statute J/ caused the land embraced therein to be otherwise disposed of so as to entitle the State of Wyoming to indemnity selections for such lands within school sections granted to the State under its Enabling Act has previously been litigated. State of Wyoming v. Andrus, 602 F.2d 1379 (10th Cir. 1979). Despite the broader limited or qualified fee interest granted by the earlier railroad right-of-way Acts of 1862 and 1864, the court held that lands within school sections granted to the states which were subject to such rights-of-way were not otherwise disposed of so as to entitle the State of Wyoming to indemnity selections for such lands. Rather, the court held it was the intent of Congress that Wyoming take the sections subject to the railroad right-of-way. Id. at 1385.

These cases decided under other railroad right-of-way statutes persuade us that the lands embraced in appellant's right-of-way should not be considered to be appropriated or reserved at the time of State selection so as to be excluded therefrom. The decision correctly held that a right-of-way for railroad shall be reserved in any State selection patent issued.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Tnteiim, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

James L. Burski
Administrative Judge

'J/ Act of July 1, 1862, ch. 120, § 2, 12 Stat. 489, as amended, Act of July 2, 1864, ch. 216, §§ 3, 4, 13 Stat. 356.

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Rep.Chuck.Kopp@akleg.gov

Patent	Serial #	RD	Book/Page	Acres ROW	Acres ROW
	84662	**FAI**			**1865,68**
50-99-0397					386.1
Lots 1-8, US Survey 9066				160	
Lots 1-8, US Survey 9067				160.9	
Lots 1-8, US Survey 9071				65.2	
50-2006-0162					1236.8
Lot 2, US Survey 2123				12.12	
Lots 2-12, US Survey 9065				165.78	
Lots1-8 US Survey 9066				160	
Lots 1-8, US Survey 9068				160.9	
Lots 1-11, US Survey 9068				163.78	
Lots 1-10, 12-16, 18-19 US Survey 9069				233.67	
Lots 1-8, US Survey 9071				65.2	
Lots 1-14, US Survey 9073				188.6	
Lots 1-7, US Survey 9074				86.75	
50-2006-0464					242.78
Lots 1-14, Parcels A,B,C , US Survey 9070				122.67	
Lots 1-9, US Survey 9072				120.11	
	84661	**NEN**			**1964.5**
50-2005-0240					975.68
Lot 8, US Survey 9050				11.93	
Lots 1-5, Parcels A,B, US Survey 9051				96.84	
Lots 1-5, Parcels A,B, US Survey 9052				52.35	
Lots 1-10, Parcels A,B, US Survey 9054				158.61	
Lots 1-7, Parcel A, US Survey 9055				153.6	
Lots 1-9, Parcels A,B,C,D, US Survey 9056				163.05	
Lots 1-9, Parcels A,B, US Survey 9057				137.5	
Lots 1-7, US Survey 9062				103.02	
Lots 1-5, US Survey 9063				98.78	
50-2005-0241					335.81
Lots 1-4, Parcel A, US Survey 9053				90.75	
Lots 1-4, US Survey 9059				131.71	
US Survey 9064				98.27	

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Patent	Serial #	RD	Book/Page	Acres ROW	Acres ROW
Lot 1 US Survey 9065				15.08	
50-2006-0465					195.58
Lots 1-6, US Survey 9058				195.58	
50-2010-0080					247.83
Lots 1-6, US Survey 9060				150.04	
Lots 1-9, Parcels A,B, US Survey 9061				97.79	
50-2011-0069					209.6
Lots 1-7, Parcel A, US Survey 9050				209.6	
	55132	**TAL**			**2093.36**
AA55132			B105 P106		26.56
Lots 3,4,8,9,13, US Survey 4851				26.56	
50-2005-0236					1180.67
Lots 15,16, US Survey 4851				7.19	
Lot 2, US Survey 7492				9.82	
Lots 8-12, US Survey 9034				51.94	
Lots 1-13, US Survey 9035				151.82	
Lots 1,2, Parcels A-G, US Survey 9041				217.56	
Lots 1-4, Parcel A, US Survey 9042				138.81	
US Survey 9043				175.77	
Lots 1,2, Parcel A, US Survey 9045				73.83	
Lots 1-3, US Survey 9046				110.01	
US Survey 9048				60.79	
Lots 1-18, US Survey 9049 including O&G, other minerals in Lots 13, 14				183.13	
50-2005-0237					621.29
Lots 1-8, Parcel A, US Survey 9036				124.82	
Lots 1-6, Parcels A,B, US Survey 9037				141.3	
Lots 1-5, Parcels A,B, US Survey 9038				148.33	
Lots 1,2, Parcels A-C, US Survey 9039				155.06	
Lot 1, Parcels A,B, US Survey 9040				51.78	
50-2005-0238					261.23
Lots 1-3, US Survey 9044				131.08	
Lots 1-4, US Survey 9047				113.42	
Lot 6, US Survey 9047				16.73	

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Patent	Serial #	RD	Book/Page	Acres ROW	Acres ROW
50-2011-0068					3.61
Lot26, US Survey 5583				3.61	
	55159	VAL			**8.35**
50-2006-0435					8.35
Lots 1,2, US Survey 9082				8.35	
	55130	**PAL**			**2258.02**
50-2005-0233					999.77
Lots 1-8, Parcels A, US Survey 9028				190.61	
Lots 1-6, US Survey 9029				87.91	
Lots 1-17, Parcels A-C, US Survey 9030				179.55	
Lots 1-15, US Survey 9031				148.49	
Lots 1-12, US Survey 9032				146.33	
Lots 1-12, US Survey 9033				147.58	
Lots 1-7, US Survey 9034				99.3	
50-2005-0234					331.76
Lots 1-13, US Survey 9024				237.26	
Lots 1-3, US Survey 9025				94.5	
50-2005-0235					575.04
Lots 1-9, US Survey 9026				162.68	
Lots 1-19, Parcels A-L, US Survey 9075				233.52	
US Survey 9076				133.84	
A strip of land through T.19N.,R.2E., Seward Meridian, 200 feet in width, centerline				45	
of which Is depicted on plat and described in the field note record of US Survey 9076 by					
A. Bert Skeesick, Cadastral Surveyor, May 25, 1989 through May 28, 1990					
50-2006-0362					147.63
Lots 1-9, US Survey 9027				147.63	
50-2010-0290					203.82
Lots 1-5, Parcel A, US Survey 9077				46.11	
US Survey 9077- Parcel 1				68.71	
US Survey 9077- Parcel 2				10.57	
US Survey 9077- Parcel 3				6.26	
US Survey 9077- Parcel 4				12.25	
US Survey 9077- Parcel 5				18.22	

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Patent	Serial #	RD	Book/Page	Acres ROW	Acres ROW
US Survey 9077- Parcel 6				41.7	
	55129	**ANC**			**2230.32**
50-2000-0018					149.01
Lots 1-3, US Survey 9020				97.75	
US Survey 9021				51.26	
50-2005-0042					256.79
Lots 1-4, Parcels A,B, US Survey 9009				154.13	
US Survey 9010				102.66	
50-2005-0043					318.42
Lot 1, Parcels A-M, US Survey 9013				164.74	
US Survey 9014				153.68	
50-2005-0232					185.02
US Survey 9007				185.02	
50-2005-0046					93.72
Sec 5, T.15N.,R.1W. , Seward Meridian				35.69	
Sec6, T.15N.,R.1W. , Seward Meridian				0.5	
Sec 7, T.15N.,R.1W. , Seward Meridian				26.02	
Sec 18, T.15N.,R.1W. , Seward Meridian				29.01	
Sec 19, T.15N.,R.1W. , Seward Meridian				2.5	
50-2006-0161					342.97
Lot 1, Parcels A-K, US Survey 9011				149.75	
Lots 1-3, 13, Parcels A-K, US Survey 9012				193.22	
50-2006-0363					237.55
Lots 1-8, US Survey 9015				163.1	
US Survey 9016				74.45	
50-2007-0715					281.99
Lots 1-8, US Survey 9022				118.83	
Lots 1-9, Parcels A-F, US Survey 9023				163.16	
50-2009-0014					125.1
US Survey 9080				125.1	
50-2009-0109					200.16
US Survey 9081				200.16	
50-2009-0260					39.59

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Patent	Serial #	RD	Book/Page	Acres ROW	Acres ROW
US Survey 9083				39.59	
50-2016-0050					
All those portion of Lots 4, 13, and 14 of Block 3, of Sunset Hills West Subdivision, according to the					
recorded plat thereof, lying southwesterly of the line designated as "Take Line" on that certain					
map titled Potter Hill Relocation, Alaska Railroad, designated as document 64-105, filed					
October 9, 1964, in the Office of the District Recorder for the Anchorage Recording					
Precinct, Third Judicial District, State of Alaska.					
	55128	**SEW**			**1419.39**
AA55128			B37 P192		2.92
Tract B, US Survey 242				2.92	
50-2005-0039					687.08
Lots 1,2,4-7, Parcel A, US Survey 9000				41.08	
Lot 1, Parcels A,B, US Survey 9002				187.94	
US Survey 9003				131.24	
US Survey 9004				211.61	
US Survey 9006				115.21	
50-2005-0040					564.24
Lots 10,11, US Survey 9000				130.99	
US Survey 9005				192.76	
Tracts 37, 38, Parcels A-E, T.4N., R.1W. Seward Meridian				121.68	
Tracts 37, 38, Parcels A-G, T.5N., R.1W. Seward Meridian				61.71	
Tracts 37, 38, Parcels A-D, T.5N., R.1E. Seward Meridian				57.1	
50-2005-0041					165.15
Lots 1-3, Parcels A,B, US Survey 9001				165.15	
				TOTAL	**9973.94**
				FAI	**1865,68**
				NEN	**1964.5**
				TAL	**2093.36**
				VAL	**8.35**
				PAL	**2258.02**
				ANC	**2230.32**
				SEW	**1419.39**
				Total	**9973.94**

SFGATE

What Is the Difference Between Easement & Right of Way?

Easements grant others a right to use your property.

Your right to own land doesn't preclude others from also having a type of right over your land as well. Easements and rights of way are property rights, in fact, that can grant others a right of use over your property. Easements describe general property rights by others over your land while a right of way describes a specific property right.

Easements

Basically, an easement is the right to use the property of another. Easements come in two types: gross easements and appurtenant easements. A gross easement is a right over use of your property held by a specific individual. Appurtenant easements are a right over use of your property for the benefit of adjoining lands. Gross easements give a right over use of your property to those adjoining lands no matter who owns them.

Rights of Way

A right of way is an easement that allows another person to travel or pass through your land. The most common form of right of way easement is a road or path through your land. The right of way easement road is meant to benefit a particular person or another parcel of land not owned by you. Right of way easements extend reasonable use for travel through others' lands to holders of the easements.

Easement Categories

Easements fall into two categories, affirmative and negative. An affirmative easement is the most common and allows its holder to do something on another individual's land, such as cross over it. Negative easements prevent something from occuring on a person's land. For example, a negative easement on your land could prevent you from building a high structure that obstructs the view from a building on another's land.

Granting of Easements

An easement, including a right of way, is typically granted by one landowner to another landowner. Generally, easements are granted by will, by deed or by a contract. However, an easement can also be granted by adverse possession, which is known as a prescriptive easement. In real estate, "adverse possession" is often called "squatting." A prescriptive easement is gained by one person's open, notorious, continuous and adverse or hostile use of the land of another.

Other Considerations

Easements only grant non-possessory rights to use others' lands; they don't grant any ownership rights to them. Right of way easements, for example, don't allow their holders to sell the land of another individual's over which they have the right to travel. Easements can also be terminated through explicit expiration, such as a right of way granted for a period of 25 years. However, an easement on a deed generally remains with the land in perpetuity.

References (3) (#)

- FindLaw.com: What is a Property Easement?(http://blogs.findlaw.com/law_and_life/2010/08/what-is-a-property-easement.html)
- Deeds.com: The Different Types of Easement Deeds in Real Property Documents(http://www.deeds.com/information/The-Different-Types-of-Easement-Deeds-in-Real-Property-Documents-1330532144.html)
- CaddenFuller.com: Real Estate Law: Easement Basics(http://www.caddenfuller.com/CM/Articles/Articles40.asp)

Resources (2) (#)

About the Author

Tony Guerra served more than 20 years in the U.S. Navy. He also spent seven years as an airline operations manager. Guerra is a former realtor, real-estate salesperson, associate broker and real-estate education instructor. He holds a master's degree in management and a bachelor's degree in interdisciplinary studies.

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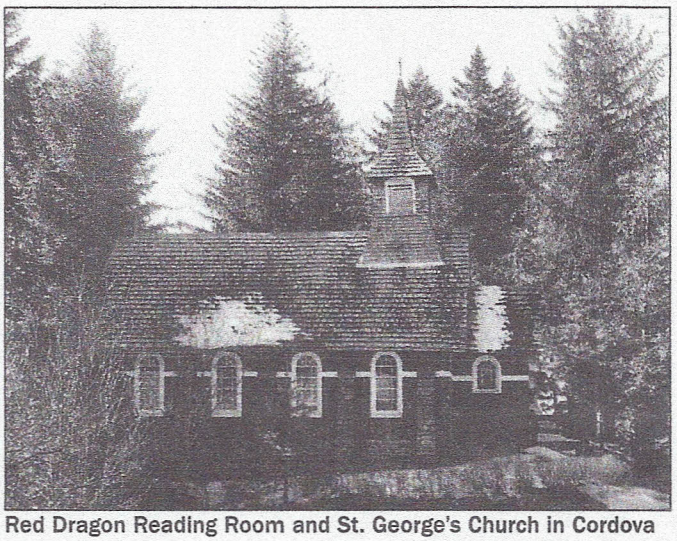
Suggest a Correction

Photos courtesy AAHP

- 4th Avenue Theatre, Anchorage
- Kake Cannery, Kake
- McCarthy General Store, McCarthy
- Red Dragon Reading Room and St. George's Church, Cordova
- Three German Bachelors Cabin, Talkeetna
- Talkeetna Wireless Transmitter Site, Anchorage



Red Dragon Reading Room and St. George's Church in Cordova

> "Physically, it's in a lot of trouble and everyone knows it. The present owners don't seem to want to talk about it. But it's iconic and we want to keep it in the public eye."
>
> — Allegra Hamer of the AAHP, on the 4th Avenue Theatre

slative with 13 other people in the Lane Hotel fire in 1966, the year that the first of the two buildings was started.

red on village side of leader- Albert negoti- ards of settle- for new utboard ships. It ing Alas- ves. And ice build- gly mod- ska.

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died along

Though dated, the buildings have been maintained and occupied over the years. What makes them "endangered?"

That's a subjective term as well, Hamer said. In the case of a functioning office building, the concern is that anyone wanting to lease the space could make alterations that would permanently alter the period character of the place or efface its historical connection.

Several of the properties on this year's list appear battered but remain in use more than 100 years after they were built. They include the Red Dragon Reading Room and St. George's Church in Cordova. It was the first church built in that town and was once overseen by Eustace Ziegler, one of Alaska's best-known painters.

The McCarthy General Store, saved from decay by local volunteers, is used for educational programs by the Wrangell Mountains Center. A large dock and indoor area would seem to offer possibilities at the Kake Cannery. The barracks building at Fort William H. Seward in Haines is one of the biggest buildings in the neighborhood, and might be used as a recreation or interpretive facility.

But being used isn't always a good thing. There used to be another barracks building, a twin to the one that survives, that housed the office and press of the local newspaper. It burned to the ground in 1981 when someone forgot to turn off the hot lead linotype machine.

Other places on the list are clearly hurting. The old octagonal Alaska Railroad water towers used in the steam era had a structural defect that caused them to split apart. The last one left, now in Willow after having been moved from Montana Station in the 1950s, faces the same problem.

No less precarious is the peril faced by a 1930s-era log cabin in Talkeetna, the so-called "Three German Bachelors" site, one of the most photographed relics in the town.

The building belongs to the Talkeetna Historical Society and sits on land belonging to the Alaska Railroad, which charges $550 a month to lease the land. To cover the cost, the society rented the space to an artist. That made it a commercial property and the Mat-Su Borough started charging the Historical Society property tax.

"The building is now heavily listing to one side," read the nomination petition to AAHP. "The building cannot

See Page E-8, **HISTORIC**

Photo by Greg Sandstrom

Fairbanks' production of "L'Italiana in Algeri"

Courtesy UAF

Five pianists will continue to the final rounds of the Alaska International Piano-e-Competition.

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Orchestra in Beethoven's "Pastoral Symphony" and, on July 26, Beethoven's "Choral Fantasy." The choir for the latter is being prepared by Emerson Eads. The major concerts take place in Davis Concert Hall.

Also returning is the "Sounds of Nature" feature, in which festival musicians debut pieces written in a short time frame by participants in Stephen Lias' "Composing in the Wilderness" workshop. Speaking of wilderness, the orchestra will perform in Denali National Park on July 19. More information is available at fsaf.org.

Literary awards announced

The 2014 Contributions to Literacy in Alaska awards will go to former Alaska writer laureate Nancy Lord of Homer, Fireside Books store owner David Cheezem of Palmer and UAF's Alaska Native Language Archive. The Kashunamiut School District and the Association of Alaska School Boards will be the first recipients of a newly created literacy award on the basis of a Cup'ik language interactive reading program developed in Chevak.

The awards are presented annually by the Alaska Center for the Book. The formal presentation will take place starting at 7:30 p.m. on July 15 at the University of Alaska Anchorage Consortium Library. It will be followed by a dessert reception. There'll also a bit of theater when Steven Hunt directs a staged reading of Zack Rogow's "Tangled Love: The Life and Work of Yosano Akiko."

New literary awards applications open

Speaking of reading and writing, the Alaska Arts and Culture Foundation and Alaska State Council on the Arts are starting a new program for writers, the Alaska Literary Awards. The awards "will recognize and support writers of poetry, fiction, creative nonfiction, playwriting, screenwriting, and mixed genres." The awards are sponsored by former state writer laureate Peggy Shumaker and Joe Usibelli.

Any Alaska writer over the age of 18 is eligible to apply for a select number of $5,000 fellowships, to be awarded this fall. There are no restrictions on the writer's use of the award. The deadline to apply is Sept. 2. More information is available at bit.ly/AKliteraryawards.

Back from the dead

The next "Stories at the Cemetery" event starts at 6 p.m. on Sunday, July 13. This is a self-guided walking tour with 10 costumed actors standing at the gravesites of their characters. Maps will be available at the John Bagoy Gate at Seventh Avenue and Cordova Street. The presentations end at 8 p.m. The event is free, but it's nice to tip the actors.

Reach Mike Dunham at mdunham@adn.com

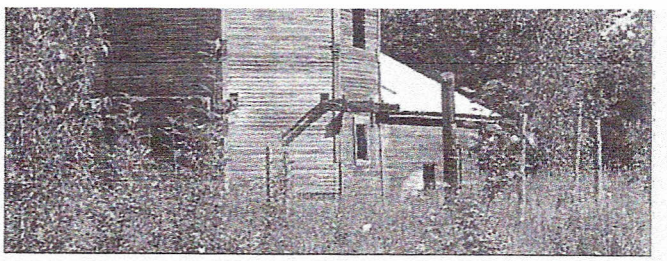

Photo courtesy AAHP

Alaska Railroad Montana Station Water Tower at Mile 95.6 of the Parks Highway

HISTORIC: Sites on previous years' lists have been saved

Continued from E-5

be moved, or it endangers the historic district of Talkeetna. Since the society does not own the ground underneath the building it cannot be righted without permission from the railroad. There is a conundrum. If it cannot have a proper foundation it will fall over and rot into the ground. If it is moved, it loses its historic significance."

SUCCESS STORIES

Sometimes the stories have happy endings, Hamer said.

The Chief Shakes house in Wrangell is a good example of the restoration and preservation of an important historical and artistic treasure. The Oscar Anderson House is another example of a once-doomed building that has been rescued — at least for the time being. The massive Kennecott Mine Complex is now drawing attention from preservationists around the world. The magnificent Holy Ascension Church in Unalaska was rebuilt even as it was crumbling into sawdust, thanks to the creative use of federal interstate highway funds by the late Sen. Ted Stevens.

Other alumni from the list linger in limbo, like the Jesse Lee Home in Seward, the igloo on the Parks Highway and the 4th Avenue Theatre in Anchorage.

"[4th Avenue Theatre] has been on the list for several years," Hamer said. "In fact, it was on the first list we did back in 1991.

"Physically, it's in a lot of trouble and everyone knows it. The present owners don't seem to want to talk about it. But it's iconic and we want to keep it in the public eye."

With enough attention, she hopes, the theater and other sites under Damocles' sword of time, change and fiscal imperatives will stay around long enough for someone to come up with the right idea and the right resources to keep them around for the future.

The magnificent Holy Ascension Church in Unalaska was rebuilt even as it was crumbling into sawdust, thanks to the creative use of federal interstate highway funds by the late Sen. Ted Stevens.

Unlike the Berg-Brown Cabin in downtown Anchorage, also known as the Brown Cabin, thought to have been one of the oldest buildings in the city . It went on the Ten Most Endangered list in 2012 and again in 2013.

Then, in October of last year, it was gone.

"One day it was knocked down," Hamer said. "Just demolished without notice."

Reach Mike Dunham at mdunham@adn.com

TITLE 45 - RAILROADS
CHAPTER 21 - ALASKA RAILROAD TRANSFER

§ 1205. Lands to be transferred

(a) Availability of lands among rail properties

Lands among the rail properties of the Alaska Railroad shall not be—

(1) available for selection under section 12 of the Act of January 2, 1976, as amended (43 U.S.C. 1611 note,), subject to the exception contained in section 12(b)(8)(i)(D) of such Act, as amended by subsection (d)(5) of this section;

(2) available for conveyance under section 1425 of the Alaska National Interest Lands Conservation Act (Public Law 96–487; 94 Stat. 2515);

(3) available for conveyance to Chugach Natives, Inc., under sections 1429 or 1430 of the Alaska National Interest Lands Conservation Act (Public Law 96–487; 94 Stat. 2531) or under sections 12(c) or 14(h)(8) of the Alaska Native Claims Settlement Act (43 U.S.C. 1611 (c) and 1613 (h)(8), respectively); or

(4) available under any law or regulation for entry, location, or for exchange by the United States, or for the initiation of a claim or selection by any party other than the State or other transferee under this chapter, except that this paragraph shall not prevent a conveyance pursuant to section 12(b)(8)(i)(D) of the Act of January 2, 1976 (43 U.S.C. 1611 note,), as amended by subsection (d)(5) of this section.

(b) Review and settlement of claims; administrative adjudication; management of lands; procedures applicable

(1) **(A)** During the ten months following January 14, 1983, so far as practicable consistent with the priority of preparing the report required pursuant to section 1204 (a) of this title, the Secretary of the Interior, Village Corporations with claims of valid existing rights, and the State shall review and make a good faith effort to settle as many of the claims as possible. Any agreement to settle such claims shall take effect and bind the United States, the State, and the Village Corporation only as of the date of transfer of the railroad.

(B) At the conclusion of the review and settlement process provided in subparagraph (A) of this paragraph, the Secretary of the Interior shall prepare a report identifying lands to be conveyed in accordance with settlement agreements under this chapter or applicable law. Such settlement shall not give rise to a presumption as to whether a parcel of land subject to such agreement is or is not public land.

(2) The Secretary of the Interior shall have the continuing jurisdiction and duty to adjudicate unresolved claims of valid existing rights pursuant to applicable law and this chapter. The Secretary of the Interior shall complete the final administrative adjudication required under this subsection not later than three years after January 14, 1983, and shall complete the survey of all lands to be conveyed under this chapter not later than five years after January 14, 1983, and after consulting with the Governor of the State of Alaska to determine priority of survey with regard to other lands being processed for patent to the State. The Secretary of the Interior shall give priority to the adjudication of Village Corporation claims as required in this section. Upon completion of the review and settlement process required by paragraph (1)(A) of this subsection, with respect to lands not subject to an agreement under such paragraph, the Secretary of the Interior shall adjudicate which lands subject to claims of valid existing rights filed by Village Corporations, if any, are public lands and shall complete such final administrative adjudication within two years after January 14, 1983.

(3) Pending settlement or final administrative adjudication of claims of valid existing rights filed by Village Corporations prior to the date of transfer or while subject to the license granted to the State pursuant to section 1203 (b)(1)(C) of this title, lands subject to such claims shall be

managed in accordance with the Memorandum of Understanding among the Federal Railroad Administration, the State, Eklutna, Incorporated, Cook Inlet Region, Incorporated (as that term is used in section 12 of the Act of January 2, 1976 (Public Law 94–204; 89 Stat. 1150)), and Toghotthele Corporation, executed by authorized officers or representatives of each of these entities. Duplicate originals of the Memorandum of Understanding shall be maintained and made available for public inspection and copying in the Office of the Secretary, at Washington, District of Columbia, and in the Office of the Governor of the State of Alaska, at Juneau, Alaska.

(4) The following procedures and requirements are established to promote finality of administrative adjudication of claims of valid existing rights filed by Village Corporations, to clarify and simplify the title status of lands subject to such claims, and to avoid potential impairment of railroad operations resulting from joint or divided ownership in substantial segments of right-of-way:

(A) **(i)** Prior to final administrative adjudication of Village Corporation claims of valid existing rights in land subject to the license granted under section 1203 (b)(1)(C) of this title, the Secretary of the Interior may, notwithstanding any other provision of law, accept relinquishment of so much of such claims as involved lands within the right-of-way through execution of an agreement with the appropriate Village Corporation effective on or after the date of transfer. Upon such relinquishment, the interest of the United States in the right-of-way shall be conveyed to the State pursuant to section 1203 (b)(1)(B) or (2) of this title.

(ii) With respect to a claim described in clause (i) of this subparagraph that is not settled or relinquished prior to final administrative adjudication, the 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. Upon failure of the interested Village Corporation to relinquish so much of its claims as involve lands within the right-of-way prior to final adjudication of valid existing rights, the Secretary shall convey to the State pursuant to section 1203 (b)(1)(B) or (2) of this title all right, title and interest of the United States in and to the right-of-way free and clear of such Village Corporation's claim to and interest in lands within such right-of-way.

(B) Where lands within the right-of-way, or any interest in such lands, have been conveyed from Federal ownership prior to January 14, 1983, or is subject to a claim of valid existing rights by a party other than a Village Corporation, the conveyance to the State of the Federal interest in such properties pursuant to section 1203 (b)(1)(B) or (2) of this title shall grant not less than an exclusive-use easement in such properties. The foregoing requirements shall not be construed to permit the conveyance to the State of less than the entire Federal interest in the rail properties of the Alaska Railroad required to be conveyed by section 1203 (b) of this title. If an action is commenced against the State or the United States contesting the validity or existence of a reservation of right-of-way for the use or benefit of the Alaska Railroad made prior to January 14, 1983, the Secretary of the Interior, through the Attorney General, shall appear in and defend such action.

(c) Judicial review; remedies available; standing of State

(1) The final administrative adjudication pursuant to subsection (b) of this section shall be final agency action and subject to judicial review only by an action brought in the United States District Court for the District of Alaska.

(2) No administrative or judicial action under this chapter shall enjoin or otherwise delay the transfer of the Alaska Railroad pursuant to this chapter, or substantially impair or impede the operations of the Alaska Railroad or the State-owned railroad.

(3) Before the date of transfer, the State shall have standing to participate in any administrative determination or judicial review pursuant to this chapter. If transfer to the State does not occur

pursuant to section 1203 of this title, the State shall not thereafter have standing to participate in any such determination or review.

(d) Omitted

(e) Liability of State for damage to land while used under license

The State shall be liable to a party receiving a conveyance of land among the rail properties of the Alaska Railroad subject to the license granted pursuant to section 1203 (b)(1)(C) of this title for damage resulting from use by the State of the land under such license in a manner not authorized by such license.

(Pub. L. 97–468, title VI, § 606(a)–(c), (e), Jan. 14, 1983, 96 Stat. 2564–2566, 2571; Pub. L. 98–620, title IV, § 402(52), Nov. 8, 1984, 98 Stat. 3361.)

References in Text

Section 12 of the Act of January 2, 1976, as amended, referred to in subsecs. (a)(1), (4) and (b)(3), is section 12 of Pub. L. 94–204, Jan. 2, 1976, 89 Stat. 1150, as amended, which is set out as a note under section 1611 of Title 43, Public Lands. Section 12(b)(8)(i)(D) of such Act as amended by subsection (d)(5) of this section is the amendment of subsection (b)(8)(i)(D) of section 12 of Pub. L. 94–204 by section 606(d)(5) of Pub. L. 97–468, title VI, Jan. 14, 1983, 96 Stat. 2566.

The Alaska National Interest Lands Conservation Act, referred to in subsecs. (a)(2) and (c), is Pub. L. 96–497, Dec. 2, 1980, 94 Stat. 2371, as amended. Sections 1425, 1429, and 1430 of the Act (94 Stat. 2515, 2531) were not classified to the Code. For complete classification of this Act to the Code, see Short Title note set out under section 3101 of Title 16, Conservation, and Tables.

Codification

Section is comprised of subsecs. (a)–(c) and (e) of section 606 of Pub. L. 97–468. Subsec. (d) of section 606 of Pub. L. 97–468 amended section 12 of Pub. L. 94–204, which is set out as a note under section 1611 of Title 43, Public Lands.

Amendments

1984—Subsec. (c)(1). Pub. L. 98–620 struck out provision that required review of agency action pursuant to this chapter to be expedited to same extent as expedited review provided by section 1108 of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3168).

Effective Date of 1984 Amendment

Amendment by Pub. L. 98–620 not applicable to cases pending on Nov. 8, 1984, see section 403 of Pub. L. 98–620, set out as a note under section 1657 of Title 28, Judiciary and Judicial Procedure.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MARVIN M. BRANDT REVOCABLE TRUST ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 12–1173. Argued January 14, 2014—Decided March 10, 2014

Congress passed the General Railroad Right-of-Way Act of 1875 to provide railroad companies "right[s] of way through the public lands of the United States," 43 U. S. C. §934. One such right of way, obtained by a railroad in 1908, crosses land that the United States conveyed to the Brandt family in a 1976 land patent. That patent stated, as relevant here, that the land was granted subject to the railroad's rights in the 1875 Act right of way, but it did not specify what would occur if the railroad later relinquished those rights. Years later, a successor railroad abandoned the right of way with federal approval. The Government then sought a judicial declaration of abandonment and an order quieting title in the United States to the abandoned right of way, including the stretch that crossed the land conveyed in the Brandt patent. Petitioners contested the claim, asserting that the right of way was a mere easement that was extinguished when the railroad abandoned it, so that Brandt now enjoys full title to his land without the burden of the easement. The Government countered that the 1875 Act granted the railroad something more than a mere easement, and that the United States retained a reversionary interest in that land once the railroad abandoned it. The District Court granted summary judgment to the Government and quieted title in the United States to the right of way. The Tenth Circuit affirmed.

Held: The right of way was an easement that was terminated by the railroad's abandonment, leaving Brandt's land unburdened. Pp. 8–17.

(a) The Government loses this case in large part because it won when it argued the opposite in *Great Northern R. Co.* v. *United States*, 315 U. S. 262. There, the Government contended that the

1875 Act (unlike pre-1871 statutes granting rights of way) granted nothing more than an easement, and that the railroad in that case therefore had no interest in the resources beneath the surface of its right of way. This Court adopted the Government's position in full. It found the 1875 Act's text "wholly inconsistent" with the grant of a fee interest, *id.*, at 271; agreed with the Government that cases describing the nature of rights of way granted prior to 1871 were "not controlling" because of a major shift in congressional policy concerning land grants to railroads after that year, *id.*, at 278; and held that the 1875 Act "clearly grants only an easement," *id.*, at 271. Under well-established common law property principles, an easement disappears when abandoned by its beneficiary, leaving the owner of the underlying land to resume a full and unencumbered interest in the land. See *Smith* v. *Townsend*, 148 U. S. 490, 499. Pp. 8–12.

(b) The Government asks this Court to limit *Great Northern*'s characterization of 1875 Act rights of way as easements to the question of who owns the oil and minerals beneath a right of way. But nothing in the 1875 Act's text supports that reading, and the Government's reliance on the similarity of the language in the 1875 Act and pre-1871 statutes directly contravenes the very premise of *Great Northern*: that the 1875 Act granted a fundamentally different interest than did its predecessor statutes. Nor do this Court's decisions in *Stalker* v. *Oregon Short Line R. Co.*, 225 U. S. 142, and *Great Northern R. Co.* v. *Steinke*, 261 U. S. 119, support the Government's position. The dispute in each of those cases was framed in terms of competing claims to acquire and develop a particular tract of land, and it does not appear that the Court considered—much less rejected—an argument that the railroad had only an easement in the contested land. But to the extent that those cases could be read to imply that the interest was something more, any such implication would not have survived this Court's unequivocal statement to the contrary in *Great Northern*. Finally, later enacted statutes, see 43 U. S. C. §§912, 940; 16 U. S. C. §1248(c), do not define or shed light on the nature of the interest Congress granted to railroads in their rights of way in 1875. They instead purport only to dispose of interests (if any) the United States already possesses. Pp. 12–17.

496 Fed. Appx. 822, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, ALITO, and KAGAN, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 12–1173

MARVIN M. BRANDT REVOCABLE TRUST, ET AL.
PETITIONERS *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[March 10, 2014]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In the mid-19th century, Congress began granting private railroad companies rights of way over public lands to encourage the settlement and development of the West. Many of those same public lands were later conveyed by the Government to homesteaders and other settlers, with the lands continuing to be subject to the railroads' rights of way. The settlers and their successors remained, but many of the railroads did not. This case presents the question of what happens to a railroad's right of way granted under a particular statute—the General Railroad Right-of-Way Act of 1875—when the railroad abandons it: does it go to the Government, or to the private party who acquired the land underlying the right of way?

I

A

In the early to mid-19th century, America looked west. The period from the Louisiana Purchase in 1803 to the Gadsden Purchase in 1853 saw the acquisition of the western lands that filled out what is now the contiguous

United States.

The young country had numerous reasons to encourage settlement and development of this vast new expanse. What it needed was a fast and reliable way to transport people and property to those frontier lands. New technology provided the answer: the railroad. The Civil War spurred the effort to develop a transcontinental railroad, as the Federal Government saw the need to protect its citizens and secure its possessions in the West. *Leo Sheep Co.* v. *United States*, 440 U. S. 668, 674–676 (1979). The construction of such a railroad would "furnish a cheap and expeditious mode for the transportation of troops and supplies," help develop "the agricultural and mineral resources of this territory," and foster settlement. *United States* v. *Union Pacific R. Co.*, 91 U. S. 72, 80 (1875).

The substantial benefits a transcontinental railroad could bring were clear, but building it was no simple matter. The risks were great and the costs were staggering. Popular sentiment grew for the Government to play a role in supporting the massive project. Indeed, in 1860, President Lincoln's winning platform proclaimed: "That a railroad to the Pacific Ocean is imperatively demanded by the interests of the whole country; that the Federal Government ought to render immediate and efficient aid in its construction." J. Ely, Railroads and American Law 51 (2001). But how to do it? Sufficient funds were not at hand (especially with a Civil War to fight), and there were serious reservations about the legal authority for direct financing. "The policy of the country, to say nothing of the supposed want of constitutional power, stood in the way of the United States taking the work into its own hands." *Union Pacific R. Co.*, *supra*, at 81.

What the country did have, however, was land—lots of it. It could give away vast swaths of public land—which at the time possessed little value without reliable transportation—in hopes that such grants would increase the appeal

of a transcontinental railroad to private investors. Ely, *supra*, at 52–53. In the early 1860s, Congress began granting to railroad companies rights of way through the public domain, accompanied by outright grants of land along those rights of way. P. Gates, History of Public Land Law Development 362–368 (1968). The land was conveyed in checkerboard blocks. For example, under the Union Pacific Act of 1862, odd-numbered lots of one square mile apiece were granted to the railroad, while even-numbered lots were retained by the United States. *Leo Sheep Co., supra*, at 672–673, 686, n. 23. Railroads could then either develop their lots or sell them, to finance construction of rail lines and encourage the settlement of future customers. Indeed, railroads became the largest secondary dispenser of public lands, after the States. Gates, *supra*, at 379.

But public resentment against such generous land grants to railroads began to grow in the late 1860s. Western settlers, initially some of the staunchest supporters of governmental railroad subsidization, complained that the railroads moved too slowly in placing their lands on the market and into the hands of farmers and settlers. Citizens and Members of Congress argued that the grants conflicted with the goal of the Homestead Act of 1862 to encourage individual citizens to settle and develop the frontier lands. By the 1870s, legislators across the political spectrum had embraced a policy of reserving public lands for settlers rather than granting them to railroads. *Id.,* at 380, 454–456.

A House resolution adopted in 1872 summed up the change in national policy, stating:

> "That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice

> to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law." Cong. Globe, 42d Cong., 2d Sess., 1585.

Congress enacted the last checkerboard land-grant statute for railroads in 1871. Gates, *supra,* at 380. Still wishing to encourage railroad construction, however, Congress passed at least 15 special acts between 1871 and 1875 granting to designated railroads "the right of way" through public lands, without any accompanying land subsidy. *Great Northern R. Co.* v. *United States*, 315 U. S. 262, 274, and n. 9 (1942).

Rather than continue to enact special legislation for each such right of way, Congress passed the General Railroad Right-of-Way Act of 1875, 18 Stat. 482, 43 U. S. C. §§934–939. The 1875 Act provided that "[t]he right of way through the public lands of the United States is granted to any railroad company" meeting certain requirements, "to the extent of one hundred feet on each side of the central line of said road." §934. A railroad company could obtain a right of way by the "actual construction of its road" or "in advance of construction by filing a map as provided in section four" of the Act. *Jamestown & Northern R. Co.* v. *Jones*, 177 U. S. 125, 130–131 (1900). Section 4 in turn provided that a company could "secure" its right of way by filing a proposed map of its rail corridor with a local Department of the Interior office within 12 months after survey or location of the road. §937. Upon approval by the Interior Department, the right of way would be noted on the land plats held at the local office, and from that day forward "all such lands over which such right of way shall pass shall be disposed of subject to the right of way." *Ibid.*

The 1875 Act remained in effect until 1976, when its

provisions governing the issuance of new rights of way were repealed by the Federal Land Policy and Management Act, §706(a), 90 Stat. 2793. This case requires us to define the nature of the interest granted by the 1875 Act, in order to determine what happens when a railroad abandons its right of way.

B

Melvin M. Brandt began working at a sawmill in Fox Park, Wyoming, in 1939. He later purchased the sawmill and, in 1946, moved his family to Fox Park. Melvin's son Marvin started working at the sawmill in 1958 and came to own and operate it in 1976 until it closed, 15 years later.

In 1976, the United States patented an 83-acre parcel of land in Fox Park, surrounded by the Medicine Bow-Routt National Forest, to Melvin and Lulu Brandt. (A land patent is an official document reflecting a grant by a sovereign that is made public, or "patent.") The patent conveyed to the Brandts fee simple title to the land "with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto said claimants, their successors and assigns, forever." App. to Pet. for Cert. 76. But the patent did include limited exceptions and reservations. For example, the patent "except[s] and reserv[es] to the United States from the land granted a right-of-way thereon for ditches or canals constructed by the authority of the United States"; "reserv[es] to the United States . . . a right-of-way for the existing Platte Access Road No. 512"; and "reserv[es] to the United States . . . a right-of-way for the existing Dry Park Road No. 517." *Id.,* at 76–77 (capitalization omitted). But if those roads cease to be used by the United States or its assigns for a period of five years, the patent provides that "the easement traversed thereby shall terminate." *Id.,* at 78.

Most relevant to this case, the patent concludes by

stating that the land was granted "subject to those rights for railroad purposes as have been granted to the Laramie[,] Hahn's Peak & Pacific Railway Company, its successors or assigns." *Ibid.* (capitalization omitted). The patent did not specify what would occur if the railroad abandoned this right of way.

The right of way referred to in the patent was obtained by the Laramie, Hahn's Peak and Pacific Railroad (LHP&P) in 1908, pursuant to the 1875 Act.[1] The right of way is 66 miles long and 200 feet wide, and it meanders south from Laramie, Wyoming, through the Medicine Bow-Routt National Forest, to the Wyoming-Colorado border. Nearly a half-mile stretch of the right of way crosses Brandt's land in Fox Park, covering ten acres of that parcel.

In 1911, the LHP&P completed construction of its railway over the right of way, from Laramie to Coalmont, Colorado. Its proprietors had rosy expectations, proclaiming that it would become "one of the most important railroad systems in this country." Laramie, Hahns Peak and Pacific Railway System: The Direct Gateway to Southern Wyoming, Northern Colorado, and Eastern Utah 24 (1910). But the railroad ultimately fell short of that goal. Rather than shipping coal and other valuable ores as originally hoped, the LHP&P was used primarily to transport timber and cattle. R. King, Trails to Rails: A History of Wyoming's Railroads 90 (2003). Largely because of high operating costs during Wyoming winters, the LHP&P never quite achieved financial stability. It changed hands numerous times from 1914 until 1935, when it was acquired by the Union Pacific Railroad at the

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[1] Locals at the time translated the acronym LHP&P as "Lord Help Push and Pull" or "Late, Hard Pressed, and Panicky." S. Thybony, R. Rosenberg, & E. Rosenberg, The Medicine Bows: Wyoming's Mountain Country 136 (1985).

urging of the Interstate Commerce Commission. *Ibid.*; S. Thybony, R. Rosenberg, & E. Rosenberg, The Medicine Bows: Wyoming's Mountain Country 136–138 (1985); F. Hollenback, The Laramie Plains Line 47–49 (1960).

In 1987, the Union Pacific sold the rail line, including the right of way, to the Wyoming and Colorado Railroad, which planned to use it as a tourist attraction. King, *supra,* at 90. That did not prove profitable either, and in 1996 the Wyoming and Colorado notified the Surface Transportation Board of its intent to abandon the right of way. The railroad tore up the tracks and ties and, after receiving Board approval, completed abandonment in 2004. In 2006 the United States initiated this action seeking a judicial declaration of abandonment and an order quieting title in the United States to the abandoned right of way. In addition to the railroad, the Government named as defendants the owners of 31 parcels of land crossed by the abandoned right of way.

The Government settled with or obtained a default judgment against all but one of those landowners—Marvin Brandt. He contested the Government's claim and filed a counterclaim on behalf of a family trust that now owns the Fox Park parcel, and himself as trustee.[2] Brandt asserted that the stretch of the right of way crossing his family's land was a mere easement that was extinguished upon abandonment by the railroad, so that, under common law property rules, he enjoyed full title to the land without the burden of the easement. The Government countered that it had all along retained a reversionary interest in the railroad right of way—that is, a future estate that would be restored to the United States if the railroad abandoned

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[2]The other landowners had a potential interest in much smaller acreages: No other party could claim an interest in more than three acres of the right of way, and only six of the 31 potential claims amounted to more than one acre. See Amended Complaint in No. 06–CV–0184J etc. (D Wyo.), ¶¶6–10.

or forfeited its interest.

The District Court granted summary judgment to the Government and quieted title in the United States to the right of way over Brandt's land. 2008 WL 7185272 (D Wyo., Apr. 8, 2008).[3] The Court of Appeals affirmed. *United States* v. *Brandt*, 496 Fed. Appx. 822 (CA10 2012) (*per curiam*). The court acknowledged division among lower courts regarding the nature of the Government's interest (if any) in abandoned 1875 Act rights of way. But it concluded based on Circuit precedent that the United States had retained an "implied reversionary interest" in the right of way, which then vested in the United States when the right of way was relinquished. *Id.,* at 824.

We granted certiorari. 570 U. S. __ (2013).

II

This dispute turns on the nature of the interest the United States conveyed to the LHP&P in 1908 pursuant to the 1875 Act. Brandt contends that the right of way granted under the 1875 Act was an easement, so that when the railroad abandoned it, the underlying land (Brandt's Fox Park parcel) simply became unburdened of the easement. The Government does not dispute that easements normally work this way, but maintains that the 1875 Act granted the railroads something more than an easement, reserving an implied reversionary interest in that something more to the United States. The Government loses that argument today, in large part because it won when it argued the opposite before this Court more than 70 years ago, in the case of *Great Northern Railway Co.* v. *United States*, 315 U. S. 262 (1942).

In 1907, Great Northern succeeded to an 1875 Act right

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[3]The District Court dismissed without prejudice Brandt's separate counterclaim for just compensation. Brandt then filed a takings claim in the Court of Federal Claims. That case has been stayed pending the disposition of this one.

of way that ran through public lands in Glacier County, Montana. Oil was later discovered in the area, and Great Northern wanted to drill beneath its right of way. But the Government sued to enjoin the railroad from doing so, claiming that the railroad had only an easement, so that the United States retained all interests beneath the surface.

This Court had indeed previously held that the pre-1871 statutes, granting rights of way accompanied by checkerboard land subsidies, conveyed to the railroads "a limited fee, made on an implied condition of reverter." See, *e.g., Northern Pacific R. Co.* v. *Townsend*, 190 U. S. 267, 271 (1903). Great Northern relied on those cases to contend that it owned a "fee" interest in the right of way, which included the right to drill for minerals beneath the surface.

The Government disagreed. It argued that "the 1875 Act granted an easement and nothing more," and that the railroad accordingly could claim no interest in the resources beneath the surface. Brief for United States in *Great Northern R. Co.* v. *United States*, O. T. 1941, No. 149, p. 29. "The year 1871 marks the end of one era and the beginning of a new in American land-grant history," the Government contended; thus, cases construing the pre-1871 statutes were inapplicable in construing the 1875 Act, *id.,* at 15, 29–30. Instead, the Government argued, the text, background, and subsequent administrative and congressional construction of the 1875 Act all made clear that, unlike rights of way granted under pre-1871 land-grant statutes, those granted under the 1875 Act were mere easements.

The Court adopted the United States' position in full, holding that the 1875 Act "clearly grants only an easement, and not a fee." *Great Northern*, 315 U. S., at 271. The Court found Section 4 of the Act "especially persuasive," because it provided that "all such lands *over* which

such right of way shall pass shall be disposed of *subject to* such right of way." *Ibid.* Calling this language "wholly inconsistent" with the grant of a fee interest, the Court endorsed the lower court's statement that "[a]pter words to indicate the intent to convey an easement would be difficult to find." *Ibid.*

That interpretation was confirmed, the Court explained, by the historical background against which the 1875 Act was passed and by subsequent administrative and congressional interpretation. The Court accepted the Government's position that prior cases describing the nature of pre-1871 rights of way—including *Townsend*, *supra,* at 271—were "not controlling," because of the shift in congressional policy after that year. *Great Northern*, *supra,* at 277–278, and n. 18. The Court also specifically disavowed the characterization of an 1875 Act right of way in *Rio Grande Western R. Co.* v. *Stringham*, 239 U. S. 44 (1915), as "'a limited fee, made on an implied condition of reverter.'" *Great Northern, supra*, at 278–279 (quoting *Stringham*, *supra*, at 47). The Court noted that in *Stringham* "it does not appear that Congress' change of policy after 1871 was brought to the Court's attention," given that "[n]o brief was filed by the defendant or the United States" in that case. *Great Northern, supra*, at 279, and n. 20.

The dissent is wrong to conclude that *Great Northern* merely held that "the right of way did not confer one particular attribute of fee title." *Post,* at 3 (opinion of SOTOMAYOR, J.). To the contrary, the Court specifically rejected the notion that the right of way conferred even a "limited fee." 315 U. S., at 279; see also *id.,* at 277–278 (declining to follow cases describing a right of way as a "limited," "base," or "qualified" fee). Instead, the Court concluded, it was "clear from the language of the Act, its legislative history, its early administrative interpretation and the construction placed upon it by Congress in subse-

quent enactments" that the railroad had obtained "only an easement in its rights of way acquired under the Act of 1875." *Id.*, at 277; see *United States* v. *Union Pacific R. Co.*, 353 U. S. 112, 119 (1957) (noting the conclusion in *Great Northern* that, in the period after 1871, "only an easement for railroad purposes was granted"); 353 U. S., at 128 (Frankfurter, J., dissenting) (observing that the Court "conclude[d] in the *Great Northern* case that a right of way granted by the 1875 Act was an easement and not a limited fee").

When the United States patented the Fox Park parcel to Brandt's parents in 1976, it conveyed fee simple title to that land, "subject to those rights for railroad purposes" that had been granted to the LHP&P. The United States did not reserve to itself any interest in the right of way in that patent. Under *Great Northern*, the railroad thus had an easement in its right of way over land owned by the Brandts.

The essential features of easements—including, most important here, what happens when they cease to be used—are well settled as a matter of property law. An easement is a "nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." Restatement (Third) of Property: Servitudes §1.2(1) (1998). "Unlike most possessory estates, easements . . . may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude." *Id.*, §1.2, Comment *d*; *id.,* §7.4, Comments *a*, *f*. In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land. See *Smith* v. *Townsend*, 148 U. S. 490, 499 (1893) ("[W]hoever obtained title from the government to any . . . land through which ran this right of way would acquire a fee to the whole tract subject to the easement of

the company, and if ever the use of that right of way was abandoned by the railroad company the easement would cease, and the full title to that right of way would vest in the patentee of the land"); 16 Op. Atty. Gen. 250, 254 (1879) ("the purchasers or grantees of the United States took the fee of the lands patented to them subject to the easement created by the act of 1824; but on a discontinuance or abandonment of that right of way the entire and exclusive property, and right of enjoyment thereto, vested in the proprietors of the soil").[4]

Those basic common law principles resolve this case. When the Wyoming and Colorado Railroad abandoned the right of way in 2004, the easement referred to in the Brandt patent terminated. Brandt's land became unburdened of the easement, conferring on him the same full rights over the right of way as he enjoyed over the rest of the Fox Park parcel.

III

Contrary to that straightforward conclusion, the Government now tells us that *Great Northern* did not really mean what it said. Emphasizing that *Great Northern* involved only the question of who owned the oil and min-

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[4] Because granting an easement merely gives the grantee the right to enter and use the grantor's land for a certain purpose, but does not give the grantee any possessory interest in the land, it does not make sense under common law property principles to speak of the grantor of an easement having retained a "reversionary interest." A reversionary interest is "any future interest left in a transferor or his successor in interest." Restatement (First) of Property §154(1)(1936). It arises when the grantor "transfers less than his entire interest" in a piece of land, and it is either certain or possible that he will retake the transferred interest at a future date. *Id.*, Comment *a*. Because the grantor of an easement has not transferred his estate or possessory interest, he has not retained a reversionary interest. He retains all his ownership interest, subject to an easement. See *Preseault* v. *United States*, 100 F. 3d 1525, 1533–1534 (CA Fed. 1996) (en banc).

erals beneath a right of way, the Government asks the Court to limit its characterization of 1875 Act rights of way as "easements" to that context. Even if the right of way has some features of an easement—such as granting only a surface interest to the railroad when the Government wants the subsurface oil and minerals—the Government asks us to hold that the right of way is not an easement for purposes of what happens when the railroad stops using it. But nothing in the text of the 1875 Act supports such an improbable (and self-serving) reading.

The Government argues that the similarity in the language of the 1875 Act and the pre-1871 statutes shows that Congress intended to reserve a reversionary interest in the lands granted under the 1875 Act, just as it did in the pre-1871 statutes. See Brief for United States 17–18. But that is directly contrary to the very premise of this Court's decision (and the Government's argument) in *Great Northern*: that the 1875 Act granted a fundamentally different interest in the rights of way than did the predecessor statutes. 315 U. S., at 277–278; see U. S. *Great Northern* Brief 30 ("[Great Northern's] argument . . . fails because it disregards the essential differences between the 1875 Act and its predecessors."). Contrary to the Government's position now—but consistent with the Government's position in 1942—*Great Northern* stands for the proposition that the pre-1871 statutes (and this Court's decisions construing them) have little relevance to the question of what interest the 1875 Act conveyed to railroads.

The Government next contends that this Court's decisions in *Stalker* v. *Oregon Short Line R. Co.*, 225 U. S. 142 (1912), and *Great Northern R. Co.* v. *Steinke*, 261 U. S. 119 (1923), support its position that the United States retains an implied reversionary interest in 1875 Act rights of way. Brief for United States 28–32. According to the Government, both *Stalker* and *Steinke* demonstrate that those

rights of way cannot be bare common law easements, because those cases concluded that patents purporting to convey the land underlying a right of way were "inoperative to pass title." Brief for United States 31 (quoting *Steinke*, *supra,* at 131); see also Tr. of Oral Arg. 28–30, 33, 40–41, 44–45. If the right of way were a mere easement, the argument goes, the patent would have passed title to the underlying land subject to the railroad's right of way, rather than failing to pass title altogether. But that is a substantial overreading of those cases.

In both *Stalker* and *Steinke*, a railroad that had already obtained an 1875 Act right of way thereafter claimed adjacent land for station grounds under the Act, as it was permitted to do because of its right of way. A homesteader subsequently filed a claim to the same land, unaware of the station grounds. The question in each case was whether the railroad could build on the station grounds, notwithstanding a subsequent patent to the homesteader. The homesteader claimed priority because the railroad's station grounds map had not been recorded in the local land office at the time the homesteader filed his claim. This Court construed the 1875 Act to give the railroad priority because it had submitted its proposed map to the Department of the Interior before the homesteader filed his claim. See *Stalker*, *supra*, at 148–154; *Steinke*, *supra*, at 125–129.

The dispute in each case was framed in terms of competing claims to the right to acquire and develop the same tract of land. The Court ruled for the railroad, but did not purport to define the precise nature of the interest granted under the 1875 Act. Indeed, it does not appear that the Court in either case considered—much less rejected—an argument that the railroad had obtained only an easement in the contested land, so that the patent could still convey title to the homesteader. In any event, to the extent that *Stalker* and *Steinke* could be read to imply that the rail-

roads had been granted something more than an easement, any such implication would not have survived this Court's unequivocal statement in *Great Northern* that the 1875 Act "clearly grants only an easement, and not a fee." 315 U. S., at 271.

Finally, the Government relies on a number of later enacted statutes that it says demonstrate that Congress believed the United States had retained a reversionary interest in the 1875 Act rights of way. Brief for United States 34–42. But each of those statutes purported only to dispose of interests the United States already possessed, not to create or modify any such interests in the first place. First, in 1906 and 1909, Congress declared forfeited any right of way on which a railroad had not been constructed in the five years after the location of the road. 43 U. S. C. §940. The United States would "resume[ ] the full title to the lands covered thereby free and discharged of such easement," but the forfeited right of way would immediately "inure to the benefit of any owner or owners of land conveyed by the United States prior to such date." *Ibid.*

Then, in 1922, Congress provided that whenever a railroad forfeited or officially abandoned its right of way, "all right, title, interest, and estate of the United States in said lands" (other than land that had been converted to a public highway) would immediately be transferred to either the municipality in which it was located, or else to the person who owned the underlying land. 43 U. S. C. §912. Finally, as part of the National Trails System Improvements Act of 1988, Congress changed course and sought to retain title to abandoned or forfeited railroad rights of way, specifying that "any and all right, title, interest, and estate of the United States" in such rights of way "shall remain in the United States" upon abandonment or forfeiture. 16 U. S. C. §1248(c).

The Government argues that these statutes prove that

Congress intended to retain (or at least believed it had retained) a reversionary interest in 1875 Act rights of way. Otherwise, the argument goes, these later statutes providing for the disposition of the abandoned or forfeited strips of land would have been meaningless. That is wrong. This case turns on what kind of interest Congress granted to railroads in their rights of way in 1875. Cf. *Leo Sheep Co.*, 440 U. S., at 681 ("The pertinent inquiry in this case is the intent of Congress when it granted land to the Union Pacific in 1862."). *Great Northern* answered that question: an easement. The statutes the Government cites do not purport to define (or redefine) the nature of the interest conveyed under the 1875 Act. Nor do they shed light on what kind of property interest Congress intended to convey to railroads in 1875. See *United States* v. *Price*, 361 U. S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

In other words, these statutes do not tell us whether the United States has an interest in any particular right of way; they simply tell us how any interest the United States might have should be disposed of. For pre-1871 rights of way in which the United States retained an implied reversionary interest, or for rights of way crossing public lands, these statutes might make a difference in what happens to a forfeited or abandoned right of way. But if there is no "right, title, interest, [or] estate of the United States" in the right of way, 43 U. S. C. §912, then the statutes simply do not apply.

We cannot overlook the irony in the Government's argument based on Sections 912 and 940. Those provisions plainly evince Congress's intent to divest the United States of any title or interest it had retained to railroad rights of way, and to vest that interest in individuals to whom the underlying land had been patented—in other words, people just like the Brandts. It was not until

1988—12 years after the United States patented the Fox Park parcel to the Brandts—that Congress did an about-face and attempted to reserve the rights of way to the United States. That policy shift cannot operate to create an interest in land that the Government had already given away.[5]

* * *

More than 70 years ago, the Government argued before this Court that a right of way granted under the 1875 Act was a simple easement. The Court was persuaded, and so ruled. Now the Government argues that such a right of way is tantamount to a limited fee with an implied reversionary interest. We decline to endorse such a stark change in position, especially given "the special need for certainty and predictability where land titles are concerned." *Leo Sheep Co.*, *supra*, at 687.

The judgment of the United States Court of Appeals for the Tenth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[5] The dissent invokes the principle that "any ambiguity in land grants 'is to be resolved favorably to a sovereign grantor,'" *post,* at 1 (quoting *Great Northern R. Co.* v. *United States*, 315 U. S. 262, 272 (1942)), but the Solicitor General does not—for a very good reason. The Government's argument here is that it gave away *more* in the land grant than an easement, so that more should revert to it now. A principle that ambiguous grants should be construed in favor of the sovereign hurts rather than helps that argument. The dissent's quotation is indeed from *Great Northern*, where the principle was cited in support of the Government's argument that its 1875 Act grant conveyed "only an easement, and not a fee." *Id.,* at 271.

SUPREME COURT OF THE UNITED STATES

No. 12–1173

MARVIN M. BRANDT REVOCABLE TRUST, ET AL.
PETITIONERS *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[March 10, 2014]

JUSTICE SOTOMAYOR, dissenting.

The Court bases today's holding almost entirely on *Great Northern R. Co.* v. *United States*, 315 U. S. 262, 271 (1942), and its conclusion that the General Railroad Right-of-Way Act of 1875 granted "only an easement, and not a fee," to a railroad possessing a right of way. The Court errs, however, in two ways. First, it does not meaningfully grapple with prior cases—*Northern Pacific R. Co.* v. *Townsend*, 190 U. S. 267, 271 (1903), and *Rio Grande Western R. Co.* v. *Stringham*, 239 U. S. 44, 47 (1915)—that expressly concluded that the United States retained a reversionary interest in railroad rights of way. To the extent the Court regards *Great Northern* as having abrogated these precedents, it places on *Great Northern* more weight than that case will bear. Second, the Court relies on "basic common law principles," *ante,* at 12, without recognizing that courts have long treated railroad rights of way as *sui generis* property rights not governed by the ordinary common-law regime. Because *Townsend* and *Stringham* largely dictate the conclusion that the Government retained a reversionary interest when it granted the right of way at issue, and because any ambiguity in land grants "is to be resolved favorably to a sovereign grantor," *Great Northern*, 315 U. S., at 272, I respectfully dissent.

I

Over a century ago, this Court held that a right of way granted to a railroad by a pre-1871 Act of Congress included "an implied condition of reverter" to the Government if the right of way ceased to be used "for the purpose for which it was granted." *Northern Pacific R. Co.* v. *Townsend*, 190 U. S. 267, 271 (1903). The question in *Townsend* was whether individual homesteaders could acquire title by adverse possession to land granted by the United States as a railroad right of way. The Court held that they could not, because "the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company." *Ibid.* "On the contrary," the Court held, "the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof." *Ibid.* Hence the "implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." *Ibid.* In essence, the Court held, "the grant was of a limited fee," *ibid.*—commonly known as a defeasible fee, see Restatement (First) of Property §16 (1936)—rather than fee simple. Thus, if the railroad were to abandon its use of the right of way, the property would revert to the United States.

The Court later confirmed in *Rio Grande Western R. Co.* v. *Stringham*, 239 U. S. 44, 47 (1915), that this rule applies not just to pre-1871 land grants to railroads, but also to rights of way granted under the General Railroad Right-of-Way Act—the Act under which the United States granted the right of way at issue in this case. That case stated that rights of way granted under the 1875 Act are "made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted." *Ibid.* Indeed, *Stringham*

sustained the validity of the reverter where, as here, the United States patented the adjacent land "subject to [the] right of way." *Id.*, at 46. If *Townsend* and *Stringham* remain good law on that point, then this case should be resolved in the Government's favor.

II

A

This case therefore turns on whether, as the majority asserts, *Great Northern* "disavowed" *Townsend* and *Stringham* as to the question whether the United States retained a reversionary interest in the right of way. *Ante,* at 10. *Great Northern* did no such thing. Nor could it have, for the Court did not have occasion to consider that question.

In *Great Northern*, a railroad sought to drill for oil beneath the surface of a right of way granted under the 1875 Act. We held that the railroad had no right to drill, because the United States did not convey the underlying oil and minerals when it granted the railroad a right of way. In language on which the Court relies heavily, *Great Northern* opined that the 1875 Act granted the railroad "only an easement, and not a fee." 315 U. S., at 271.

But that language does not logically lead to the place at which the majority ultimately arrives. All that *Great Northern* held—all, at least, that was necessary to its ruling—was that the right of way did not confer one particular attribute of fee title. Specifically, the Court held, the right of way did not confer the right to exploit subterranean resources, because the 1875 Act could not have made clearer that the right of way extended only to surface lands: It provided that after the recordation of a right of way, "all . . . lands *over* which such right of way shall pass shall be disposed of subject to such right of way." *Ibid.* (second emphasis and internal quotation marks omitted). But the Court did not hold that the right of way

failed to confer any sticks in the proverbial bundle of rights generally associated with fee title. Cf. B. Cardozo, The Paradoxes of Legal Science 129 (1928) (reprint 2000); *United States* v. *Craft*, 535 U. S. 274, 278 (2002). And this case concerns an attribute of fee title—defeasibility—that no party contends was at issue in *Great Northern*.

The majority places heavy emphasis on *Great Northern*'s characterization of rights of way under the 1875 Act as "easements," rather than "limited fees." When an easement is abandoned, the majority reasons, it is extinguished; in effect, it reverts to the owner of the underlying estate, rather than to its original grantor. *Ante,* at 11–12. For that reason, the majority concludes, "basic common law principles" require us to retreat from our prior holdings that railroad rights of way entail an implied possibility of reverter to the original grantor—the United States—should the right of way cease to be used by a railroad for its intended purpose. *Ante*, at 12.

But federal and state decisions in this area have not historically depended on "basic common law principles." To the contrary, this Court and others have long recognized that in the context of railroad rights of way, traditional property terms like "fee" and "easement" do not neatly track common-law definitions. In *Stringham*, the Court articulated ways in which rights of ways bear attributes both of easements and fees, explaining that "[t]he right of way granted by [the 1875 Act] and similar acts is neither a mere easement, nor a fee simple absolute." 239 U. S., at 47. In *New Mexico* v. *United States Trust Co.*, 172 U. S. 171, 182–183 (1898), the Court further observed that even if a particular right of way granted by the United States was an "easement," then it was "surely more than an ordinary easement" because it had "attributes of the fee" like exclusive use and possession. See also *Western Union Telegraph Co.* v. *Pennsylvania R. Co.*, 195 U. S. 540, 569–570 (1904) (reaffirming this view). Earlier, in

1854, the Massachusetts Supreme Judicial Court had explained that although the right acquired by a railroad was "technically an easement," it "require[d] for its enjoyment a use of the land permanent in its nature and practically exclusive." *Hazen* v. *Boston and Me. R. Co.*, 68 Mass. 574, 580 (1854). And the Iowa Supreme Court, in a late 19th-century opinion, observed that "[t]he easement" in question "is not that spoken of in the old law books, but is peculiar to the use of a railroad." *Smith* v. *Hall*, 103 Iowa 95, 96, 72 N. W. 427, 428 (1897).

Today's opinion dispenses with these teachings. Although the majority canvasses the special role railroads played in the development of our Nation, it concludes that we are bound by the common-law definitions that apply to more typical property. In doing so, it ignores the *sui generis* nature of railroad rights of way. That *Great Northern* referred to a right of way granted under the 1875 Act as an "easement" does not derail the Court's previous unequivocal pronouncements that rights of way under the Act are "made on an implied condition of reverter." *Stringham*, 239 U. S., at 47.

B

Not only does *Great Northern* fail to support the majority's conclusion; significant aspects of *Great Northern*'s reasoning actually support the contrary view. In that case, the Court relied heavily on Congress' policy shift in the early 1870's away from bestowing extravagant "'subsidies in public lands to railroads and other corporations.'" 315 U. S., at 273–274 (quoting Cong. Globe, 42d Cong., 2d Sess., 1585 (1872)). That history similarly weighs in the Government's favor here. Just as the post-1871 Congress did not likely mean to confer subsurface mineral rights on railroads, as held in *Great Northern*, it did not likely mean to grant railroads an indefeasible property interest in rights of way—a kind of interest more generous than that

which it gave in our cases concerning pre-1871 grants.

As in *Great Northern*, moreover, the purpose of the 1875 Act supports the Government. Congress passed the Act, we noted, "to permit the construction of railroads through public lands" and thus to "enhance their value and hasten their settlement." 315 U. S., at 272. In *Great Northern*, we held, that purpose did not require granting to the railroad any right to that which lay beneath the surface. The same is true here. As we recognized in *Townsend* and *Stringham*, the United States granted rights of way to railroads subject to "an implied condition of reverter in the event that the" railroads "cease[d] to use or retain the land for the purposes for which it is granted." *Stringham*, 239 U. S., at 47. Nothing about the purpose of the 1875 Act suggests Congress ever meant to abandon that sensible limitation.

Further, *Great Northern* relied on the conventional rule that "a grant is to be resolved favorably to a sovereign grantor," 315 U. S., at 272, and that "'nothing passes but what is conveyed in clear and explicit language,'" *ibid.* (quoting *Caldwell* v. *United States*, 250 U. S. 14, 20 (1919)). "Nothing in the [1875] Act," we observed, "may be characterized as a 'clear and explicit' conveyance of the . . . oil and minerals" underlying a right of way. 315 U. S., at 272. Just so here, as nothing in the 1875 Act clearly evinces Congress' intent not to make the rights of way conveyed under the Act defeasible, in the manner described by *Townsend* and *Stringham*. In fact, the presumption in favor of sovereign grantors applies doubly here, where the United States was the sovereign grantor both of the right of way and of the ultimate patent.

III

The majority notes that in *Great Northern*, the United States took the position that rights of way granted to railroads are easements. *Ante,* at 9. In the majority's

view, because the *Great Northern* Court adopted that position "in full," it is unfair for the Government to backtrack on that position now. *Ante,* at 9.

Even assuming that it is an injustice for the Government to change positions on an issue over a 70-year period, it is not clear that such a change in position happened here. Yes, the Government argued in *Great Northern* that a right of way was an "easement." It proposed, however, that the right of way may well have had "some of the attributes of a fee." Brief for United States in *Great Northern R. Co.* v. *United States*, O. T. 1941, No. 149, pp. 36–37. The Government contended that it is "'not important whether the interest or estate passed be considered an easement or a limited fee,'" observing that an easement "may be held in fee determinable." Id., at 35–36 (quoting *United States* v. *Big Horn Land & Cattle Co.*, 17 F. 2d 357, 365 (CA8 1927)). Indeed, the Government expressly reserved the possibility that it retained a reversionary interest in the right of way, even if the surrounding land was patented to others. Brief for United States in *Great Northern,* at 10 n. 4. The Court is right to criticize the Government when it takes "self-serving" and contradictory positions, *ante,* at 12, but such critique is misplaced here.

* * *

Since 1903, this Court has held that rights of way were granted to railroads with an implied possibility of reverter to the United States. Regardless of whether these rights of way are labeled "easements" or "fees," nothing in *Great Northern* overruled that conclusion. By changing course today, the Court undermines the legality of thousands of miles of former rights of way that the public now enjoys as means of transportation and recreation. And lawsuits challenging the conversion of former rails to recreational trails alone may well cost American taxpayers hundreds of

millions of dollars.* I do not believe the law requires this result, and I respectfully dissent.

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*Dept. of Justice, Environment and Natural Resources Div., FY 2014 Performance Budget, Congressional Submission, p. 7, http://www.justice.gov/jmd/2014justification/pdf/enrd-justification.pdf (visited Mar. 7, 2014, and available in Clerk of Court's case file).

THE SUPREME COURT OF THE STATE OF ALASKA

JOHN REEVES and FAIRBANKS GOLD CO., LLC, Appellants and Cross-Appellees, v. GODSPEED PROPERTIES, LLC and GOLD DREDGE 8, LLC, Appellees and Cross-Appellants.	Supreme Court Nos. S-15461/15482 Superior Court No. 4FA-12-02133 CI O P I N I O N No. **7219**– January 26, 2018

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Bethany Harbison, Judge.

Appearances: Joseph W. Sheehan, Sheehan Law Office, Fairbanks, for Appellants/Cross-Appellees. Michael C. Kramer, Kramer and Associates, and Robert John, Law Office of Robert John, Fairbanks, for Appellees/Cross-Appellants.

Before: Fabe, Chief Justice, Stowers, Maassen, Bolger, and Carney, Justices. [Winfree, Justice, not participating.]

STOWERS, Justice.

FABE, Chief Justice, with whom CARNEY, Justice, joins, dissenting in part.

I. INTRODUCTION

Two adjoining landowners dispute the creation and continuing validity of an easement for ingress and egress to and from property near Fairbanks. The superior court held that a valid easement was created but had been extinguished by prescription. We are asked to decide whether one party's mining activities — placing gravel piles, equipment, and a processing plant in the easement — were sufficient to prescriptively extinguish the entire easement. We hold that they were not. Although the processing plant extinguished the portion of the easement on which it stood, the evidence presented regarding the gravel piles and equipment was insufficient to support extinguishing the entire easement.

II. FACTS AND PROCEEDINGS

A. Facts

Alaska Gold Company owned a considerable amount of property near Fairbanks in the early 1980s. In 1982 John Reeves purchased a lot from Alaska Gold — MS-851 — that contained an old gold dredge, which he turned into a tourist attraction. The parties refer to this property as "Gold Dredge 8." MS-851 was located southwest of MS-1724, a separate lot owned by Alaska Gold. Alaska Gold allowed Reeves to cross MS-1724 to reach Gold Dredge 8.[1]

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[1] A sketch of the relevant properties is attached as an Appendix to this opinion. Reeves also owned the Byrne Fraction, which connected the easement to Gold Dredge 8.

In 1986 Alaska Gold sold MS-1724 to Alice Ellingson. Alice married Harold Ellingson shortly thereafter. The deed contained a reserved easement for Alaska Gold to cross MS-1724 to reach its other properties:

> SPECIFICALLY RESERVING UNTO THE GRANTOR, its successors and assigns a dedicatable easement for ingress, egress, and utilities, 100 feet in width, along the southerly boundary of Side Claim On Bench Off No. 2 Above Discovery On Engineer On R.L. Placer, United States Mineral Survey No. 1724 beginning at its intersection with the westerly boundary of the Old Steese Highway right of way and proceeding South 59°37' West approximately 500.00 feet to Corner No. 1 of said claim; Thence North 70°09' West approximately 728.2 feet to Corner No. 2 of said claim.

Alaska Gold owned MS-1709, the property at the terminus of the reserved easement. Pete Eagan, Alaska Gold's manager beginning in 1986, used the easement occasionally to travel to Alaska Gold's land beyond the easement. Eagan was friendly with the Ellingsons, and he was aware of the easement to cross MS-1724. He also gave Reeves permission to use Alaska Gold's easement to access Gold Dredge 8.

Alice and Harold Ellingson erected a gold plant on MS-1724 soon after Alice purchased the property from Alaska Gold.[2] The plant began operating in 1988. At Reeves's suggestion, the Ellingsons also erected an elevated footbridge spanning the easement so that tourists could walk from Gold Dredge 8 to the gold plant to view the mining operations. Eagan commonly drove off the easement onto other portions of the Ellingsons' property with the Ellingsons' knowledge.

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[2] The deed conveyed the property to Alice Ebenal, but she changed her name to Alice Ellingson after marrying Harold. Alice and Harold built the gold mine together. Harold died before trial.

In 1996 Reeves sold Gold Dredge 8 to Holland America, which in turn sold it to Godspeed Properties. In 2000 Reeves bought Alaska Gold's remaining property in the area. This included part of MS-1709 — the parcel next to MS-1724 — at the terminus of the easement. In 2002 the Ellingsons shut down the gold plant, and in 2009 Godspeed purchased MS-1724 from Alice Ellingson. Thus, at the time of this litigation, Godspeed owned Gold Dredge 8 and MS-1724, while Reeves owned MS-1709, the parcel at the end of the easement crossing MS-1724.

Reeves informed Godspeed of the easement and offered to sell it to Godspeed. The parties negotiated between 2009 and 2012 but were unable to come to an agreement. During this time Godspeed developed MS-1724 as an integrated tourist attraction with Gold Dredge 8; it built a small-gauge railway through the property for visitors to view Gold Dredge 8 and learn about mining in the area.

In 2012 Reeves was granted plat approval to subdivide MS-1709. The plat memorialized Reeves's plan to dedicate the easement through MS-1724 to public use as the access for the subdivision. Reeves constructed a rough dirt road through the easement. In response, Godspeed built a gravel berm across the easement and blocked access.

B. Proceedings

Godspeed filed a complaint against Reeves seeking declaratory relief and to quiet title. Godspeed also moved for and was granted a preliminary injunction barring Reeves from constructing the road until a court determined whether the easement was valid. After considerable motion practice, the superior court ruled that the 1986 deed from Alaska Gold to Ellingson created a valid easement. The court also concluded that "John Reeves and [Reeves's company] Fairbanks Gold Company, LLC are the successors-in-interest to Alaska Gold Company." The parties proceeded to trial on the

main remaining issue: whether the easement was extinguished by prescription during the time that the Ellingsons owned MS-1724 and Alaska Gold owned MS-1709.

During the trial, Alice Ellingson testified that she and Harold poured the concrete foundation for the gold plant in 1986 and that it was "all concrete and steel and it . . . probably [weighed] . . . a couple hundred tons." The plant was "pretty sophisticated," cost close to a million dollars to install, and occupied "not quite half" of the easement.[3] She explained that equipment, conveyor belts, and sand, gravel, and sewer rock surrounded the plant. She also testified that the plant was in continuous operation until 2002 when it was dismantled. Both Alice and Eagan testified that the footbridge between Reeves's property and the gold plant was high enough to drive underneath.

There was also considerable testimony about the condition of the remainder of the easement. Alice testified that Harold built berms out of sewer rock around the property. One year, he also blocked the main gate with a berm in the winter and unblocked it in the spring. And she testified that there were piles of material in the easement that were continually being built up and moved as they were sold. Hatton Franciol, a former employee of the Ellingsons, testified that cars had been parked on the easement and that, based on a picture taken when the Ellingsons owned MS-1724, a pile of rock spanned almost the entire easement at one end. But he also explained that miners berm off the entrance to mines at the end of the season to comply with safety regulations. Like Alice, he testified that the material piles in the easement were for sale and

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[3] It is clear from aerial photographs of the area that Alice meant the gold plant occupied almost half of the width of the easement where it was situated, not half of the entire easement.

constantly moving. Eagan testified that the process piles[4] "were not permanent"; "the nature of [the] business is that you produce piles of material and then hopefully you're [going] to sell them."

Eagan further testified that he would visit the property three to six times each summer. He stated that "Harold ended up having the plant out there and . . . parts of the easement were blocked. But [Eagan did] know that you could pretty much get through there," and it was never "absolutely blocked." Alice testified that a "substantial" gate blocked the easement but that it was only meant to keep out the public and that Reeves had a key to the gate. Reeves testified that the gate was built after he sold the dredge. And former employees testified that they had seen Reeves using the easement frequently.

In its decision the superior court noted that "because of the social relationship between the Ellingsons and Eagan/Alaska Gold, adversity is difficult to determine." As a result the court required "Godspeed [to] show extensive activity in the easement area." The court concluded that "operating and maintaining the gold plant within the easement area for a period of 15 years unreasonably interfered with Alaska Gold's ingress and egress along the easement to access MS-1709," and "[i]t also unreasonably interfered with a prospective dedication of the easement to the public." The court found that the gold plant was a "permanent and expensive improvement that was difficult and damaging to remove" and that it "completely blocked approximately half of the easement." The court further found that sometimes the plant activities blocked the entire easement or forced someone navigating it to go close to the gold plant in a manner that would be unsafe for the general public. Finally, the court found that the Ellingsons had constructed various barriers that restricted public access to the easement.

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[4] These piles were created by material that was produced by the gold plant.

Based on these findings the court concluded that the entire easement had been terminated by prescription.

Both parties appeal. Godspeed appeals the superior court's conclusion that an easement was created, and Reeves appeals its conclusion that the easement was terminated by prescription.

III. STANDARD OF REVIEW

Whether a deed or plat is ambiguous is a question of law that we review de novo.[5] "When applying the de novo standard of review, we apply our independent judgment . . . , adopting the rule of law most persuasive in light of precedent, reason, and policy."[6] When a deed is ambiguous, the trial court's findings about the parties' intent are findings of fact that we review for clear error.[7] A decision is clearly erroneous "when a review of the entire record leaves us with a definite and firm conviction that a mistake has been made."[8]

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[5] *HP Ltd. P'ship v. Kenai River Airpark, LLC*, 270 P.3d 719, 726 (Alaska 2012).

[6] *Ranes & Shine, LLC v. MacDonald Miller Alaska, Inc.*, 355 P.3d 503, 507-08 (Alaska 2015) (alteration in original) (quoting *ConocoPhillips Alaska, Inc. v. Williams Alaska Petroleum., Inc.*, 322 P.3d 114, 122 (Alaska 2014)).

[7] *Norken Corp. v. McGahan*, 823 P.2d 622, 626 (Alaska 1991).

[8] *Chung v. Rora Park*, 339 P.3d 351, 353 (Alaska 2014) (quoting *Offshore Sys.-Kenai v. State, Dep't of Transp. & Pub. Facilities*, 282 P.3d 348, 354 (Alaska 2012)).

Whether an easement was extinguished by prescription presents issues of both law and fact.[9] "We do not disturb a trial court's findings of fact unless they are clearly erroneous. We review the application of law to facts de novo."[10]

IV. DISCUSSION

A. The 1986 Deed Created An Easement Appurtenant.

The superior court concluded that Alaska Gold's transfer of MS-1724 to Ellingson in 1986 created an easement appurtenant.[11] Godspeed contends that this holding was error because the deed contained ambiguities. Specifically, Godspeed argues that the deed uses the word "dedicatable" — which is not a word — and does not specify which property is benefited by the easement.

" '[T]he touchstone of deed interpretation is the intent of the parties,' and 'where possible, . . . the intentions of the parties [will be] given effect.' "[12] We apply a three-step test to interpret a deed: first, we "look at the four corners of the document to see if it unambiguously presents the parties' intent"; second, "[i]f a deed is ambiguous, the next step is to consider 'the facts and circumstances surrounding the conveyance' to discern the parties' intent"; and finally, "[i]n the event that the parties' intent cannot be

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[9] *See HP Ltd. P'ship*, 270 P.3d at 726 (holding that creation of easement by prescription presented mixed issues of law and fact).

[10] *Id.*

[11] An easement appurtenant "is a right to use a certain parcel, the servient estate, for the benefit of another parcel, the dominant estate." *SOP, Inc. v. State, Dep't of Nat. Res., Div. of Parks & Outdoor Recreation*, 310 P.3d 962, 969 n.32 (Alaska 2013) (quoting 25 AM. JUR. 2D *Easements and Licenses* § 8 (2004)).

[12] *Estate of Smith v. Spinelli*, 216 P.3d 524, 529 (Alaska 2009) (alterations in original) (first quoting *Norken Corp.*, 823 P.2d at 625; then quoting *Shilts v. Young*, 567 P.2d 769, 773 (Alaska 1977)).

determined, we rely on rules of construction."[13] The inquiry under step two "can be broad, looking at 'all of the facts and circumstances of the transaction in which the deed was executed, in connection with the conduct of the parties after its execution.' "[14]

The language of the 1986 deed states, in relevant part: "SPECIFICALLY RESERVING UNTO THE GRANTOR, its successors and assigns a *dedicatable* easement for ingress, egress, and utilities, 100 feet in width, along the southerly boundary of . . . [MS] No. 1724." While "dedicatable" is not a word, its use was plainly an attempt to create an easement that was capable of being dedicated.[15] We conclude that the use of a slight variation on a well-known and commonly used word does not make the deed ambiguous; rather, the use of the variant word is akin to a spelling mistake. "Where it is perfectly plain that a word is misspelled, the courts will construe the deed according to the meaning of the word intended, rather than according to the meaning of the word actually used."[16] This is especially true when construing the word as written "would give no effect to the clause containing the doubtful word."[17] Here "looking

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[13] *McCarrey v. Kaylor*, 301 P.3d 559, 563 (Alaska 2013) (quoting *Estate of Smith*, 216 P.3d at 529).

[14] *Estate of Smith*, 216 P.3d at 529 (quoting *Norken Corp.*, 823 P.2d at 629).

[15] Black's Law Dictionary defines "dedication" as "[t]he donation of land or creation of an easement for public use." Dedication, BLACK'S LAW DICTIONARY (10th ed. 2014).

[16] *Anderson & Kerr Drilling Co. v. Bruhlmeyer*, 136 S.W.2d 800, 803 (Tex. 1940) (quoting *Baustic v. Phillips*, 121 S.W. 629, 630 (Ky. 1909)).

[17] *Baustic*, 121 S.W. at 630.

within 'the four corners of the document,' 'the [word "dedicatable" is] capable of but one reasonable interpretation.' "[18] The deed is not ambiguous in this regard.

But the deed is ambiguous as to whether the easement is an easement appurtenant or an easement in gross. An easement appurtenant "is a right to use a certain parcel, the servient estate, for the benefit of another parcel, the dominant estate."[19] "[A]n appurtenant easement . . . may not be used for the benefit of property other than the dominant estate."[20] While easements appurtenant run with the land and continue to benefit the dominant estate, easements in gross are assigned to a specific person and do not run with the land.[21] Here, although the easement is for ingress and egress and is descendable,[22] it is ambiguous whether the easement is an easement appurtenant because it is not clear, looking at the face of the deed, which parcel of land is to benefit. Because the deed fails to explicitly state what parcel will be benefited by the easement, the deed must be considered ambiguous.[23]

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[18] *Estate of Smith*, 216 P.3d at 530 (quoting *Norken Corp.*, 823 P.2d at 626).

[19] *SOP, Inc. v. State, Dep't of Nat. Res., Div. of Parks & Outdoor Recreation*, 310 P.3d 962, 969 n.32 (Alaska 2013) (quoting 25 AM. JUR. 2D *Easements and Licenses* § 8 (2004)).

[20] *HP Ltd. P'ship v. Kenai River Airpark, LLC*, 270 P.3d 719, 730 (Alaska 2012) (second alteration in original) (quoting RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.11 (AM. LAW INST. 2000)).

[21] *See SOP, Inc.*, 310 P.3d at 968-69 (citing 25 AM. JUR. 2D *Easements and Licenses* §§ 8, 120 (2004)).

[22] The deed uses the operative language "[reserving unto the grantor], its successors and assigns."

[23] "Whether a deed is ambiguous is a question of law." *Estate of Smith*, 216 P.3d at 528 (quoting *Norken Corp.*, 823 P.2d at 626).

Thus, we proceed to apply the second step of our three-step analysis in interpreting deeds: we consider " 'the facts and circumstances surrounding the conveyance' to discern the parties' intent."[24] The relevant inquiry is whether the easement was intended to benefit another parcel of land or a person.[25]

The superior court considered evidence of the parties' intent, the situation of the properties, and the purpose and nature of the easement. The court found that "[the easement] clearly created a servient estate (MS-1724) in favor of a dominant estate (adjacent Alaska Gold [p]roperty, specifically, MS-1709, which is now divided into MS-1709 and MS-1709A)." It noted that the "domina[nt] estate is the property at the terminus of the easement corridor," MS-1709. This finding is not clearly erroneous. MS-1709 lies at the end of the easement, so it would be the logical benefited parcel of an easement for ingress and egress. The evidence shows that Alaska Gold usually accessed its land by driving across MS-1724. And a 2002 Notice of Reservation of Rights given by Alaska Gold to Reeves reflects this intent by stating that Alaska Gold had easements to access its adjoining land. The superior court therefore did not err in holding that the 1986 deed created a valid easement appurtenant on MS-1724.

B. It Was Error To Conclude That The Entire Easement Was Terminated By Prescription.

The superior court concluded that the entire easement was terminated by prescription. An easement is terminated by prescription if the party claiming prescription can "prove continuous and open and notorious use of the easement area for a ten-year

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[24] *McCarrey v. Kaylor*, 301 P.3d 559, 563 (Alaska 2013) (quoting *Estate of Smith*, 216 P.3d at 529).

[25] *See, e.g.*, *SOP, Inc.*, 310 P.3d at 968-69.

period by clear and convincing evidence."[26] The prescriptive period is triggered when "use of the easement 'unreasonably interfere[s]' with the current or prospective use of the easement by the easement holder."[27]

The superior court found that the gold plant was a "permanent and expensive improvement that was difficult and damaging to remove" and that "operating and maintaining the gold plant within the easement area for a period of 15 years unreasonably interfered" with Alaska Gold's use of the easement. The court also found that the operation of the plant used the entire easement, that Eagan did not drive next to the gold plant, and that it would not have been safe for him to do so.

Reeves disagrees with the superior court and argues: (1) there was no interference, much less unreasonable interference, with the current or prospective use of the easement because mining operations ceased before the development of the easement; (2) the Ellingsons' property was a mining claim, and therefore mining on the property should not be considered unreasonable interference; (3) gold plants are movable and therefore are not permanent improvements; and (4) the gold plant did not entirely block use of the easement.

We disagree with Reeves's third argument and conclude that the superior court did not err in holding that the gold plant extinguished that portion of the easement upon which it stood. But we agree with Reeves's fourth argument that the gold plant did not entirely block use of the easement. This suggests that the easement was partially

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[26] *Hansen v. Davis*, 220 P.3d 911, 916 (Alaska 2009).

[27] *Id.* (alteration in original) (quoting RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.9 (AM. LAW INST. 2000)).

prescripted. We requested supplemental briefing from the parties on partial prescription.[28]

1. Alaska law allows for partial extinguishment of an easement prescription.

In *Hansen v. Davis* we "follow[ed] the approach adopted by the Restatement (Third) of Property and many jurisdictions and h[e]ld that an easement can be extinguished by prescription."[29] We have not previously addressed the possibility of partial prescription, but we agree with the weight of authority that an easement may be partially prescripted.

The Restatement explains that an easement may be "*modified or extinguished*" by prescription;[30] it further clarifies in a comment that "extinguishment brought about by prescription may be complete or partial."[31] The treatise The Law of Easements and Licenses in Land explains, "An easement . . . may be increased in width,

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[28] Reeves also argues that Godspeed's prescription claim is barred by the statute of limitations and estoppel and that if the easement was terminated he revived it after the gold plant was removed. The superior court did not address these issues because Reeves did not litigate them at trial. We therefore review for plain error and find none. *See Partridge v. Partridge*, 239 P.3d 680, 685 (Alaska 2010). A claim for prescription is based on, not subject to, the statute of limitations. *McGill v. Wahl*, 839 P.2d 393, 395-97 (Alaska 1992). And estoppel fails because Reeves does not point to any intention by Godspeed or Alice to deceive him. *See Dressel v. Weeks*, 779 P.2d 324, 329 (Alaska 1989) (requiring express intention to deceive when real property is involved). Reeves's claim that he re-established the easement was not litigated below, was inadequately briefed on appeal, and is based on facts that the superior court did not examine because they occurred after the prescriptive period.

[29] *Hansen*, 220 P.3d at 916 (citations omitted).

[30] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.7 (AM. LAW INST. 2000) (emphasis added), *cited with approval in Hansen*, 220 P.3d at 916.

[31] *Id.* § 7.7 cmt. b.

depth, or height by prescription. Likewise, a servient owner may reduce an easement's dimensions by preventing the holder from utilizing a portion of the easement area for the prescriptive period,"[32] and more directly, "[A]n easement may be partially extinguished . . . ."[33] The treatise Powell on Real Property agrees: "The servient owner can extinguish an easement *in whole or in part* by adverse uses continued for the prescriptive period."[34]

The rationale underlying the doctrine of prescription supports recognizing partial prescription. "The doctrine [of prescription] protects the expectations of purchasers and creditors who act on the basis of the apparent ownerships suggested by the actual uses of the land."[35] Prescription also "is supported by the rationale that underlies statutes of limitation[:] [b]arring claims after passage of time encourages assertion of claims when evidence is more likely to be available and brings closure to legal disputes."[36] Recognizing partial prescription best allows for legal title to match apparent title and brings closure to legal disputes in the way that best reflects reality.[37]

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[32] JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 7:18 (2017).

[33] *Id.* § 10:25, *cited with approval in Hansen*, 220 P.3d at 916-17.

[34] 4 POWELL ON REAL PROPERTY § 34.21[1] (Richard R. Powell & Michael Allen Wolf eds. 2017) (emphasis added).

[35] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.17 cmt. c (referenced in § 7.7 cmt. a as explaining rationale behind prescription of easements).

[36] *Id.*

[37] Godspeed argues that the language of *Hansen* precludes partial prescription. *Hansen* said, "[T]he prescriptive period is triggered where the use of the easement 'unreasonably interfere[s]' with the current *or prospective* use of the easement by the easement holder." *Hansen*, 220 P.3d at 916 (second alteration in original) (emphasis added) (quoting RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.9). Godspeed (continued...)

Godspeed argues that adopting partial prescription "will substantially erode the hostility element for prescription because doing so will encourage people to stealthily encroach on easements by expanding their garden, extending their lawn, or building an addition to their deck." Easement holders will still be able to use their easements, Godspeed argues, and will not recognize the infringement of their rights until it is too late. But this argument understates the "hardi[ness]"[38] of easements. The prescriptive period is not triggered until the owner of the servient estate's "use of the easement 'unreasonably interfere[s]' with the current or prospective use of the easement by the easement holder."[39] This standard sufficiently guards the rights of the easement holder.[40]

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[37](...continued)
notes that Reeves offers no examples of jurisdictions that use "prospective use" language and recognize partial prescription. But Godspeed points to no case where a court considered adopting partial prescription and decided not to do so. And our holding in *Hansen* that an easement can be extinguished by prescription did not reject the rationales that underlie prescription; it embraced them.

[38] 7 THOMPSON ON REAL PROPERTY § 60.08 (David A. Thompson ed., 2d ed. 2017) (calling easements "hardier creatures than . . . real covenants and equitable servitudes" because they are harder to terminate).

[39] *Hansen*, 220 P.3d at 916 (quoting RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.9); *see also* RESTATEMENT (FIRST) OF PROPERTY § 506 cmt. c (AM. LAW INST. 1944) ("For a use of the servient tenement to be adverse to the owner of an easement, the use must be made without submission to or without being in subordination to the owner of the easement and must be open and notorious." (cross-references omitted)).

[40] We note that the arguments Godspeed makes against the adoption of partial prescription here undermine its principal argument that we should conclude prescription took place in this case. Godspeed's hypothetical about encroachment on an easement that goes unnoticed by the easement holder is similar to the facts of this case: Godspeed's predecessors in interest erected a gold plant that blocked part of the easement, but Reeves's predecessor did not bring a case because it still was able to
(continued...)

The parties agree that if we adopt partial extinguishment, then the standard set forth in *Hansen* should apply. This is consistent with the authorities already cited, which treat partial extinguishment as part of the doctrine of extinguishment by prescription and not as a separate concept. We therefore hold that Alaska law recognizes partial extinguishment of easements through prescription and that the standard to show partial extinguishment is the standard we set out in *Hansen*.

2. The gold plant partially extinguished the easement.

The gold plant did extinguish that part of the easement upon which it stood. The superior court found that the gold plant "cost approximately one million dollars to erect" and "took years to build and substantial effort to dismantle." Alice testified that the plant was "all concrete and steel and it was probably . . . a couple hundred tons," and that it was in continuous operation from 1988 until 2002, when it was dismantled. The testimony established that the plant was in continuous, open, and notorious operation for more than ten years,[41] and the superior court therefore did not clearly err in finding that the gold plant was a permanent improvement.

3. The gold plant's operations did not fully extinguish the easement.

We do not agree with the superior court that the remainder of the easement was extinguished. "Whether the improvement is an unreasonable interference with the

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[40](...continued)
access its land. Further, "expanding a garden" and "extending a lawn" are not enough to trigger extinguishment of an easement by prescription, *see Hansen*, 220 P.3d at 917, and "building an addition to [a] deck" may not be in all circumstances, *see Titcomb v. Anthony*, 492 A.2d 1373, 1375-76 (N.H. 1985) (holding that an easement was not totally extinguished because passage on foot was still possible).

[41] *See Hansen*, 220 P.3d at 916 ("[A] party claiming that an easement was extinguished by prescription must prove continuous and open and notorious use of the easement area for a ten-year period by clear and convincing evidence.").

servitude depends on the character of the improvement and the likelihood that it will make future development of the easement difficult. If the improvement is temporary and easily removed, it is generally not unreasonable."[42]

Although the gold plant itself was an unreasonable interference, none of the parties testified to an impediment that continuously blocked the entire easement for the entire ten-year period. Alice testified that equipment, conveyor belts, and sand, gravel, and sewer rock surrounded the plant. A former employee testified that cars were parked in the easement and that a pile of rock spanned almost the entire easement during one year. This type of temporary activity was insufficient to terminate the easement over a mining claim.

In *Hansen* we considered whether the maintenance of a garden on an easement was sufficient to terminate an easement and concluded it was not.[43] We explained that "[a]s a matter of law, the maintenance of a garden on the easement area did not constitute an improvement sufficiently adverse to commence the prescriptive period."[44] And cars, equipment, and gravel piles are not significantly less moveable than a garden. In mining country gravel piles, berms, miscellaneous mining equipment, and vehicles (often broken down) are the "vegetation" one would expect to find "growing" in the area.

The weight of authority indicates that equipment, conveyor belts, and sand, gravel, and sewer rock are insufficient to terminate an easement, at least in a setting like

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[42] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.9 cmt. c; *see also Hansen*, 220 P.3d at 917 ("As a general guideline, temporary improvements to an unused easement area that are easily and cheaply removed will not trigger the prescriptive period.").

[43] *Hansen*, 220 P.3d at 917-18.

[44] *Id.* at 917.

mining country. "[T]he adversity standard is not met when the owner of a servient estate uses the easement area for gardening; places obstructions on the easement that the easement holder can simply go around; or relies on a natural barrier, such as an embankment, to obstruct the easement holder," and "parking cars from time to time in a manner that obstructs the easement does not meet the continuity requirement."[45] Further, "what constitutes unreasonable interference, and thus triggers the prescriptive period, [is] heavily fact dependent."[46] This includes the manner in which the parties are using the land.[47]

The superior court found that the operation of the gold plant, including the conveyor belts, jigs, and supporting equipment, made driving past it in the easement unsafe. The court also found that Eagan never drove past the plant in the easement, instead taking other routes through the property. Neither of these findings leads to prescription as a matter of law: "[w]here the easement holder has not used the easement for some time, or at all, the servient estate owner enjoys wide latitude with respect to use of the easement area, and a showing of extensive activity will be required to demonstrate adversity."[48] There is no reason why the Ellingsons should have had to worry about the

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[45] BRUCE & ELY, *supra* note 32, § 10:25 (citations omitted).

[46] *Hansen*, 220 P.3d at 917.

[47] *See id.*; BRUCE & ELY, *supra* note 32, § 10:25.

[48] *Hansen*, 220 P.3d at 917. The superior court's finding that Eagan never drove past the gold plant in the easement was clearly erroneous. Eagan testified that he drove under the footbridge between the plant and Gold Dredge 8, which means that he drove in the easement next to the gold plant. This testimony is uncontradicted. Regardless, an easement holder does not have to use an easement to maintain title to it. *See id.*

safety of someone driving through the easement if no one was driving through the easement.

"[T]he 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."[49] This allows for maximum value to come from the easement. The question then is not whether Eagan actively asserted Alaska Gold's easement rights or whether Eagan could have driven on the easement at a time when he was not asserting those rights; the question is whether Eagan could have used the easement if he had insisted on using it. And more to the point, the question really is whether Eagan could not have used the easement for the entire ten-year prescriptive period. No evidence established that Eagan's use of the easement was unreasonably interfered with for the ten-year period.

As explained above, we conclude that the easement was terminated by prescription only where the gold plant sat. This means that the easement still exists in some form for its entire length but that part of it is narrower in width because of the gold plant's obstruction. The superior court found that the gold plant blocked at least half of the width of the easement. But the only evidence offered to show the location of the gold plant was several aerial photographs, and none of the photographs show the gold plant crossing the line that demarcates the boundary of the proposed public road — that is, none of the photographs show the gold plant extending even 40 feet into the 100-foot easement. Given that the photographs were the only evidence offered as to the position of the gold plant, the court's finding that at least half of the easement was blocked was clearly erroneous. On remand the superior court should determine the extent to which the permanent structure of the gold plant occupied the easement and terminate only that portion of the easement.

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[49] BRUCE & ELY, *supra* note 32, § 10:25.

Deciding this appeal calls for an understanding of Alaska history — particularly Alaska gold mining history and how gold mines operate. Operating an active gold mine means that gravel piles, berms, and miscellaneous mining equipment and vehicles will appear and move around the property and disappear over time. This is part and parcel to owning land in mining country, and the Ellingsons, Eagan, and Reeves all understood this. To conclude years later that these kinds of mining activities terminated the easement would ignore the reality of the parties' mining and other activities on the ground and would be unjust. We conclude that the easement was only terminated to the extent the gold plant stood on it and that none of the ancillary mining activities, rock piles, equipment, and vehicles were sufficient to terminate the remainder of the easement.[50]

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[50] We offer several responses to the dissenting opinion. First, the dissent argues that "the court adopts a doctrine that is new to Alaska law without giving the parties an opportunity to litigate this issue in the trial court." But as explained in section IV.B.1 of our opinion, authoritative treatises "treat partial prescription as part of the doctrine of prescription and not as a separate concept." *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.7 & cmt. b (AM. LAW INST. 2000); BRUCE & ELY, *supra* note 32, §§ 7:18, 10:25; POWELL ON REAL PROPERTY, *supra* note 34, § 34.21[1]. Thus, partial extinguishment is simply part of the doctrine of extinguishment by prescription governed by the regular rules of extinguishment; it is not a new doctrine.

Second, the parties were given the opportunity to address in detail the application of partial prescription to the facts of this case. We ordered the parties to file supplemental briefing as follows:

> 1. Should Alaska adopt the doctrine of partial extinguishment of an easement by prescription? Why or why not?
>
> 2. Regardless of the answer to question 1, what are the elements of partial extinguishment by prescription, and under what circumstances have courts applied this doctrine?
>
> 3. Should this doctrine apply to the case at bar? Why or why

(continued...)

V. CONCLUSION

We AFFIRM the superior court's conclusion that the 1986 deed created an easement appurtenant and AFFIRM its finding and conclusion that the gold plant extinguished that part of the easement it occupied. We REVERSE the court's finding

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[50](...continued)
not?

The parties responded and agreed that if this court adopted partial extinguishment, then the standard set forth in *Hansen* should apply.

Third, the dissent argues that if the parties knew that partial extinguishment was in play at trial, they might have focused their presentation of evidence on more particular parts of the easement to demonstrate whether those parts were extinguished. But at trial Reeves's overall position was that there had been *no* prescription, so he presented evidence and testimony to show as little interference with the easement as possible. Godspeed, on the other hand, contended that the *entire* easement was extinguished and accordingly presented evidence and testimony to show as much interference with the easement as possible. In other words, both parties had every incentive to offer all of the evidence available to them to prove their respective positions; all of that evidence relevant to total extinguishment or no extinguishment necessarily encompassed all evidence of partial extinguishment. Notably, neither party requested in their supplemental briefing to this court that the case be remanded to the superior court so additional evidence could be presented on the issue of partial extinguishment, nor did they argue that the superior court's factual findings were insufficient.

Fourth, the dissent suggests that "extensive activity" should not be required to show unreasonable interference in this case because, unlike in *Hansen*, the easement holder used the easement. The superior court required a showing of extensive activity in this case because the social relationship of the parties made adversity difficult to determine. We agree with the superior court. And under any standard, equipment, conveyor belts, and sand, gravel, and sewer rock in mining country do not rise to the level of unreasonable interference sufficient to terminate an easement. *See* BRUCE & ELY, *supra* note 32, § 10:25. We reiterate, apart from the gold plant no evidence was admitted and no testimony established that any equipment, conveyer belts, sand, gravel, or sewer rock remained in place and obstructed the easement for a ten-year period.

and conclusion that the remainder of the easement apart from the location of the gold plant was terminated and REMAND for further proceedings consistent with this opinion.

FABE, Chief Justice, with whom CARNEY, Justice, joins, dissenting in part.

I disagree with the court's analysis and its conclusion that the superior court erred in finding that the entire easement over the Ellingsons' property was terminated by prescription. The court's decision is based on a theory of partial extinguishment of the easement, a theory that was never considered by the superior court. As a matter of procedural fairness, this court should remand to the superior court for the parties to have an opportunity to present additional evidence on this new, fact-intensive theory. And, in my view, even under a partial extinguishment theory, the superior court correctly concluded that the entire easement was extinguished. I therefore agree with the court's conclusion that the part of the easement under the gold plant was extinguished, but I respectfully dissent from the court's decision that the remainder of the easement was not also extinguished.

I. PRINCIPLES OF PROCEDURAL FAIRNESS PROHIBIT REVERSAL ON NEW GROUNDS WITHOUT AN OPPORTUNITY TO BE HEARD.

Neither party raised the question of partial extinguishment of the easement in the trial court, nor did the superior court address the question in its ruling. Importantly, the parties had no reason to believe that the issue of partial extinguishment would be addressed because none of our prior decisions have adopted or even considered that doctrine. *Hansen v. Davis* remains the only Alaska case that has addressed the question of extinguishment by prescription,[1] and that decision made no mention of the possibility of partial extinguishment by prescription despite a similar fact pattern where one portion of the easement was occupied by permanent improvements and another portion was occupied by more temporary improvements.[2] So by basing its decision on

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[1] 220 P.3d 911, 915-16 (Alaska 2009).

[2] *Id.* at 913-14.

partial extinguishment, the court adopts a doctrine that is new to Alaska law without giving the parties an opportunity to litigate this issue in the trial court. Procedural fairness requires that parties be given an adequate hearing, which includes the principle that "[p]arties must have notice of the subject of proceedings that concern them 'so that they will have a reasonable opportunity to be heard.' "[3]

In *Price v. Eastham* we considered this issue in a context very similar to that of the current case.[4] There, a group of snowmachiners brought suit against a landowner, claiming that they had established a prescriptive easement over part of the land by using the same trail consistently since the 1950s.[5] Price, the landowner, argued that an easement had not been perfected and counterclaimed for injunctive relief against the snowmachiners.[6] Instead of ruling on the prescriptive easement question, the superior court initially held that an easement had been established under former 43 U.S.C. § 932 (also known as RS 2477), under which sufficient public use of certain types of land could establish a self-executing grant of land from the federal government.[7] Neither party had raised this issue before the superior court.[8] On appeal, we held that the superior court violated Price's due process rights by ruling on an issue that Price did not have an opportunity to litigate:

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[3] *Price v. Eastham*, 75 P.3d 1051, 1056 (Alaska 2003) (quoting *Potter v. Potter*, 55 P.3d 726, 728 (Alaska 2002)).

[4] 75 P.3d 1051.

[5] *Id.* at 1054.

[6] *Id.*

[7] *Id.* at 1054-55.

[8] *Id.* at 1056.

> Because Price did not have notice that an RS 2477 right-of-way was at issue, his due process rights were violated. Here, Price did not have an opportunity to be heard on the RS 2477 matter; in fact, he reasonably believed that RS 2477 was not at issue. Accordingly, we hold that the trial court's failure to give Price notice and an opportunity to be heard and to present evidence on the RS 2477 issue at trial violated his due process rights, and we therefore reverse the superior court's finding of an RS 2477 right-of-way on Price's land.[9]

Like the superior court in *Price*, here the court bases its conclusion on a doctrine that the parties did not raise before the superior court.[10] The parties here "did not have an opportunity to be heard on the [partial extinguishment] matter."[11] And like Price, Godspeed "reasonably believed" that partial extinguishment "was not at issue" here[12] because no case in Alaska has previously adopted or even considered that doctrine, nor did the superior court address the issue in its decision.

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[9] *Id.*

[10] Although the issue of partial extinguishment is obviously related to the broader question of extinguishment by prescription, I believe it is properly considered a separate issue here. Its status as a distinct question is particularly relevant in light of the fact that no case in Alaska had previously addressed the question whether the partial extinguishment doctrine is even recognized in this state.

In *Price*, the question of an easement by prescription and an easement under RS 2477 were closely related in that they both required the claimants to show some of the same factual elements. *Id.* at 1056-57. But we concluded that it was a violation of due process to issue a decision on one type of easement when the parties had no notice of that issue. *Id.* at 1056. Under this precedent, it is evident that giving the parties an opportunity to brief and present evidence about a related issue is not sufficient to satisfy the principles of procedural fairness in these circumstances.

[11] *See id.* at 1056.

[12] *See id.*

As we have explained, "[b]ecause basic fairness requires an opportunity to present relevant evidence, applying an unanticipated body of law could be an abuse of discretion if doing so were to make different outcome-determinative facts relevant."[13] We have in many contexts remanded cases to the superior court when a novel legal theory was presented in a manner that prevented one or both parties from presenting evidence related to that theory. For example, in a different type of easement case, we remanded the question whether the dedication of an easement had been accepted when "neither party expressly presented the theory of common law dedication to the superior court."[14] And in a case where the superior court allowed amendment of the pleadings after trial to include a breach of contract claim, we vacated and remanded the decision to allow presentation of evidence related to damages for breach of contract because one party had not had the opportunity to present evidence to support its position on damages.[15]

Here, neither the parties nor the superior court raised the issue of partial extinguishment, and the superior court made no factual findings relating to a partial extinguishment theory. The parties accordingly focused their arguments on the simpler question whether the entire easement was extinguished; they might have emphasized different facts or legal arguments had they known that they would need to address the

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[13] *Frost v. Spencer*, 218 P.3d 678, 682 (Alaska 2009); *see also Bruce L. v. W.E.*, 247 P.3d 966, 977 (Alaska 2011) (applying the reasoning of *Frost* to reverse a superior court decision that had relied on an issue not raised by the parties).

[14] *McCarrey v. Kaylor*, 301 P.3d 559, 568 (Alaska 2013).

[15] *Alderman v. Iditarod Props., Inc.*, 32 P.3d 373, 395-97 (Alaska 2001). *See also Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 396 (Alaska 2013) (remanding for further proceedings when trial court's decision relied on new argument made at oral argument on summary judgment without the other party having an opportunity to respond).

question whether separate parts of the easement had been extinguished.[16] For example, the parties presented some evidence about rock piles and other equipment or structures incidental to the gold plant that interfered with use of the easement. The superior court did not make detailed findings about those other obstructions, considering them part of the plant's operation, which it determined sufficiently interfered with the prospective use of the easement as a public means of ingress and egress to extinguish the entire easement.[17] As we have concluded in analogous situations, adopting a partial extinguishment theory here means the court is "applying an unanticipated body of law" that might "make different outcome-determinative facts relevant."[18] The fact that the parties did not have an opportunity to address this issue or present facts relevant to this theory before the superior court, therefore, creates a procedural fairness problem.

Because the court has concluded that the partial extinguishment doctrine applies to this case, I believe it is most appropriate to remand this fact-specific inquiry to the superior court for an opportunity for presentation of additional evidence on this theory and for the superior court's determination whether the easement was partially or fully extinguished. This is the approach we have followed in other cases involving fact-

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[16] *Cf. Frost*, 218 P.3d at 682 (considering whether the court's application of a different body of law "would, if announced at the outset of the trial, have reasonably led [the parties] to present different evidence or to place more emphasis on some of the evidence that [they] did present").

[17] *See Hansen v. Davis*, 220 P.3d 911, 915 (Alaska 2009) (holding that easement may be extinguished when owner of servient estate "unreasonably interferes with the current *or prospective* use of the easement" (emphasis added)).

[18] *Frost*, 218 P.3d at 682.

intensive easement issues,[19] and I believe we should adhere to that established practice here.

II. EVEN UNDER A PARTIAL EXTINGUISHMENT THEORY, THE SUPERIOR COURT DID NOT CLEARLY ERR.

But even if it were appropriate to decide this case on the factual record developed below — without providing an opportunity for the parties to present evidence now that they know that the doctrine of partial extinguishment applies — I would affirm the superior court's decision. I agree with the court's conclusion that the portion of the easement under the gold plant was extinguished, but I disagree with its conclusion that the remainder of the easement was not also extinguished. We held in *Hansen* that "permanent and expensive improvements that are difficult and damaging to remove will trigger the prescriptive period."[20] Here, the superior court found that the gold plant was a steel and concrete structure that cost nearly a million dollars to install, while other temporary improvements at times occupied and interfered with the remainder of the easement. The superior court focused its analysis on the way these and other

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[19] We remanded for further fact-finding in *Price* after reviewing the superior court's conclusion that a prescriptive easement had been created (a conclusion the superior court had reached independent of the RS 2477 easement question discussed above). *See Price v. Eastham*, 75 P.3d 1051, 1059 (Alaska 2003). We noted that the superior court had not "define[d] the extent of the prescriptive easement over Price's land" and therefore we "remand[ed] for a determination of the scope of this easement" rather than answering that question ourselves. *Id.*

In *Hansen*, similarly, after deciding the issue of prescriptive extinguishment we were left with the question whether the easement had been effectively transferred to new owners. 220 P.3d at 918. We remanded this issue for further factual findings, explaining that "[q]uestions concerning a property's chain of title are often fact-intensive, and the trial court is in the best position to address questions of fact." *Id.* Accordingly, we "decline[d] to decide this issue as a matter of law and remand[ed] for a hearing on the quiet title action." *Id.*

[20] *Hansen*, 220 P.3d at 917.

improvements interfered with public access to the easement. An easement can be extinguished by use that interferes with a prospective use of it,[21] and Reeves currently intends to use the easement for a public road. I would therefore conclude that the entire easement was extinguished, even if each part of the easement is considered separately under a partial extinguishment theory.

The creation or extinguishment of an easement by prescription presents questions of both law and fact:[22] The relevant findings of fact are reviewed for clear error,[23] and the application of law to these facts is reviewed de novo.[24] But we clarified in *Hansen* that for the specific question of "[d]etermining what constitutes unreasonable interference, and thus triggers the prescriptive period" for extinguishing an easement by prescription, the analysis "will be heavily fact dependent."[25]

In *Hansen* we held that "[a]s a matter of law, the maintenance of a garden on the easement area did not constitute an improvement sufficiently adverse to commence the prescriptive period."[26] Here, the court relies heavily on *Hansen* to conclude that "cars, equipment, and gravel piles are not significantly less moveable than a garden" and that therefore those impediments were insufficient to extinguish the

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[21] *Id.* at 915.

[22] *See* Op. at 8 (citing *HP Ltd. P'ship v. Kenai River Airpark, LLC*, 270 P.3d 719, 726 (Alaska 2012)).

[23] *See* Op. at 8 (citing *HP Ltd. P'ship*, 270 P.3d at 726).

[24] *See* Op. at 8 (citing *HP Ltd. P'ship*, 270 P.3d at 726).

[25] *Hansen*, 220 P.3d at 917.

[26] *Id.*

easement by prescription.[27] But in *Hansen* we considered only the garden and vegetation; we did not consider the effect of the greenhouse occupying the other portion of the easement because the prescriptive period of ten years had not yet elapsed since the greenhouse was built.[28] And in *Hansen*, we never held that a permanent building constructed on part of an easement is insufficient to extinguish the entire easement. If the easement is considered as a whole, then a gold plant occupying roughly half of the easement would easily satisfy the *Hansen* test for prescriptive extinguishment: "[P]ermanent and expensive improvements that are difficult and damaging to remove will trigger the prescriptive period."[29] A gold plant consisting of a steel and concrete structure that cost almost a million dollars to install[30] surely qualifies as a "permanent and expensive improvement" under *Hansen*.

Applying this reasoning to the partial extinguishment theory, the superior court was almost certainly correct to conclude that the portion of the easement under the gold plant was extinguished.[31] The superior court was also correct to conclude that the gold plant extinguished the entire easement when the plant is viewed *in conjunction with* the more temporary improvements occupying much of the remainder of the easement and the current proposed use of the easement as a public road. Once the gold plant permanently blocked half of the easement, the rock piles and equipment impeded a large

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[27] Op. at 17.

[28] *Hansen*, 220 P.3d at 917-18.

[29] *Id.* at 917.

[30] Op. at 5.

[31] Op. at 16.

portion of the remaining passable land, thereby "unreasonably interfer[ing]"[32] with and extinguishing that portion of the easement.

Even considering each portion of the easement entirely separately, the superior court's findings were not clearly erroneous in concluding that the portion of the easement not covered by the gold plant was still extinguished under our *Hansen* test. Eagan testified that he may have been forced to drive outside the edges of the easement at times, because parts of the easement were blocked. Thus, the superior court did not clearly err in finding that Eagan could not always drive the entire length of the easement, even if he was sometimes able to drive next to the plant. Nor did it clearly err in finding that the general public could not safely use the easement while the gold plant intruded into it. Therefore, the superior court was correct to conclude that this portion of the easement was extinguished, even when considered separately from the gold plant portion.

An easement can be extinguished by prescription if the servient owner's use "unreasonably interferes with the current or prospective use of the easement by the easement holder."[33] There is no indication that the superior court clearly erred in finding that the gold plant's operation "unreasonably interfered with a prospective dedication of the easement to the public." Indeed, the prospective use of the easement for a public road was a factor the superior court considered at several points, noting that at the times when a single vehicle could navigate the easement, it "would not be safe for the general public" to do so. The superior court also found that additional efforts were made to restrict access by the general public even if Eagan could drive around barriers to access Alaska Gold's property.

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[32] *See Hansen*, 220 P.3d at 915.

[33] *Id.* at 916.

Moreover, the nature of the other impediments and blockages is sufficient to establish that the non-gold-plant portion of the easement was extinguished. In setting out the standards for termination by prescription under Alaska law, we explained in *Hansen* that the doctrine of extinguishment by prescription relies on the longstanding property law principle of encouraging property owners to protect their rights: "When satisfied, the various requirements of adverse possession, and similarly prescription, serve to 'put [the property owner] on notice of the hostile nature of the possession so that he [or she], the owner, may take steps to vindicate his [or her] rights by legal action.' "[34] In light of this principle, we concluded that "[u]se of the easement that unreasonably interferes with the 'easement owner's enjoyment of the easement' is adequate 'to give notice that the easement is under threat.' "[35] Accordingly, we explained that "[w]here the easement holder has not used the easement for some time, or at all, the servient estate owner enjoys wide latitude with respect to use of the easement area, and a showing of extensive activity will be required to demonstrate adversity."[36] The converse of this statement is that an easement may be extinguished if the easement holder knew of the other party's adverse use and did nothing to stop it.

In *Hansen*, it was "undisputed that the easement was unused by an easement holder from its creation until [the time of the lawsuit]."[37] Thus, by *Hansen*'s own standard, it would have required a demonstration of "extensive activity" to meet the

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[34] *Id.* (first alteration in original) (footnote omitted) (quoting *Peters v. Juneau–Douglas Girl Scout Council*, 519 P.2d 826, 832 (Alaska 1974)).

[35] *Id.* (quoting 7 THOMPSON ON REAL PROPERTY § 60.08(b)(7)(i) (David A. Thomas ed., 2004)).

[36] *Id.* at 917.

[37] *Id.*

unreasonable interference test in that case; we found that the claimants had failed to make this showing. In the current case, by contrast, the parties agree that Eagan, the local representative of the easement holder, repeatedly used the easement during the period of the Ellingsons' adverse use. Yet neither Eagan nor Alaska Gold took any action to halt the Ellingsons' use. As the superior court pointed out, "the parties were not protective of their property rights."

In fact, the use of the easement in this case was more extensive than in *Hansen*: In contrast to the garden beds in *Hansen*, the easement here was occupied by equipment and rock piles that sometimes blocked large portions of the easement.[38] So contrary to the court's conclusion, the fact that a garden failed the "unreasonable interference" test in *Hansen* does not mean that similar (and even more extensive) use of the easement would fail the test in the current case, where the easement holder knew of the interference and did nothing to protect its rights. Accordingly, the extensive interference caused by the rock piles and heavy equipment here satisfies the "unreasonable interference" test — even when considered independently from the portion of the easement occupied by the gold plant. I would therefore hold that the superior court did not clearly err in concluding that the entire easement was extinguished by prescription.

For these reasons, I respectfully dissent from the court's decision to reverse a portion of the superior court's decision. I believe that the proper course of action in this case is to remand to the superior court to allow the parties to supplement their evidentiary presentations now that they know that the doctrine of partial extinguishment is the law in Alaska. Here, the newly adopted legal doctrine, "if announced at the outset

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[38] Unlike the garden in *Hansen*, some rock piles here were not easily removed: "[P]retty good size equipment" would have been needed to move them; they could not be moved "by hand."

of the trial, [would] have reasonably led [the parties] to present different evidence or to place more emphasis on some of the evidence that [they] did present."[39] But even if we are to decide the case on the current record, I would affirm the superior court's factual finding that the majority of the easement was blocked and that the entire easement was extinguished.

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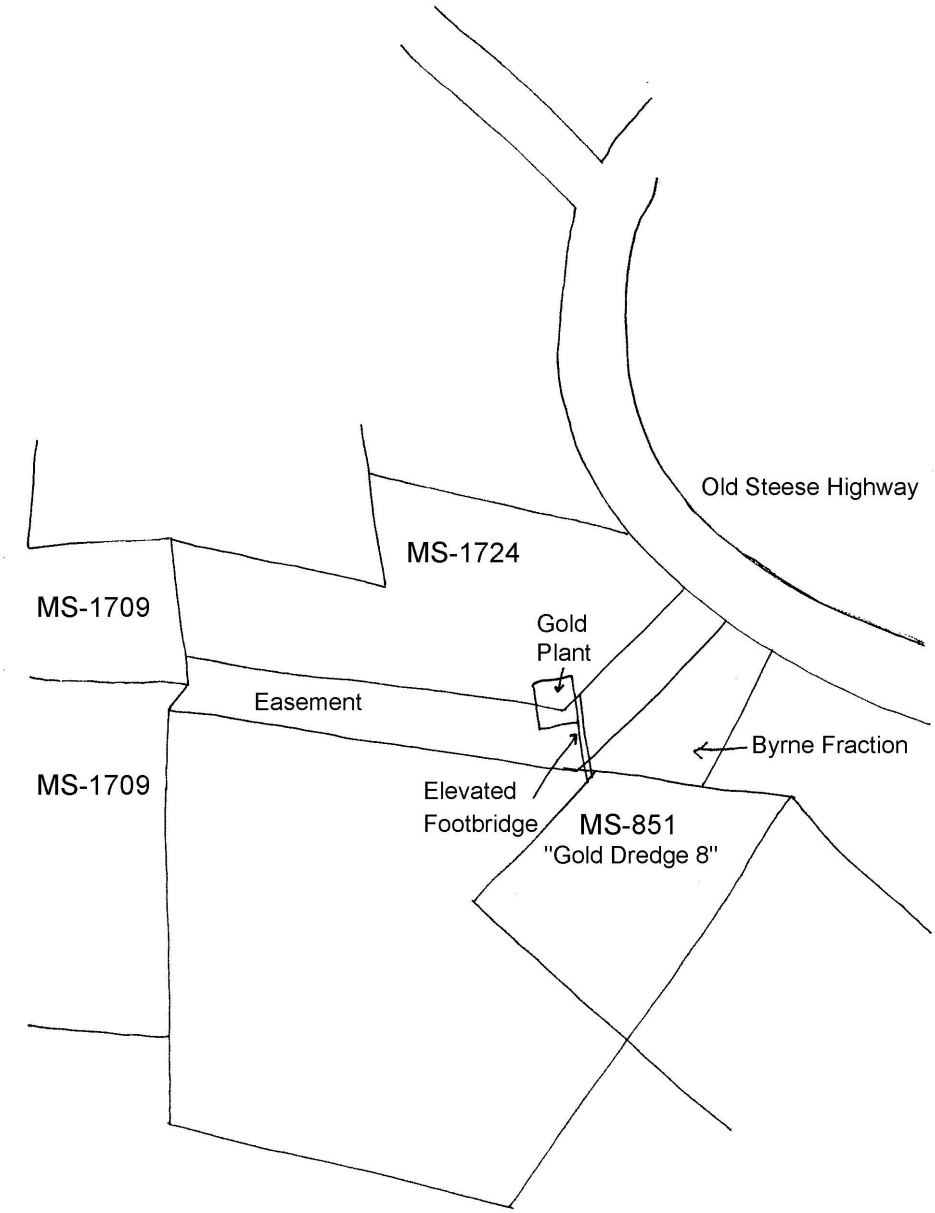
[39] *Frost v. Spencer*, 218 P.3d 678, 682 (Alaska 2000).


Old Steese Highway
MS-1724
MS-1709
Gold
Plant
Easement
Byrne Fraction
MS-1709
Elevated
Footbridge
MS-851
"Gold Dredge 8"

ALASKA RAILROAD CORPORATION

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ALASKA RAILROAD TRANSFER ACT ("ARTA")

UNITED STATES CODE

TITLE 45

CHAPTER 21

[June 2005]

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TABLE OF CONTENTS

TABLE OF CONTENTS
Continued

Page

UNITED STATES CODE

TITLE 45 - RAILROADS

CHAPTER 21 - ALASKA RAILROAD TRANSFER

1201. FINDINGS

The Congress finds that--

(1) the Alaska Railroad, which was built by the Federal Government to serve the transportation and development needs of the Territory of Alaska, presently is providing freight and passenger services that primarily benefit residents and businesses in the State of Alaska;

(2) many communities and individuals in Alaska are wholly or substantially dependent on the Alaska Railroad for freight and passenger service and provision of such service is an essential governmental function;

(3) continuation of services of the Alaska Railroad and the opportunity for future expansion of those services are necessary to achieve Federal, State, and private objectives; however, continued Federal control and financial support are no longer necessary to accomplish these objectives;

(4) the transfer of the Alaska Railroad and provision for its operation by the State in the manner contemplated by this chapter is made pursuant to the Federal goal and ongoing program of transferring appropriate activities to the States;

(5) the State's continued operation of the Alaska Railroad following the transfer contemplated by this chapter, together with such expansion of the railroad as may be necessary or convenient in the future, will constitute an appropriate public use of the rail system and associated properties, will provide an essential governmental service, and will promote the general welfare of Alaska's residents and visitors; and

(6) in order to give the State government the ability to determine the Alaska Railroad's role in serving the State's transportation needs in the future, including the opportunity to extend rail service, and to provide a savings to the Federal Government, the Federal Government should offer to transfer the railroad to the State, in accordance with the provisions of this chapter, in the same manner in which other Federal transportation functions (including highways and airports) have been transferred since Alaska became a State in 1959.

(Pub.L. 97-468, Title VI, §602, Jan. 14, 1983, 96 Stat. 2556)

[**Editor's Note:** §601 of Pub.L. 97-468 provided that "This title may be cited as the Alaska Railroad Transfer Act of 1982."]

1202. DEFINITIONS

As used in this chapter, the term--

(1) "Alaska Railroad" means the agency of the United States Government that is operated by the Department of Transportation as a rail carrier in Alaska under authority of the Act of March 12, 1914 (43 U.S.C. 975 et seq.) (popularly referred to as the "Alaska Railroad Act") and section 6(i) of the Department of Transportation Act, or, as the context requires, the railroad operated by that agency;

(2) "Alaska Railroad Revolving Fund" means the public enterprise fund maintained by the Department of the Treasury into which revenues of the Alaska Railroad and appropriations for the Alaska Railroad are deposited, and from which funds are expended for Alaska Railroad operation, maintenance and construction work authorized by law;

(3) "claim of valid existing rights" means any claim to the rail properties of the Alaska Railroad on record in the Department of the Interior as of January 13, 1983;

(4) "date of transfer" means the date on which the Secretary delivers to the State the four documents referred to in section 1203(b)(1) of this title;

(5) "employees" means all permanent personnel employed by the Alaska Railroad on the date of transfer, including the officers of the Alaska Railroad, unless otherwise indicated in this chapter;

(6) "exclusive-use easement" means an easement which affords to the easement holder the following:

> (A) the exclusive right to use, possess, and enjoy the surface estate of the land subject to this easement for transportation, communication, and transmission purposes and for support functions associated with such purposes;
>
> (B) the right to use so much of the subsurface estate of the lands subject to this easement as is necessary for the transportation, communication, and transmission purposes and associated support functions for which the surface of such lands is used;
>
> (C) subjacent and lateral support of the lands subject to the easement; and

(D) the right (in the easement holder's discretion) to fence all or part of the lands subject to this easement and to affix track, fixtures, and structures to such lands and to exclude other persons from all or part of such lands;

(7) ''Native Corporation'' has the same meaning as such term has under section 102(6) of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3102(6));

(8) ''officers of the Alaska Railroad'' means the employees occupying the following positions at the Alaska Railroad as of the day before the date of transfer: General Manager; Assistant General Manager; Assistant to the General Manager; Chief of Administration; and Chief Counsel;

(9) ''public lands'' has the same meaning as such term has under section 3(e) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(e));

(10) ''rail properties of the Alaska Railroad'' means all right, title, and interest of the United States to lands, buildings, facilities, machinery, equipment, supplies, records, rolling stock, trade names, accounts receivable, goodwill, and other real and personal property, both tangible and intangible, in which there is an interest reserved, withdrawn, appropriated, owned, administered or otherwise held or validly claimed for the Alaska Railroad by the United States or any agency or instrumentality thereof as of January 14, 1983, but excluding any such properties disposed of, and including any such properties acquired, in the ordinary course of business after that date but before the date of transfer, and also including the exclusive-use easement within the Denali National Park and Preserve conveyed to the State pursuant to this chapter and also excluding the following:

(A) the unexercised reservation to the United States for future rights-of-way required in all patents for land taken up, entered, or located in Alaska, as provided by the Act of March 12, 1914 (43 U.S.C. 975 et seq.);

(B) the right of the United States to exercise the power of eminent domain;

(C) any moneys in the Alaska Railroad Revolving Fund which the Secretary demonstrates, in consultation with the State, are unobligated funds appropriated from general tax revenues or are needed to satisfy obligations incurred by the United States in connection with the operation of the Alaska Railroad which would have been paid from such Fund but for this chapter and which are not assumed by the State pursuant to this chapter;

(D) any personal property which the Secretary demonstrates, in consultation with the State, prior to the date of transfer under section 1203 of this title, to be necessary to carry out functions of the United States after the date of transfer; and

(E) any lands or interest therein (except as specified in this chapter) within the boundaries of the Denali National Park and Preserve;

(11) ''right-of-way'' means, except as used in section 1208 of this title--

(A) an area extending not less than one hundred feet on both sides of the center line of any main line or branch line of the Alaska Railroad; or

(B) an area extending on both sides of the center line of any main line or branch line of the Alaska Railroad appropriated or retained by or for the Alaska Railroad that, as a result of military jurisdiction over, or non-Federal ownership of, lands abutting the main line or branch line, is of a width less than that described in subparagraph (A) of this paragraph;

(12) ''Secretary'' means the Secretary of Transportation;

(13) ''State'' means the State of Alaska or the State-owned railroad, as the context requires;

(14) ''State-owned railroad'' means the authority, agency, corporation or other entity which the State of Alaska designates or contracts with to own, operate or manage the rail properties of the Alaska Railroad or, as the context requires, the railroad owned, operated, or managed by such authority, agency, corporation, or other entity; and

(15) ''Village Corporation'' has the same meaning as such term has under section 3(j) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(j)).

(Pub.L. 97-468, Title VI, §603, Jan. 14, 1983, 96 Stat. 2556)

1203. TRANSFER AUTHORIZATION

(a) Authority of Secretary; time, manner, etc., of transfer

Subject to the provisions of this chapter, the United States, through the Secretary, shall transfer all rail properties of the Alaska Railroad to the State. Such transfer shall occur as soon as practicable after the Secretary has made the certifications required by subsection (d) of this section and shall be accomplished in the manner specified in subsection (b) of this section.

(b) Simultaneous and interim transfers, conveyances, etc.

(1) On the date of transfer, the Secretary shall simultaneously:

(A) deliver to the State a bill of sale conveying title to all rail properties of the Alaska Railroad except any interest in real property;

(B) deliver to the State an interim conveyance of the rail properties of the Alaska Railroad that are not conveyed pursuant to subparagraph (A) of this paragraph and are not subject to unresolved claims of valid existing rights;

(C) deliver to the State an exclusive license granting the State the right to use all rail properties of the Alaska Railroad not conveyed pursuant to subparagraphs (A) or (B) of this paragraph pending conveyances in accordance with the review and settlement or final administrative adjudication of claims of valid existing rights;

(D) convey to the State a deed granting the State (i) an exclusive-use easement for that portion of the right-of-way of the Alaska Railroad within the Denali National Park and Preserve extending not less than one hundred feet on either side of the main or branch line tracks, and eight feet on either side of the centerline of the "Y" track connecting the main line of the railroad to the power station at McKinley Park Station and (ii) title to railroad-related improvements within such right-of-way.

Prior to taking the action specified in subparagraphs (A) through (D) of this paragraph, the Secretary shall consult with the Secretary of the Interior. The exclusive-use easement granted pursuant to subparagraph (D) of this paragraph and all rights afforded by such easement shall be exercised only for railroad purposes, and for such other transportation, transmission, or communication purposes for which lands subject to such easement were utilized as of January 14, 1983.

(2) The Secretary shall deliver to the State an interim conveyance of rail properties of the Alaska Railroad described in paragraph (1)(C) of this subsection that become available for conveyance to the State after the date of transfer as a result of settlement, relinquishment, or final administrative adjudication pursuant to section 1205 of this title. Where the rail properties to be conveyed pursuant to this paragraph are surveyed at the time they become available for conveyance to the State, the Secretary shall deliver a patent therefor in lieu of an interim conveyance.

(3) The force and effect of an interim conveyance made pursuant to paragraphs (1)(B) or (2) of this subsection shall be to convey to and vest in the State exactly the same right, title, and interest in and to the rail properties identified therein as the State would have received had it been issued a patent by the United States. The Secretary of the Interior shall survey the land conveyed by an interim conveyance to the State pursuant to paragraphs (1)(B) or (2) of this subsection and, upon completion of the survey, the

Secretary shall issue a patent therefor.

(4) The license granted pursuant to paragraph (1)(C) of this subsection shall authorize the State to use, occupy, and directly receive all benefits of the rail properties described in the license for the operation of the State-owned railroad in conformity with the Memorandum of Understanding referred to in section 1205(b)(3) of this title. The license shall be exclusive, subject only to valid leases, permits, and other instruments issued before the date of transfer and easements reserved pursuant to subsection (c)(2) of this section. With respect to any parcel conveyed pursuant to this chapter, the license shall terminate upon conveyance of such parcel.

(c) Reservations to United States in interim conveyances and patents

(1) Interim conveyances and patents issued to the State pursuant to subsection (b) of this section shall confirm, convey and vest in the State all reservations to the United States (whether or not expressed in a particular patent or document of title), except the unexercised reservations to the United States for future rights-of-way made or required by the first section of the Act of March 12, 1914 (43 U.S.C. 975d). The conveyance to the State of such reservations shall not be affected by the repeal of such Act under section 615 of this title.

(2) In the license granted under subsection (b)(1)(C) of this section and in all conveyances made to the State under this chapter, there shall be reserved to the Secretary of the Interior, the Secretary of Defense and the Secretary of Agriculture, as appropriate, existing easements for administration (including agency transportation and utility purposes) that are identified in the report required by section 1204(a) of this title. The appropriate Secretary may obtain, only after consent of the State, such future easements as are necessary for administration. Existing and future easements and use of such easements shall not interfere with operations and support functions of the State-owned railroad.

(3) There shall be reserved to the Secretary of the Interior the right to use and occupy, without compensation, five thousand square feet of land at Talkeetna, Alaska, as described in ARR lease numbered 69-25-0003-5165 for National Park Service administrative activities, so long as the use or occupation does not interfere with the operation of the State-owned railroad. This reservation shall be effective on the date of transfer under this section or the expiration date of such lease, whichever is later.

(d) Certifications by Secretary; scope, subject matter, etc.

(1) Prior to the date of transfer, the Secretary shall certify that the State has agreed to operate the railroad as a rail carrier in intrastate and interstate commerce.

(2)(A) Prior to the date of transfer, the Secretary shall also certify that the State has agreed to assume all rights, liabilities, and obligations of the Alaska Railroad on the date of transfer, including leases, permits, licenses, contracts, agreements, claims, tariffs, accounts receivable, and accounts payable, except as otherwise provided by this chapter.

(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, the United States shall be solely responsible for--

(i) all claims and causes of action against the Alaska Railroad that accrue on or before the date of transfer, regardless of the date on which legal proceedings asserting such claims were or may be filed, except that the United States shall, in the case of any tort claim, only be responsible for any such claim against the United States that accrues before the date of transfer and results in an award, compromise, or settlement of more than $2,500, and the United States shall not compromise or settle any claim resulting in State liability without the consent of the State, which consent shall not be unreasonably withheld; and

(ii) all claims that resulted in a judgment or award against the Alaska Railroad before the date of transfer.

(C) For purposes of subparagraph (B) of this paragraph, the term ''accrue'' shall have the meaning contained in section 2401 of Title 28.

(D) Any hazardous substance, petroleum or other contaminant release at or from the State-owned rail properties that began prior to January 5, 1985, shall be and remain the liability of the United States for damages and for the costs of investigation and cleanup. Such liability shall be enforceable under 42 U.S.C. 9601 et seq. for any release described in the preceding sentence.

(3)(A) Prior to the date of transfer, the Secretary shall also certify that the State-owned railroad has established arrangements pursuant to section 1206 of this title to protect the employment interests of employees of the Alaska Railroad during the two-year period commencing on the date of transfer. These arrangements shall include provisions--

(i) which ensure that the State-owned railroad will adopt collective bargaining agreements in accordance with the provisions of subparagraph (B) of this paragraph;

(ii) for the retention of all employees, other than officers of the Alaska Railroad, who elect to transfer to the State-owned railroad in their same positions for the two-year period commencing on the date of transfer, except in cases of reassignment, separation for cause, resignation, retirement, or lack of work;

(iii) for the payment of compensation to transferred employees (other than

employees provided for in subparagraph (E) of this paragraph), except in cases of separation for cause, resignation, retirement, or lack of work, for two years commencing on the date of transfer at or above the base salary levels in effect for such employees on the date of transfer, unless the parties otherwise agree during that two-year period;

(iv) for priority of reemployment at the State-owned railroad during the two-year period commencing on the date of transfer for transferred employees who are separated for lack of work, in accordance with subparagraph (C) of this paragraph (except for officers of the Alaska Railroad, who shall receive such priority for one year following the date of transfer);

(v) for credit during the two-year period commencing on the date of transfer for accrued annual and sick leave, seniority rights, and relocation and turnaround travel allowances which have been accrued during their period of Federal employment by transferred employees retained by the State-owned railroad (except for officers of the Alaska Railroad, who shall receive such credit for one year following the date of transfer);

(vi) for payment to transferred employees retained by the State-owned railroad during the two-year period commencing on the date of transfer, including for one year officers retained or separated under subparagraph (E) of this paragraph, of an amount equivalent to the cost-of-living allowance to which they are entitled as Federal employees on the day before the date of transfer, in accordance with the provisions of subparagraph (D) of this paragraph; and

(vii) for health and life insurance programs for transferred employees retained by the State-owned railroad during the two-year period commencing on the date of transfer, substantially equivalent to the Federal health and life insurance programs available to employees on the day before the date of transfer (except for officers of the Alaska Railroad, who shall receive such credit for one year following the date of transfer).

(B) The State-owned railroad shall adopt all collective bargaining agreements which are in effect on the date of transfer. Such agreements shall continue in effect for the two-year period commencing on the date of transfer, unless the parties agree to the contrary before the expiration of that two-year period. Such agreements shall be renegotiated during the two-year period, unless the parties agree to the contrary. Any labor-management negotiation impasse declared before the date of transfer shall be settled in accordance with chapter 71 of Title 5. Any impasse declared after the date of transfer shall be subject to applicable State law.

(C) Federal service shall be included in the computation of seniority for transferred employees with priority for reemployment, as provided in subparagraph (A)(iv) of this paragraph.

(D) Payment to transferred employees pursuant to subparagraph (A)(vi) of this paragraph shall not exceed the percentage of any transferred employee's base salary level provided by the United States as a cost-of-living allowance on the day before the date of transfer, unless the parties agree to the contrary.

(E) Prior to the date of transfer, the Secretary shall also certify that the State-owned railroad has agreed to the retention, for at least one year from the date of transfer, of the offices of the Alaska Railroad, except in cases of separation for cause, resignation, retirement, or lack of work, at or above their base salaries in effect on the date of transfer, in such positions as the State-owned railroad may determine; or to the payment of lump-sum severance pay in an amount equal to such base salary for one year to officers not retained by the State-owned railroad upon transfer or, for officers separated within one year on or after the date of transfer, of a portion of such lump-sum severance payment (diminished pro rata for employment by the State-owned railroad within one year of the date of transfer prior to separation).

(4) Prior to the date of transfer, the Secretary shall also certify that the State has agreed to allow representatives of the Secretary adequate access to employees and records of the Alaska Railroad when needed for the performance of functions related to the period of Federal ownership.

(5) Prior to the date of transfer, the Secretary shall also certify that the State has agreed to compensate the United States at the value, if any, determined pursuant to section 1204(d) of this title.

(Pub.L. 97-468, Title VI, §604, Jan. 14, 1983, 96 Stat. 2556)

[**Editor's Note:** §(b)(1) was amended in 2003 to delete reference to reversion, see §1209 below. §(d)(2)(D) was added in 2004 by Pub.L. 108-447, Div. H, §152.]

1204. TRANSITION PERIOD

(a) Joint report by Secretary and Governor of Alaska; contents, preparation, etc.

Within 6 months after January 14, 1983, the Secretary and the Governor of Alaska shall jointly prepare and deliver to the Congress of the United States and the legislature of the State a report that describes to the extent possible the rail properties of the Alaska Railroad, the liabilities and obligations to be assumed by the State, the sum of money, if any, in the Alaska Railroad Revolving Fund to be withheld from the State pursuant to section 1202(10)(C) of this title, and any personal property to be withheld pursuant to section 1202(10)(D) of this title. The report shall separately identify by the

best available descriptions (1) the rail properties of the Alaska Railroad to be transferred pursuant to section 1203(b)(1)(A), (B), and (D) of this title; (2) the rail properties to be subject to the license granted pursuant to section 1203(b)(1)(C) of this title; and (3) the easements to be reserved pursuant to section 1203(c)(2) of this title. The Secretaries of Agriculture, Defense, and the Interior and the Administrator of the General Services Administration shall provide the Secretary with all information and assistance necessary to allow the Secretary to complete the report within the time required.

(b) Inspection, etc., of rail properties and records; terms and conditions; fiscal restrictions

During the period from January 14, 1983, until the date of transfer, the State shall have the right to inspect, analyze, photograph, photocopy and otherwise evaluate all of the rail properties of the Alaska Railroad and all records related to the rail properties of the Alaska Railroad maintained by any agency of the United States under conditions established by the Secretary to protect the confidentiality of proprietary business data, personnel records, and other information, the public disclosure of which is prohibited by law. During that period, the Secretary and the Alaska Railroad shall not, without the consent of the State and only in conformity with applicable law and the Memorandum of Understanding referred to in section 1205(b)(3) of this title--

(1) make or incur any obligation to make any individual capital expenditure of money from the Alaska Railroad Revolving Fund in excess of $300,000;

(2) (except as required by law) sell, exchange, give, or otherwise transfer any real property included in the rail properties of the Alaska Railroad; or

(3) lease any rail property of the Alaska Railroad for a term in excess of five years.

(c) Format for accounting practices and systems

Prior to transfer of the rail properties of the Alaska Railroad to the State, the Alaska Railroad's accounting practices and systems shall be capable of reporting data to the Interstate Commerce Commission in formats required of comparable rail carriers subject to the jurisdiction of the Interstate Commerce Commission.

(d) Fair market value; determination, terms and conditions, etc.

(1) Within nine months after January 14, 1983, the United States Railway Association (hereinafter in this section referred to as the "Association") shall determine the fair market value of the Alaska Railroad under the terms and conditions of this chapter, applying such procedures, methods and standards as are generally accepted as normal and common practice. Such determination shall include an appraisal of the real and personal property to be transferred to the State pursuant to this chapter. Such appraisal by the Association shall be conducted in the usual manner in accordance with

generally accepted industry standards, and shall consider the current fair market value and potential future value if used in whole or in part for other purposes. The Association shall take into account all obligations imposed by this chapter and other applicable law upon operation and ownership of the State-owned railroad. In making such determination, the Association shall use to the maximum extent practicable all relevant data and information, including, if relevant, that contained in the report prepared pursuant to subsection (a) of this section.

(2) The determination made pursuant to paragraph (1) of this subsection shall not be construed to affect, enlarge, modify, or diminish any inventory, valuation, or classification required by the Interstate Commerce Commission pursuant to subchapter V of chapter 107 of Title 49.

(Pub.L. 97-468, Title VI, §605(a) - (d), Jan. 14, 1983, 96 Stat. 2556)

1205. LANDS TO BE TRANSFERRED

(a) Availability of lands among the rail properties

Lands among the rail properties of the Alaska Railroad shall not be--

(1) available for selection under section 12 of the Act of January 2, 1976, as amended (43 U.S.C. 1611, note), subject to the exception contained in section 12(b)(8)(i)(D) of such Act, as amended by subsection (d)(5) of this section;

(2) available for conveyance under section 1425 of the Alaska National Interest Lands Conservation Act (Public Law 96-487; 94 Stat. 2515);

(3) available for conveyance to Chugach Natives, Inc., under sections 1429 or 1430 of the Alaska National Interest Lands Conservation Act (Public Law 96-487; 94 Stat. 2531) or under sections 12(c) or 14(h)(8) of the Alaska Native Claims Settlement Act (43 U.S.C. 1611(c) and 1613(h)(8), respectively); or

(4) available under any law or regulation for entry, location, or for exchange by the United States, or for the initiation of a claim or selection by any party other than the State or other transferee under this chapter, except that this paragraph shall not prevent a conveyance pursuant to section 12(b)(8)(i)(D) of the Act of January 2, 1976 (43 U.S.C. 1611, note), as amended by subsection (d)(5) of this section.

(b) Review and settlement of claims; administrative adjudication process; management of lands; procedures applicable

(1)(A) During the ten months following January 14, 1983, so far as practicable

consistent with the priority of preparing the report required pursuant to section 1204(a) of this title, the Secretary of the Interior, Village Corporations with claims of valid existing rights, and the State shall review and make a good faith effort to settle as many of the claims as possible. Any agreement to settle such claims shall take effect and bind the United States, the State, and the Village Corporation only as of the date of transfer of the railroad.

(B) At the conclusion of the review and settlement process provided in subparagraph (A) of this paragraph, the Secretary of the Interior shall prepare a report identifying lands to be conveyed in accordance with settlement agreements under this chapter or applicable law. Such settlement shall not give rise to a presumption as to whether a parcel of land subject to such agreement is or is not public land.

(2) The Secretary of the Interior shall have the continuing jurisdiction and duty to adjudicate unresolved claims of valid existing rights pursuant to applicable law and this chapter. The Secretary of the Interior shall complete the final administrative adjudication required under this subsection not later than three years after January 14, 1983, and shall complete the survey of all lands to be conveyed under this chapter not later than five years after January 14, 1983, and after consulting with the Governor of the State of Alaska to determine priority of survey with regard to other lands being processed for patent to the State. The Secretary of the Interior shall give priority to the adjudication of Village Corporation claims as required in this section. Upon completion of the review and settlement process required by paragraph (1)(A) of this subsection, with respect to lands not subject to an agreement under such paragraph, the Secretary of the Interior shall adjudicate which lands subject to claims of valid existing rights filed by Village Corporations, if any, are public lands and shall complete such final administrative adjudication within two years after January 14, 1983.

(3) Pending settlement or final administrative adjudication of claims of valid existing rights filed by Village Corporations prior to the date of transfer or while subject to the license granted to the State pursuant to section 1203(b)(1)(C) of this title, lands subject to such claims shall be managed in accordance with the Memorandum of Understanding among the Federal Railroad Administration, the State, Eklutna, Incorporated, Cook Inlet Region, Incorporated (as that term is used in section 12 of the Act of January 2, 1976 (Public Law 94-204; 89 Stat. 1150)), and Toghotthele Corporation, executed by authorized officers or representatives of each of these entities. Duplicate originals of the Memorandum of Understanding shall be maintained and made available for public inspection and copying in the Office of the Secretary, at Washington, District of Columbia, and in the Office of the Governor of the State of Alaska, at Juneau, Alaska.

(4) The following procedures and requirements are established to promote finality of administrative adjudication of claims of valid existing rights filed by Village Corporations, to clarify and simplify the title status of lands subject to such claims, and to avoid potential impairment of railroad operations resulting from joint or divided ownership in substantial segments of right-of-way:

(A)(i) Prior to final administrative adjudication of Village Corporation claims of valid existing rights in land subject to the license granted under section 1203(b)(1)(C) of this title, the Secretary of the Interior may, notwithstanding any other provision of law, accept relinquishment of so much of such claims as involved lands within the right-of-way through execution of an agreement with the appropriate Village Corporation effective on or after the date of transfer. Upon such relinquishment, the interest of the United States in the right-of-way shall be conveyed to the State pursuant to section 1203(b)(1)(B) or (2) of this title.

(ii) With respect to a claim described in clause (i) of this subparagraph that is not settled or relinquished prior to final administrative adjudication, the 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. Upon failure of the interested Village Corporation to relinquish so much of its claims as involve lands within the right-of-way prior to final adjudication of valid existing rights, the Secretary shall convey to the State pursuant to section 1203(b)(1)(B) or (2) of this title all right, title and interest of the United States in and to the right-of-way free and clear of such Village Corporation's claim to and interest in lands within such right-of-way.

(B) Where lands within the right-of-way, or any interest in such lands, have been conveyed from Federal ownership prior to January 14, 1983, or is subject to a claim of valid existing rights by a party other than a Village Corporation, the conveyance to the State of the Federal interest in such properties pursuant to section 1203(b)(1)(B) or (2) of this title shall grant not less than an exclusive-use easement in such properties. The foregoing requirements shall not be construed to permit the conveyance to the State of less than the entire Federal interest in the rail properties of the Alaska Railroad required to be conveyed by section 1203(b) of this title. If an action is commenced against the State or the United States contesting the validity or existence of a reservation of right-of-way for the use or benefit of the Alaska Railroad made prior to January 14, 1983, the Secretary of the Interior, through the Attorney General, shall appear in and defend such action.

(c) Judicial review; remedies available; standing of State

(1) The final administrative adjudication pursuant to subsection (b) of this section shall be final agency action and subject to judicial review only by an action brought in the United States District Court for the District of Alaska.

(2) No administrative or judicial action under this chapter shall enjoin or otherwise delay the transfer of the Alaska Railroad pursuant to this chapter, or substantially impair or impede the operations of the Alaska Railroad or the State-owned railroad.

(3) Before the date of transfer, the State shall have standing to participate in any administrative determination or judicial review pursuant to this chapter. If transfer to the State does not occur pursuant to section 1203 of this title, the State shall not thereafter have standing to participate in any such determination or review.

(d) Omitted [amended various Native claim statutes, see 43 U.S.C. §1611 note]

(e) Liability of State for damage to land while used under license

The State shall be liable to a party receiving a conveyance of land among the rail properties of the Alaska Railroad subject to the license granted pursuant to section 1203(b)(1)(C) of this title for damage resulting from use by the State of the land under such license in a manner not authorized by such license.

(Pub.L. 97-468, Title VI, §606(a) - (c), (e), Jan. 14, 1983, 96 Stat. 2556)

[**Editor's Note:** §(c)(1) amended in 1984 to delete reference to expedited review as if under ANILCA, see Pub.L. 98-620, §402(52).]

1206. EMPLOYEES OF ALASKA RAILROAD

(a) Coverage under Federal civil service retirement laws; election, funding, nature of benefits, etc., for employees transferring to State-owned railroad; voluntary separation incentives

(1) Any employees who elect to transfer to the State-owned railroad and who on the day before the date of transfer are subject to the civil service retirement law (subchapter III of chapter 83 of Title 5) shall, so long as continually employed by the State-owned railroad without a break in service, continue to be subject to such law, except that the State-owned railroad shall have the option of providing benefits in accordance with the provisions of paragraph (2) of this subsection. Employment by the State-owned railroad without a break in continuity of service shall be considered to be employment by the United States Government for purposes of subchapter III of chapter 83 of Title 5. The State-owned railroad shall be the employing agency for purposes of section 8334(a) of Title 5 and shall contribute to the Civil Service Retirement and Disability Fund a sum as provided by such section, except that such sum shall be determined by applying to the total basic pay (as defined in section 8331(3) of Title 5) paid to the employees of the State-owned railroad who are covered by the civil service retirement law, the per centum rate determined annually by the Director of the Office of Personnel Management to be the excess of the total normal cost per centum rate of the civil service retirement system over the employee deduction rate specified in section 8334(a) of Title 5. The State-owned railroad shall pay into the Federal Civil Service Retirement and Disability Fund that portion of the cost of administration of such Fund which is demonstrated by the Director of the Office of Personnel Management to be

attributable to its employees.

(2) At any time during the two-year period commencing on the date of transfer, the State-owned railroad shall have the option of providing to transferred employees retirement benefits, reflecting prior Federal service, in or substantially equivalent to benefits under the retirement program maintained by the State for State employees. If the State decides to provide benefits under this paragraph, the State shall provide such benefits to all transferred employees, except those employees who will meet the age and service requirements for retirement under section 8336(a), (b), (c) or (f) of Title 5 within five years after the date of transfer and who elect to remain participants in the Federal retirement program.

(3) If the State provides benefits under paragraph (2) of this subsection--

(A) the provisions of paragraph (1) of this subsection regarding payments into the Civil Service Retirement and Disability Fund for those employees who are transferred to the State program shall have no further force and effect (other than for employees who will meet the age and service requirements for retirement under section 8336(a), (b), (c) or (f) of Title 5 within five years after the date of transfer and who elect to remain participants in the Federal retirement program); and

(B) all of the accrued employee and employer contributions and accrued interest on such contributions made by and on behalf of the transferred employees during their prior Federal service (other than amounts for employees who will meet the age and service requirements for retirement under section 8336(a), (b), (c) or (f) of Title 5 within five years after the date of transfer and who elect to remain participants in the Federal retirement program) shall be withdrawn from the Federal Civil Service Retirement and Disability Fund and shall be paid into the retirement fund utilized by the State-owned railroad for the transferred employees, in accordance with the provisions of paragraph (2) of this subsection. Upon such payment, credit for prior Federal service under the Federal civil service retirement system shall be forever barred, notwithstanding the provisions of section 8334 of Title 5.

(4)(A) The State-owned railroad shall be included in the definition of "agency" for purposes of section 3(a), (b), (c), and (e) of the Federal Workforce Restructuring Act of 1994 and may elect to participate in the voluntary separation incentive program established under such Act. Any employee of the State-owned railroad who meets the qualifications as described under the first sentence of paragraph (1) shall be deemed an employee under such Act. [**Editor's Note:** This section was added in 1994, Pub.L. 103-226, §10(a).]

(B) An employee who has received a voluntary separation incentive payment under this paragraph and accepts employment with the State-owned railroad within 5 years after the date of separation on which payment of the incentive is based shall be required to repay the entire amount of the incentive payment unless the head of the State-owned

railroad determines that the individual involved possesses unique abilities and is the only qualified applicant available for the position.

(b) Coverage for employees not transferring to State-owned railroad

Employees of the Alaska Railroad who do not transfer to the State-owned railroad shall be entitled to all of the rights and benefits available to them under Federal law for discontinued employees.

(c) Rights and benefits of transferred employees whose employment with State-owned railroad is terminated

Transferred employees whose employment with the State-owned railroad is terminated during the two-year period commencing on the date of transfer shall be entitled to all of the rights and benefits of discontinued employees that such employees would have had under Federal law if their termination had occurred immediately before the date of the transfer, except that financial compensation paid to officers of the Alaska Railroad shall be limited to that compensation provided pursuant to section 1203(d)(3)(E) of this title. Such employees shall also be entitled to seniority and other benefits accrued under Federal law while they were employed by the State-owned railroad on the same basis as if such employment had been Federal service.

(d) Lump-sum payment for unused annual leave for employees transferring to State-owned railroad

Any employee who transfers to the State-owned railroad under this chapter shall not be entitled to lump-sum payment for unused annual leave under section 5551 of Title 5, but shall be credited by the State with the unused annual leave balance at the time of transfer.

(e) Continued coverage for certain employees and annuitants in Federal health benefits plans and life insurance plans [**Editor's Note:** This entire section was added in 1988, Pub.L. 100-238, and replaced in current form in 1994, Pub.L. 103-226, §10(b).]

(1) Any person described under the provisions of paragraph (2) may elect life insurance coverage under chapter 87 of Title 5 and enroll in a health benefits plan under chapter 89 of Title 5 in accordance with the provisions of this subsection.

(2) The provisions of paragraph (1) shall apply to any person who--

(A) on March 30, 1994, is an employee of the State-owned railroad;

(B) has 20 years or more of service (in the civil service as a Federal employee or as an employee of the State-owned railroad, combined) on the date of retirement from the State-owned railroad; and

(C)(i) was covered under a life insurance policy pursuant to chapter 87 of Title 5 on January 4, 1985, for the purpose of electing life insurance coverage under the provisions of paragraph (1); or

(ii) was enrolled in a health benefits plan pursuant to chapter 89 of Title 5 on January 4, 1985, for the purpose of enrolling in a health benefits plan under the provisions of paragraph (1).

(3) For purposes of this section, any person described under the provisions of paragraph (2) shall be deemed to have been covered under a life insurance policy under chapter 87 of Title 5 and to have been enrolled in a health benefits plan under chapter 89 of Title 5 during the period beginning on January 5, 1985, through the date of retirement of any such person.

(4) The provisions of paragraph (1) shall not apply to any person described under paragraph (2) until the date such person retires from the State-owned railroad.

(Pub.L. 97-468, Title VI, §607, Jan. 14, 1983, 96 Stat. 2556)

1207. STATE OPERATION

(a) Laws, authorities, etc., applicable to State-owned railroad with status as rail carrier engaged in interstate and foreign commerce

(1) After the date of transfer to the State pursuant to section 1203 of this title, the State-owned railroad shall be a rail carrier engaged in interstate and foreign commerce subject to part A of subtitle IV of Title 49 and all other Acts applicable to rail carriers subject to that chapter, including the antitrust laws of the United States, except, so long

as it is an instrumentality of the State of Alaska, the Railroad Retirement Act of 1974 (45 U.S.C. 231 et seq.), the Railroad Retirement Tax Act (26 U.S.C. 3201 et seq.), the Railway Labor Act (45 U.S.C. 151 et seq.), the Act of April 22, 1908 (45 U.S.C. 51 et seq.) (popularly referred to as the "Federal Employers' Liability Act"), and the Railroad Unemployment Insurance Act (45 U.S.C. 351 et seq.). Nothing in this chapter shall preclude the State from explicitly invoking by law any exemption from the antitrust laws as may otherwise be available.

(2) The transfer to the State authorized by section 1203 of this title and the conferral of jurisdiction to the Interstate Commerce Commission pursuant to paragraph (1) of this subsection are intended to confer upon the State-owned railroad all business opportunities available to comparable railroads, including contract rate agreements meeting the requirements of section 10713 of Title 49, notwithstanding any participation in such agreements by connecting water carriers.

(3) All memoranda which sanction noncompliance with Federal railroad safety regulations contained in 49 CFR Parts 209-236, and which are in effect on the date of transfer, shall continue in effect according to their terms as "waivers of compliance" (as that term is used in section 20103(d) of Title 49).

(4) The operation of trains by the State-owned railroad shall not be subject to the requirement of any State or local law which specifies the minimum number of crew members which must be employed in connection with the operation of such trains.

(5) Revenues generated by the State-owned railroad, including any amount appropriated or otherwise made available to the State-owned railroad, shall be retained and managed by the State-owned railroad for railroad and related purposes.

(6)(A) After the date of transfer, continued operation of the Alaska Railroad by a public corporation, authority or other agency of the State shall be deemed to be an exercise of an essential governmental function, and revenue derived from such operation shall be deemed to accrue to the State for the purposes of section 115(a)(1) of Title 26. Obligations issued by such entity shall also be deemed obligations of the State for the purposes of section 103(a)(1) of Title 26, but not obligations within the meaning of section 103(b)(2) of Title 26.

(B) Nothing in this chapter shall be deemed or construed to affect customary tax treatment of private investment in the equipment or other assets that are used or owned by the State-owned railroad.

(b) Procedures for issuance of certificate of public convenience and necessity; inventory, valuation, or classification of property; additional laws, authorities, etc., applicable

As soon as practicable after January 14, 1983, the Interstate Commerce Commission shall promulgate an expedited, modified procedure for providing on the date of transfer a certificate of public convenience and necessity to the State-owned railroad. No inventory, valuation, or classification of property owned or used by the State-owned railroad pursuant to subchapter V of chapter 107 of Title 49 shall be required during the two-year period after the date of transfer. The provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and section 382(b) of the Energy Policy and Conservation Act (42 U.S.C. 6362(b)) shall not apply to actions of the Commission under this subsection.

(c) Eligibility for participation in Federal railroad assistance programs

The State-owned railroad shall be eligible to participate in all Federal railroad assistance programs on a basis equal to that of other rail carriers subject to part A of subtitle IV of Title 49.

(d) Laws and regulations applicable to national forest and park lands; limitations on Federal actions

After the date of transfer to the State pursuant to section 1203 of this title, the portion of the rail properties within the boundaries of the Chugach National Forest and the exclusive-use easement within the boundaries of the Denali National Park and Preserve shall be subject to laws and regulations for the protection of forest and park values. The right to fence the exclusive-use easement within Denali National Park and Preserve shall be subject to the concurrence of the Secretary of the Interior. The Secretary of the Interior, or the Secretary of Agriculture where appropriate, shall not act pursuant to this subsection without consulting with the Governor of the State of Alaska or in such a manner as to unreasonably interfere with continued or expanded operations and support functions authorized under this chapter.

(e) The State-owned railroad may take any necessary or appropriate action, consistent with Federal railroad safety laws, to preserve and protect its rail properties in the interests of safety.

(Pub.L. 97-468, Title VI, §608, Jan. 14, 1983, 96 Stat. 2556)

[**Editor's Note:** §§(a)(1) and (c) were amended in 1995 to reflect abolition of the Interstate Commerce Commission, Pub.L. 104-88, §326. §(a)(5) was amended and § (e) was added in 2004, Pub.L. 108-447, Div. H, §152.]

1208. FUTURE RIGHTS-OF-WAY

(a) Access across Federal lands; application approval

After January 14, 1983, the State or State-owned railroad may request the Secretary of the Interior or the Secretary of Agriculture, as appropriate under law, to expeditiously approve an application for a right-of-way in order that the Alaska Railroad or State-owned railroad may have access across Federal lands for transportation and related purposes. The State or State-owned railroad may also apply for a lease, permit, or conveyance of any necessary or convenient terminal and station grounds and material sites in the vicinity of the right-of-way for which an application has been submitted.

(b) Consultative requirements prior to approval of application; conformance of rights-of-way, etc.

Before approving a right-of-way application described in subsection (a) of this section, the Secretary of the Interior or the Secretary of Agriculture, as appropriate, shall consult with the Secretary. Approval of an application for a right-of-way, permit, lease, or conveyance described in subsection (a) of this section shall be pursuant to applicable law. Rights-of-way, grounds, and sites granted pursuant to this section and other applicable law shall conform, to the extent possible, to the standards provided in the Act of March 12, 1914 (43 U.S.C. 975 et seq.) and section 1202(6) of this title. Such conformance shall not be affected by the repeal of such Act under section 615 of this title.

(c) Reversion to United States [Repealed. Pub.L. 108-7, Div. I, Title III, §345(5), Feb. 20, 2003, 117 Stat. 418.]

Reversion to the United States of any portion of any right-of-way or exclusive-use easement granted to the State or State-owned railroad shall occur only as provided in section 1209 of this title. For purposes of such section, the date of the approval of any such right-of-way shall be deemed the "date of transfer."

(Pub.L. 97-468, Title VI, §609, Jan. 14, 1983, 96 Stat. 2556)

1209. REVERSION [Repealed. Pub.L. 108-7, Div. I, Title III, §345(5), Feb. 20, 2003, 117 Stat. 418.]

(a) Reversion or payment to Federal Government for conversion to use preventing
State-owned railroad from continuing to operate

If, within ten years after the date of transfer to the State authorized by section 1203 of this title, the Secretary finds that all or part of the real property transferred to the State under this chapter, except that portion of real property which lies within the boundaries of the Denali National Park and Preserve, is converted to a use that would prevent the State-owned railroad from continuing to operate, that real property (including permanent improvements to the property) shall revert to the United States Government, or (at the option of the State) the State shall pay to the United States Government an amount determined to be the fair market value of that property at the time its conversion prevents continued operation of the railroad.

(b) Reversion upon discontinuance by State of use of any land within right-of-way;
criteria for discontinuance

If, after the date of transfer pursuant to section 1203 of this title, the State discontinues use of any land within the right-of-way, the State's interest in such land shall revert to the United States. The State shall be considered to have discontinued use within the meaning of this subsection and subsection (d) of this section when:

(1) the Governor of the State of Alaska delivers to the Secretary of the Interior a notice of such discontinuance, including a legal description of the property subject to the notice, and a quitclaim deed thereto; or

(2) the State has made no use of the land for a continuous period of eighteen years for transportation, communication, or transmission purposes. Notice of such discontinuance shall promptly be published in the Federal Register by the Secretary, the Secretary of the Interior, or the Secretary of Agriculture, and reversion shall be effected one year after such notice, unless within such one-year period the State brings an appropriate action in the United States District Court for the District of Alaska to establish that the use has been continuing without an eighteen-year lapse. Any such action shall have the effect of staying reversion until exhaustion of appellate review from the final judgment in that action or termination of the right to seek such review, whichever first occurs.

(c) Conveyances by United States subsequent to reversion

Upon such reversion pursuant to subsection (b) of this section, the Secretary of the Interior shall immediately convey by patent to abutting landowners all right, title and interest of the United States. Where land abutting the reverted right-of-way is owned by

different persons or entities, the conveyance made pursuant to this subsection shall extend the property of each abutting owner to the centerline of the right-of-way.

(d) Discontinuance by State of use of national park or forest lands; jurisdiction upon reversion

If use is discontinued (as that term is used in subsection (b) of this section) of all or part of those properties of the Alaska Railroad transferred to the State pursuant to this chapter which lie within the boundaries of the Denali National Park and Preserve or the Chugach National Forest, such properties or part thereof (including permanent improvements to the property) shall revert to the United States and shall not be subject to subsection (c) of this section. Upon such reversion, jurisdiction over that property shall be transferred to the Secretary of the Interior or the Secretary of Agriculture, as appropriate, for administration as part of the Denali National Park and Preserve or the Chugach National Forest.

(e) Payment into Treasury of United States of excess proceeds from sale or transfer of all or substantially all of State-owned railroad; limitations

Except as provided in subsections (a) through (d) of this section, if, within five years after the date of transfer to the State pursuant to section 1203 of this title, the State sells or transfers all or substantially all of the State-owned railroad to an entity other than an instrumentality of the State, the proceeds from the sale or transfer that exceed the cost of any rehabilitation and improvement made by the State for the State-owned railroad and any net liabilities incurred by the State for the State-owned railroad shall be paid into the general fund of the Treasury of the United States.

(f) Enforcement by Attorney General

The Attorney General, upon the request of the Secretary, the Secretary of the Interior, or the Secretary of Agriculture, shall institute appropriate proceedings to enforce this section in the United States District Court for the District of Alaska.

(Pub.L. 97-468, Title VI, §610, Jan. 14, 1983, 96 Stat. 2556)

1210. OTHER DISPOSITION

If the Secretary has not certified that the State has satisfied the conditions under section 1203 of this title within one year after the date of delivery of the report referred to in section 1204(a) of this title, the Secretary may dispose of the rail properties of the Alaska Railroad. Any disposal under this section shall give preference to a buyer or transferee who will continue to operate rail service, except that--

(1) such preference shall not diminish or modify the rights of the Cook Inlet Region, Incorporated (as that term is used in section 12 of the Act of January 2, 1976 (Public Law 94-204; 89 Stat. 1150)), pursuant to such section, as amended by section 606(d) of this title; and

(2) this section shall not be construed to diminish or modify the powers of consent of the Secretary or the State under section 12(b)(8) of such Act, as amended by section 606(d)(5) of this title.

Any disposal under this section shall be subject to valid existing rights.

(Pub.L. 97-468, Title VI, §611, Jan. 14, 1983, 96 Stat. 2556)

1211. DENALI NATIONAL PARK AND PRESERVE LANDS

On the date of transfer to the State (pursuant to section 1203 of this title) or other disposition (pursuant to section 1210 of this title), that portion of rail properties of the Alaska Railroad within the Denali National Park and Preserve shall, subject to the exclusive-use easement granted pursuant to section 1203(b)(1)(D) of this title, be transferred to the Secretary of the Interior for administration as part of the Denali National Park and Preserve, except that a transferee under section 1210 of this title shall receive the same interest as the State under section 1203(b)(1)(D) of this title.

(Pub.L. 97-468, Title VI, §612, Jan. 14, 1983, 96 Stat. 2556)

1212. APPLICABILITY OF OTHER LAWS

(a) Actions subject to other laws

The provisions of chapter 5 of Title 5 (popularly known as the Administrative Procedure Act, and including provisions popularly known as the Government in the Sunshine Act), the Federal Advisory Committee Act (5 U.S.C. App. 1 et seq.), the National Historic Preservation Act (16 U.S.C. 470 et seq.), section 303 of Title 49, and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall not apply to actions taken pursuant to this chapter, except to the extent that such laws may be applicable to granting of rights-of-way under section 1208 of this title.

(b) Federal surplus property disposal; withdrawal or reservation of lands

The enactment of this chapter, actions taken during the transition period as provided in section 1204 of this title, and transfer of the rail properties of the Alaska Railroad under authority of this chapter shall be deemed not to be the disposal of Federal surplus property under the Federal Property and Administrative Services Act of 1949 or the Act of October 3, 1944, popularly referred to as the "Surplus Property Act of

1944" (50 U.S.C. App. 1622). Such events shall not constitute or cause the revocation of any prior withdrawal or reservation of land for the use of the Alaska Railroad under the Act of March 12, 1914 (43 U.S.C. 975 et seq.), the Alaska Statehood Act (note preceding 48 U.S.C. 21), the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), the Act of January 2, 1976 (Public Law 94-204; 89 Stat. 1145), the Alaska National Interest Lands Conservation Act (Public Law 96-487; 94 Stat. 2371), and the general land and land management laws of the United States.

(c) Ceiling on Government contributions for Federal employees health benefits insurance premiums

Beginning on January 14, 1983, the ceiling on Government contributions for Federal employees health benefits insurance premiums under section 8906(b)(2) of Title 5 shall not apply to the Alaska Railroad.

(d) Acreage entitlement of State or Native Corporation

Nothing in this chapter is intended to enlarge or diminish the acreage entitlement of the State or any Native Corporation pursuant to existing law.

(e) Judgments involving interests, etc., of Native Corporations

With respect to interests of Native Corporations under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) and the Alaska National Interest Lands Conservation Act (16 U.S.C. 3101 et seq.), except as provided in this chapter, nothing contained in this chapter shall be construed to deny, enlarge, grant, impair, or otherwise affect any judgment heretofore entered in a court of competent jurisdiction, or valid existing right or claim of valid existing right.

(Pub.L. 97-468, Title VI, §613, Jan. 14, 1983, 96 Stat. 2556)

1213. CONFLICT WITH OTHER LAWS

The provisions of this chapter shall govern if there is any conflict between this chapter and any other law.

(Pub.L. 97-468, Title VI, §614, Jan. 14, 1983, 96 Stat. 2556)

1214. SEPARABILITY

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

(Pub.L. 97-468, Title VI, §616, Jan. 14, 1983, 96 Stat. 2556)

[**Editor's Note:** Approved January 14, 1983.]

[**Editor's Note:** §615 of Pub.L. 97-468 was not codified into the U.S. Code. It amended numerous other federal statutes to reflect transfer of the Alaska Railroad from federal ownership, for example the Public Health Services Act, the Railroad Retirement Act of 1974, the Department of Transportation Act, and so on.]

06/25/96
0900
JOINT COMMITTEE ON LEGISLATIVE BUDGET AND AUDIT
June 25, 1996
9:00 a.m.
Fairbanks, Alaska

MEMBERS PRESENT

Representative Terry Martin, Chairman
Representative Con Bunde
Representative Gary Davis
Representative Vic Kohring

Senator Randy Phillips, Vice Chairman
Senator Al Adams

MEMBERS ABSENT

Representative John Davies
Representative Mark Hanley

Senator Rick Halford
Senator Steve Frank
Senator Steve Rieger
Senator Fred Zharoff

ALSO PRESENT

Representative Jeannette James

COMMITTEE CALENDAR

ALASKA RAILROAD UPDATE

WITNESS REGISTER

RANDY WELKER, Legislative Auditor
Legislative Audit Division
Legislative Affairs Agency
P.O. Box 113300
Juneau, Alaska 99811-3300
Telephone: (907) 465-3830
POSITION STATEMENT:Provided overview of what the audit committee has done.

EVAN ALLEN, Economic and Financial Consultant
Klick Kent Allen
66 Canal Center Plaza, Suite 305
Alexandria, Virginia 22314

Telephone: (730) 683-1120
POSITION STATEMENT:Provided information on history, valuations and other railroad issues.

ARNOLD TESH, President
Arnold S. Tesh Advisors (counselors and appraisers,
specializing in railroad assets and real property)
1001 "G" Street, NW, Suite 1210
Washington, D.C. 20001
Telephone: (Not provided)
POSITION STATEMENT:Provided information on history, valuations and other railroad issues.

BILL SHEFFIELD, Former Governor and
Chairman, Board of Directors
Alaska Railroad Corporation
P.O. Box 107500
Anchorage, Alaska 99510-7500
Telephone: (907) 265-2403
POSITION STATEMENT: Provided information on the railroad.

JIM BLASINGAME, Vice President
Corporate Affairs
Alaska Railroad Corporation
P.O. Box 107500
Anchorage, Alaska 99510-7500
Telephone: (907) 265-2403
POSITION STATEMENT: Provided information on the railroad.

PHYLLIS JOHNSON, Vice President
General Counsel
Alaska Railroad Corporation
P.O. Box 107500
Anchorage, Alaska 99510-7500
Telephone: (907) 265-2403
POSITION STATEMENT: Provided information on the railroad.

JOHN BURNS, Vice President
Real Estate

Alaska Railroad Corporation
P.O. Box 107500
Anchorage, Alaska 99510-7500
Telephone: (907) 265-2403
POSITION STATEMENT: Provided information on the railroad.

BOB HATFIELD, President and CEO
Alaska Railroad Corporation
P.O. Box 107500

Anchorage, Alaska 99510-7500
Telephone: (907) 265-2403
POSITION STATEMENT: Provide information on land the railroad.

ACTION NARRATIVE

TAPE 96-LB&A (TAPE 1 OF 3), SIDE A
[No log notes or tape numbers were provided]

CHAIRMAN TERRY MARTIN called the Joint Committee on Legislative Budget and Audit meeting to order at 9:00 a.m. in Fairbanks. Members present at the call to order were Representatives Martin, Bunde and Davis, and Senators Phillips and Adams. Representative Kohring joined the meeting later.

CHAIRMAN MARTIN told members the meeting was to provide an update since the state's purchase of the Alaska Railroad 13 years ago. Questions to be addressed would include what to do with the land, how much is needed, what to do with the excess land, and who should decide that - the legislature, the Department of Natural Resources (DNR) or the Alaska Railroad Corporation.

CHAIRMAN MARTIN said that as part of the Alaska Railroad Transfer Act (ARTA) of 1982, the railroad was supposed to be offered for sale every five years; the vision then was that the railroad would be an albatross around the state's neck, as it had been around the federal government's neck. However, the state's investment of $22 million may have paid off.

CHAIRMAN MARTIN advised members that they would hear from: Randy Welker, legislative auditor, would give an overview of what the audit committee has done; Evan Allen and Arnie Tesh, railroad specialists involved in the original ARTA (a copy of that 790-page document was at the meeting); a group from the Alaska Railroad

Corporation, including Bill Sheffield, chairman of the board, who was governor at the time of the purchase, as well as Bob Hatfield, president and chief executive officer; they would provide an update on land uses. That afternoon, there would be an open session for some of the users of the railroad to be heard.

RANDY WELKER, Legislative Auditor, Legislative Audit Division, Legislative Affairs Agency, reported that the legislature has not taken an active role in operation of the Alaska Railroad. There has been little change in ARTA over the years. In 1988, the statute was changed that required the railroad to report every five years and to analyze any potential sales. In addition, language was taken out that required documentation of at least three offers to sell.

MR. WELKER told members the railroad is required to have a financial audit and a performance audit done by experts; the performance audit has been done by a company called Mercer for the last four or five years. Mr. Welker recommended that the committee get copies of those reports to see how the experts view the railroad operations; the experts point out concerns and recommend improvements, similar to how the Legislative Audit Division conducts audits of state agencies.

MR. WELKER said although the audit division has had limited involvement overall with the railroad, it has been called in to look at a variety of topics that often deal with the railroad's utilization of their lands which are not used primarily for railroad operations. They have looked into some procurement issues, but the majority of time spent relates to real estate transactions. They also monitor the railroad's financial statements and contact them for information about the operation and the financial status.

MR. WELKER noted that in the valuation of the railroad under ARTA, Mr. Tesh was involved in valuing the real estate assets, Mr. Allen looked at the earnings valuation, and they supervised other consultants. Since then, both have worked extensively on railroad issues. They have been asked to summarize their roles and responsibilities in the original transfer, answer questions and discuss the current status of the railroad.

SENATOR ADAMS asked whether any past audit showed what land usage is necessary to operate the Alaska Railroad.

RANDY WELKER said no.

SENATOR ADAMS asked whether it is 12,000 or 18,000 acres.

RANDY WELKER said he couldn't answer that.

EVAN ALLEN, Economic and Financial Consultant, Klick Kent Allen, came forward, specifying that he and Mr. Tesh were asked to look at five different areas: 1) what was done in 1983 for the original valuation; 2) the financial statements and comments on that; 3) HB 136, passed in the House and waiting for the Governor's signature; 4) whether the real estate should be parceled off of the railroad; and 5) what valuation methodology should be used. He suggested that many public policy issues need to be addressed before the railroad or parts of it can be sold.

MR. ALLEN offered some history. The U.S. Railway Association was created to help solve the Northeast rail crisis in the early 1970s when "Penn Central" went bankrupt; he and Mr. Tesh both worked there at the time. In 1982, U.S. Senator Ted Stevens asked the federal government to give the state of Alaska the railroad, to which then-President Reagan was amenable. U.S. Senator Metzenbaum, "guardian of the federal treasury," had said it couldn't be given away because there is some value to it. As a result, the ARTA was passed, requiring the U.S. Railway Association to value the railroad on the basis of what a private buyer would pay for the railroad. This valuation was divided into two parts: the "going concern value," and the railroad value and real estate aspects.

MR. ALLEN continued, explaining that the railroad had been valued by taking a five-year projection of the railroad earnings, revenues expenses and capital; adjustments were made for the Usibelli coal mine's coming on earlier than anticipated and productivity improvements expected. It was thought that the forecast given back then did not adequately have enough money to bring the railroad up to the preferred capital improvements that were needed. Another forecast was made for five years, as well as earnings of the railroad for 10 years, using two different scenarios: first, if the railroad shut down at the end of tenth year and all assets were sold and, second, if the railroad continued to operate.

MR. ALLEN explained that for that valuation, the cash flows and the

present value were calculated; after that, there was a negative value for the "going concern value" of the railroad, which is completely separate from the real estate value that Mr. Tesh would detail. Under the two scenarios there was one negative value, $25 million, which was just the railroad operation added to the positive value of the real estate; this is the value that the state of Alaska could pay. The way the transfer legislation worked, the valuation was binding on the federal government but not on the state of Alaska. The state looked at the numbers and decided this was a more-than-fair price to pay for the railroad. The numbers were off a little bit, but the conclusions turned out to be right. The last ten years' cash flow generated by the rail operation itself justifies the value on the railroad operations.

ARNOLD TESH, President, Arnold S. Tesh Advisors, informed the committee that he has done property valuation and portfolios for railroads for nearly 30 years; he and Mr. Allen were there to help legislators and the current management of the railroad to reach decisions regarding its management and disposition. He noted that some of the 1983 issues are still around.

MR. TESH told members the most important determination from the 1983 valuation was that the Alaska Railroad would make a profit from prudent management of its real estate portfolio. However, prudent management would probably not result in the overall profitable or positive return with the operation of the railroad, which is typical in many railroad companies. Valuation of the real estate in 1980 was a determination of the present worth of future net proceeds.

MR. TESH said they were looking for a conclusion to supply to the state in the 1980s about what it should pay for the right to receive future net income from the ownership and management of real estate. The state was required to operate certain property and do certain things with certain property, but it was barred from doing other things. The legal requirements forced a valuation procedure whereby they couldn't look at what the property was worth in 1983; they had to look at what the property might be worth in 1993. He restated that it projected positive for real estate but negative for operations.

MR. TESH listed some of the issues in valuation: 1) what property is required to operate a railroad, a question even more critical

today than in 1983; 2) how the value of non-operating property would be determined; 3) title issues, which should be kept in mind even though they weren't considered in determining the purchase price in 1983; 4) when the return on the investment can be realized, a bigger issue today because real estate is not the safe investment it was in 1983; 5) coal, a commodity that is highly volatile in affecting real estate value, as well as railroad operations; and 6) leasing situations, which are more stable now. Mr. Tesh noted that the railroad has focused more than ever on the management of leasing efforts.

MR. TESH explained that the railroad had been valued as the present worth to future net benefits, determining what the state would require as a measurement of its own returns. Based on the discussions, it appears that once again Alaska has to deal with these decisions, because for ten years the Alaska Railroad was barred from liquidating or transferring certain assets. The rights to make financial decisions without violating the sales contract are now in place. Mr. Tesh told members that when the price that Alaska should pay for the railroad was determined, Alaska paid a lower price because it was barred from making certain decisions.

MR. TESH said the Alaska Railroad is different from others in many ways. It is not connected to any other rail system, and its operating existence is directly tied to extremely volatile commodity markets. It is at the mercy of external factors outside the state, and approximately 45 percent of the total operating revenue is from two major shippers. Although it has extraordinarily valuable real estate, the value distribution is very lopsided. The fact that approximately less than 5 percent of the total land area of the Alaska Railroad, and about 75 percent of its value, is in Anchorage highlights a major issue. The Alaska Railroad is operated by a for-profit corporation but is subject to the needs and demands of the legislature. This balancing act is as much as issue in discussing the disposition as it is for the ongoing management and continuation of the Alaska Railroad as a profitable enterprise.

MR. TESH explained that in the 1980s the U.S. Railway Association was not asked to consider what was in the best interest of Alaska; it was asked to consider what it was worth. What is best for the railroad and for Alaska now depends on what is physically possible, appropriately supported and financially feasible, as well as what

produces the greatest value to Alaskans. There are internal values, as well as social and macroeconomic issues. On that basis, this is a multidimensional situation that requires periodic review. Doing nothing is as much a decision as doing something.

TAPE 96-LB&A (TAPE 1 OF 3), SIDE B

MR. TESH referred to the railroad's financial statement. He pointed out that the loss from operations has been offset by very healthy income from real estate. If the state is now contemplating selling the railroad without any real estate, he isn't sure they will find anyone who wants to continue to lose money, unless there is something that they can do with the railroad.

MR. TESH reminded members that the state, after its initial purchase price, has not given the railroad any kind of subsidy, although $9 million has been put aside to acquire equipment pending the start of a project. Nor has the railroad paid directly back to the state any of the purchase price. The state's return has been in macroeconomic terms, by whatever additional jobs have been generated by the railroad, without a dividend.

SENATOR PHILLIPS asked whether any federal funds had been added to the railroad since 1983.

MR. ALLEN said the federal money he is aware of is a $10 million grant from the Department of Transportation for the nominal passenger service.

REPRESENTATIVE DAVIS asked what restrictions, if any, are on the land holdings that were transferred to the railroad, as far as expansion or development of operations.

MR. ALLEN responded that ARTA restricted certain expansion into an area, although he wasn't sure which area; that is still in effect. He doesn't know whether there is any restriction on what the railroad could do with the land in Anchorage, for example, although he doesn't believe there is. What the legislature has done in the interim is a different issue, he added.

REPRESENTATIVE DAVIS asked Mr. Tesh to explain why all railroads deal with problems involving how much real estate they may need.

MR. TESH explained that most railroads have a lot of real estate

assets; a railroad can't run without land. As railroads have become "meaner and leaner," they have tended to abandon certain holdings, consolidate lines, and hold on to real estate. Historically, railroads have been run by railroad people, with small real estate departments that either just administer existing real estate or don't make decisions. In the early 1970s, however, a revolution was caused by 24,000 miles of the United States mainline's involvement in bankruptcy. Subsequently, they had to determine assets and liabilities, developing a methodology in which railroads were no longer valued purely on the basis of operating income. This process helped the railroad companies to look at all aspects, to determine how to get the most value out of the land.

SENATOR ADAMS asked whether other states own railroads.

MR. ALLEN indicated no others have "line hold railroads," but there are some municipally owned switching companies.

SENATOR ADAMS asked whether the timing is right to sell the Alaska Railroad. He further asked whether it would be better to sell it whole or to sell the real estate and railroad separately.

MR. ALLEN told members that he and Mr. Tesh believe the timing is right for the state to decide what it wants to do; however, he doesn't know whether it is right to sell. The state first needs to decide whether it wants to sell the railroad with or without the passenger service, and whether it is willing to subsidize the passenger service because of the other benefits, such as tourism, one of the larger contributors to the state economy. It also needs to decide whether it wants to transfer all the non-operating real estate to a state agency. Such questions need to be answered before looking for a buyer, and before they can tell what the value might be. Mr. Allen said he doesn't know if Montana Railway wants to buy just the railroad, or the railroad and the real estate. Nor does he know whether it wants the passenger service. The state's keeping the status quo is another alternative because of the other benefits such as job development.

REPRESENTATIVE JAMES asked whether Mr. Allen sees a future for railroad transportation of freight and people.

MR. ALLEN said absolutely, both here and in the Lower 48. Other than barges, railroads are the most fuel-efficient method of transportation. Certain commodities have shifted from railroads to

truck, but now have gone back to railroads through containers. He believes that in the Lower 48, coal is the largest commodity hauled by railroads in terms of carloads and tons.

REPRESENTATIVE JAMES noted that land is sacred to Alaskans because there is very little privately owned land. Since Mr. Allen had mentioned that people can lose money in real estate now, she asked whether this applies in Alaska as well as nationwide.

MR. ALLEN said certainly there are pockets in Alaska where one could still lose money, although he thinks there are fewer areas in Alaska where that is likely than in the Lower 48. The question is one of price and timing. One who sells at the right time will make money, for example.

REPRESENTATIVE JAMES said she was referring to long-term investment in raw land.

MR. ALLEN replied that long-term investment in raw land is a very safe investment, statistically, but Alaska is one of the exceptions, particularly in the Anchorage area. In addition, long-term real estate investments have not paid as well as the stock market. Real estate has a slow growth line with a few dips in it. In 1983, the perception was that it was almost impossible to lose money in real estate. However, in 1996, particularly because many pension funds that invested in real estate lost money, real estate is not perceived to be quite as safe an investment as before.

REPRESENTATIVE BUNDE asked whether there is a ballpark figure for the total railroad operation. He further asked whether the railroad would have made money if the operation had shut down.

MR. ALLEN said yes, but 400 people would be unemployed. The Usibelli mine would probably close down, and he doesn't know what Mapco would do. In his view, the railroad is an integral part of the Alaskan economy; if shut down, it will become real estate.

MR. TESH noted that there is a gray area. It is more difficult to answer how much real estate income is generated from leases that would not exist if it were not for the rail service.

SENATOR PHILLIPS asked whether more money would be made if the whole operation were sold and the money put in a certificate of deposit.

CHAIRMAN MARTIN asked whether they had evaluated the idea of expanding the railroad from Fairbanks to Canada, and what that would be to Alaska.

MR. ALLEN replied that yes, expansion would be good for the railroad, assuming it is cost-effective. The railroad needs new revenue and new shippers, but they don't want to spend $100 million to expand the line and only get $1 million of potential revenue out of it.

SENATOR ADAMS asked if any study has been made of who would provide the best service for the delivery of goods, whether it is state-operated, municipally operated or privatized.

MR. ALLEN said the incentives are different, certainly, between one and the other, but he didn't know of any study.

REPRESENTATIVE DAVIS asked whether it is timing, location, subsidies or tax breaks that make a railroad successful.

MR. ALLEN answered that it isn't subsidies and tax breaks. Most of the big Class I railroads have revenues over $400 million; all of them, except maybe one, are considered successful. They all have very large amounts of traffic, and none has a situation with two shippers that control so much of the traffic. One thing that helps profitability of a railroad is the length of the haul, where fixed costs are spread out along the miles. However, good management always helps, no matter what distance the railroad goes.

CHAIRMAN MARTIN called for an at-ease, then called the meeting back to order.

BILL SHEFFIELD, Former Governor and Chairman, Board of Directors, Alaska Railroad Corporation, introduced Jim Blasingame, Phyllis Johnson, John Burns and Bob Hatfield, who would present information and answer questions about the Alaska Railroad Corporation.

JIM BLASINGAME, Vice President of Corporate Affairs, Alaska Railroad Corporation, told members he was the "point person on the federal side" during the transfer process. He provided a book for the committee containing ARTA, as well as other documents about the railroad. He indicated he would talk about several issues that faced the federal government when it decided to divest itself of

the railroad. One big issue was that there was no buyer, and they had thought about liquidating it; however, Alaska then decided to acquire the railroad.

MR. BLASINGAME told members that under the transfer the railroad got all 36,000-plus acres of land that it had as a federal enterprise. He indicated he had left a copy of a state/federal report titled, "The Transfer Report," which details information on the land, title issues and employee issues. He noted that the railroad was to operate as an Interstate Commerce Commission (ICC) carrier, so the law put in place that it would be an interstate carrier.

MR. BLASINGAME explained that all claims under federal ownership were assumed by the federal government on the day of transfer, January 5, 1985, whereas the state assumed all of the railroad's liabilities from that date forward. The state has an exclusive license to all lands that were transferred, and it is still dealing with some environmental issues. Of the 485 permanent employees, 80 retired on the day of transfer in order to guarantee their federal health benefits. The corporation, the state-owned railroad, the governor, and the Secretary of the Department of Transportation had to certify that they would assume all the rights and liabilities of those employees.

MR. BLASINGAME told members one issue is that the corporation, within two years, had authority to assume the rights and liabilities of all the employees, and to provide retirement and health benefits when those individuals retire. The federal government could not certify to the state what the unknown liability was, although they had estimated it to be anywhere from $25 million to $75 million; therefore, the corporation decided not to assume that liability. After the two-year period, the corporation notified the federal government that those employees would remain in the civil service retirement system. It took approximately a year and a half to develop policies for retirement and health benefits, which the board had to adopt and ratify. Some of the policies were encased in buy-ins of federal rules and regulations.

TAPE 96-LB&A (TAPE 2 OF 3), SIDE A

MR. BLASINGAME explained that the two-year period was to

renegotiate the seven bargaining agreements. It took a little over two years, based on existing law that said the parties could agree to extend it for whatever reason. He noted that board membership includes a union representative, the commissioner of the Department of Transportation and Public Facilities (DOT/PF), the commissioner of the Department of Commerce and Economic Development, an employee representative, an individual who has at least ten years' experience on the U.S. railroad, and two appointed individuals who represent the various judicial districts served by the railroad.

PHYLLIS JOHNSON, Vice President, General Counsel, Alaska Railroad Corporation, informed the committee about the current status of the lands. Legally, the title is about the same as in 1985. At transfer, the railroad got several different kinds of conveyances. Because the federal government was not certain of the status of its ownership of the land used by the railroad, only about 7,000 acres of the 38,000-odd acres acquired at transfer were in a patent. Another 10,000 acres came in a so-called interim conveyance, which means the government is sure that it owns the title to convey but it hasn't been surveyed yet.

MS. JOHNSON told members that the rest, about 17,000 acres, came in the form of an exclusive license; all the properties acquired that way in 1985 are still owned through exclusive license. The exclusive license is the preliminary method of conveyance, which means that the acreage is subject to some potential adverse party claims, whether from homesteaders, Native allotees, state selections or Native corporation selections. When the federal government was not quite sure of the status of its title, it gave the railroad a license to basically stand in its place and collect all the rent from leased property that would accrue, and to basically control the property the same way the federal government would have; they just couldn't patent it yet. Since 1985, the federal Bureau of Land Management (BLM) has been slowly adjudicating all potentially conflicting titles to property, which has required a considerable amount of survey work.

MS. JOHNSON said about five years after the transfer, when the railroad hadn't received any new patents, they found out they weren't the top priority for getting the land surveyed so that it could be conveyed. It did not make a great difference to the railroad, and in fact it is sometimes useful not to own full title to property. That played into a ten-year delay in getting

conveyances issued. The BLM has completed the surveys all up and down the Railbelt, and this past winter they negotiated a settlement in which the City of Whittier, the state and the railroad agreed upon a boundary line in Whittier so that the BLM did not have to adjudicate it in its normal manner. That was about the last one to fall into place. Ms. Johnson told members she would expect the BLM to start issuing patents now.

MS. JOHNSON noted that there will be further negotiations with the federal government because of ongoing disputes about language in documents relating to environmental liabilities. With all other aspects of the transfer in place, she believes the state and federal governments will be able to work out the language to start getting patents issued.

MS. JOHNSON reminded the committee that there will be restrictions, more or less forever, on the way the railroad property is handled. One stretch of right-of-way within Denali National Park will only get an easement, not a full conveyance, from the federal government; the rights on that easement will always be subject to the discretion of the park superintendent and they will carry on to whoever acquires the railroad.

MS. JOHNSON indicated that unless the federal legislation is changed, three different reversion provisions in the transfer would continue to apply. One is a reversion after five years if the railroad is sold; another is a ten-year reversion provision whereby the land would revert to the federal government if the state sells or transfers the railway to someone, which has fallen by the wayside now; and another says that if the state discontinues use of the right-of-way for transportation, transmission or communication purposes, and if that disuse continues for 18 years, then it reverts to the federal government. The latter provision was probably intended to prevent abandonment of sections of the right-of-way. Ms. Johnson noted that obviously all of their properties are subject to any contracts that were in place at the time of transfer.

REPRESENTATIVE JAMES asked whether the issues about the right-of-way between Fairbanks and Eielson are close to being resolved.

MS. JOHNSON said there are strict legal answers and practical answers. 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. An exclusive-use easement is defined in the statute basically to guarantee to the state-owned railroad possession of the surface estate for transportation, transmission and communication purposes; the right to as much of the subsurface as necessary to support it; the right to lateral support; and the right to fence the right-of-way. Ms. Johnson told members that is what the federal government guaranteed to the state from Seward to Eielson.

MS. JOHNSON continued, saying that if the federal government didn't own that much to give, then they would condemn the majority of the property owners' interest to give to the state. Her answer to someone with a complaint is for that person to go see the federal government, which is the entity that condemned that person's land. She commented that it is neither practical nor neighborly. 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.

REPRESENTATIVE JAMES asked when the right-of-way issues could be settled in the near future.

MS. JOHNSON answered that she has made progress going through the Army Corps of Engineers' acquisition documents, but they don't cover the whole stretch. Once she gets through their documents, within the next four or five months, she should be able to get to the rest of it.

SENATOR ADAMS asked what the time frame is for the full transfer of the 38,000 acres of land to the state of Alaska.

MS. JOHNSON said she thought within 13 months they would be ready

to issue transfer documents with everything. The only delay will be based on whether the federal government, specifically the Federal Railroad Administration (FRA), will sign this document once the BLM prepares it, because of the environmental language in it. She would like to think they will see the justice of the state's insistence that they guarantee that the environmental problems are their problems; there is obviously no way to say how long it will take. If that falls away, the final conveyance could be within six months.

SENATOR ADAMS asked whether Ms. Johnson foresees any problems or restrictions relating to selling a piece of land, not a right-of-way, to Fairbanks, Anchorage or Seward.

MS. JOHNSON said not from the federal perspective, because the one remaining restriction relates only to right-of-way. The current statute has various provisions regarding disposal in general, whether to a municipality or otherwise, regarding legislative approval, appraisals and so on. She said in all of those they would want to use the Alaska Railroad Corporation.

CHAIRMAN MARTIN asked whether the title would be in the name of the state of Alaska or the Alaska Railroad Corporation.

MS. JOHNSON said the title goes directly to the Alaska Railroad Corporation, which is consistent with the federal statute that said it could either go to the state or the state-owned corporation.

CHAIRMAN MARTIN commented that there was a program where municipalities could get land in lieu of money. He asked if they still have an option of selecting railroad excess lands.

MS. JOHNSON said she didn't believe so, because the different statutes or constitutional entitlements that allow municipalities to select lands applied to railroad land per se.

CHAIRMAN MARTIN asked if municipalities would have any priorities regarding excess railroad land.

MS. JOHNSON replied that they don't under existing statute or constitutional law, as she understands it.

CHAIRMAN MARTIN asked who is responsible for liability, if there is a liability limitation, and what has been inherited.

MS. JOHNSON said the liability depends upon the contract between the railroad and whoever suffered the loss, and it depends upon what caused the accident. The transfer legislation from the federal government provided in fairly vague, bleak terms that liabilities that accrued prior to 1985 would remain with the federal government. Nowhere did it ever say anything specifically about environmental liabilities. About 1990 it was realized that there was some need to flesh that out with the federal government, because "superfund" sites were coming up and everyone was getting nervous. They entered into an agreement with the FRA that specifically dealt with environmental liability and followed the philosophy of the statute, saying that if the liability accrued prior to 1985, the federal government would remain responsible for it. Although there hasn't been an opportunity to make the federal government write a check, soon it will be seen if their checkbook is as good as the contract they signed. The commitment of the federal government would accrue to a future purchaser of the railroad, as well.

CHAIRMAN MARTIN asked at what point the liability of the corporation stops.

MS. JOHNSON replied that under the statute only the Alaska Railroad Corporation is responsible for the debts and liabilities; the Alaska Railroad Corporation Act specifies that the state is not responsible. Many plaintiffs may have seen the state as a sufficiently deep pocket, but so far no one has tried to sue the state. The language of the statute discourages that.

CHAIRMAN MARTIN asked if the state is vulnerable because someone can say there has been negligence of deferred maintenance.

MS. JOHNSON said she couldn't say.

REPRESENTATIVE JAMES asked whether, if some maintenance on the highway has not been done and someone gets hurt, that person can sue the state.

PHYLLIS JOHNSON answered that there are a number of cases involved in DOT/PF's being sued for faulty maintenance.

CHAIRMAN MARTIN informed the committee that all the reports there that day would be kept in the Anchorage Legislative Information

Office (LIO).

JOHN BURNS, Vice President, Utilities and Real Estate, Alaska Railroad Corporation, presented maps of the railroad lands and went over the information in the packets. He specified the exact number of acres as 36,228; 13,758 acres of that is right-of-way. As of June 1996, there are 262 actives leases which are leased for up to 35 years, with options beyond that time. There are 910 permits that are used for a combination of activities. The information packet includes seven areas of information: an overview, the data system of leases and permits, the abstracts of the leases, the presentation for today, a sample of the Brown lease, the permits, and standard specifications to work on railroad property. Mr. Burns also referred to a pie chart that shows the real estate inventory and another chart that shows the operating and non-operating lands. He noted that 36.9 percent of the property is non-operating.

SENATOR PHILLIPS asked what is owned in Valdez.

MR. BURNS said they own 86 acres that were picked up under during pipeline construction, where they laid railroad down and moved materials off of ships into the storage areas.

SENATOR PHILLIPS asked what they are doing with the land in the old townsite of Valdez, which the federal government literally gave to the state because no one wanted it.

MR. BURNS answered that there are several leases on it, and it has been improved in the last several years.

CHAIRMAN MARTIN asked what the process is when people are interested in leasing the land.

MR. BURNS pointed out that the lease language lays that out in Section 5 and in Section 1, the real estate lease policy. They can either lease by appraisal or through a bid process. However, he doesn't believe they have bid real property leases. It has been a matter of people expressing an interest in the property, going through an application process, having an appraisal done and advertising in public. A change in the last four years has been for the railroad to identify properties and propose a plan to the public to realize the land's potential; then people approach the railroad and go through the application process.

CHAIRMAN MARTIN asked whether the land evaluation includes the resources, including coal, gravel or others.

MR. BURNS said the vast majority has to do with the right to utilize the surface reserve, if indeed the state has obtained the subsurface mineral rights from the federal government.

SENATOR PHILLIPS asked if they do leases for residential or state-owned housing.

MR. BURNS answered that they do very few seasonal leases. He referred to a slide on real estate revenue that gives the most recent scenario; it includes the 1996 projection, which doesn't include the permits. He noted that since 1992 there basically has been a steady increase. [There were some technical difficulties in the tape during this portion of Mr. Burns' testimony.]

TAPE 96-LB&A (TAPE 2 OF 3), SIDE B

REPRESENTATIVE JAMES asked whether the state or the people get the permit to get access off the "Rex Trail" going into the Southwind Homestead.

CHAIRMAN MARTIN mentioned that this meeting was scheduled to gather information on the railroad. However, when it was publicized there was some hysteria from people who thought they were going to get rid of the railroad, which is not true.

[Technical problems with Side B of second tape; only this small portion has been transcribed.]

TAPE 96-LB&A (TAPE 3 OF 3), SIDE A

CHAIRMAN MARTIN expressed the need to be clear about who is responsible, and to have a mutual understanding that they are doing the best for the people and the resources.

MR. SHEFFIELD said he just wants to be a good chairman to the Alaska Railroad Corporation and to look out for its interests in serving Alaskans. The railroad should be closer to the 600,000 shareholders than it has been, and more responsive to them than the legislature needs to be. However, when people complain to the legislature, they need to ask some questions and the corporation

needs to provide answers. A lot has happened in the last six months, and people felt the legislature was trying to sell the railroad overnight. If the legislature is going to talk about selling the railroad, then they need to take two or three years to develop a procurement plan. Mr. Sheffield noted that many rural people don't listen to the radio or read the Anchorage Daily News every day, so they are confused about this.

SENATOR ADAMS pointed out that people tell him to sell it. He clarified that the legislature wasn't trying to sell it in three weeks; they had this debate a year ago in SB 64, a Rieger bill to sell this, and nobody paid attention. He has been pounding on the legislature for the last 10 years to the sell the railroad. It has been in many of his speeches on the Senate floor and the House floor. One of the things they tried to do in passing HB 136 was to set up this procurement. Senator Adams said he wants to know what is good for the 600,000 shareholders; the rural shareholders don't have any benefit from it. He thinks they should look at selling it.

MR. SHEFFIELD asked Senator Adams why he wants to sell the railroad.

SENATOR ADAMS said he believes it is time to have the railroad operated by the private sector. The state government wasn't set up to operate transportation systems. There is nothing wrong with just looking at selling it, and perhaps after looking at it, he might be wrong and have to eat his words in a year or two.

REPRESENTATIVE JAMES pointed out that the Alaska Railroad is not designed to make a profit to the extent that private industry would be interested in it. If the private industry were interested, they may have a different plan to serve the people, and that scares her; not serving the people at all could be the likely outcome. She understands Senator Adams' attitude, and that his people are not necessarily being served. However, it isn't fair for them to say they don't participate in the rest of the state. Everything they buy comes through the hubs in the city.

REPRESENTATIVE JAMES added that she sees the railroad as an integral part of Alaska's operation because it provides service to Alaskans. Once it is sold, the people would lose control over it. She thinks it is important to debate this issue, come to some

conclusion, get on with their lives and have Alaska be one of the best states in the Union.

CHAIRMAN MARTIN agreed that he would like the discussion kept open.

REPRESENTATIVE DAVIS said he thought it would be the public who maintains the interest, letting the legislature and the railroad's board of directors know their bottom line.

BOB HATFIELD, President and CEO, Alaska Railroad Corporation, told members that whereas the industry has continuous welded rail, centralized traffic control and a variety of other things, the Alaska Railroad Corporation has nothing like it. From the tracks and the roadbed up, the technology used today is identical to that when the golden spike was driven in Promontory, Utah, in the 1860s. Reports note that when the state bought the railroad, a significant capital infusion was needed to bring it up to Class I standards; he didn't recall the initial number, but it was large, followed by $70 million a year for three years.

MR. HATFIELD said that money never materialized, for whatever reason, now irrelevant. They have spent roughly $25 million a year on maintenance of equipment and track, totaling about $25 billion over 11 years. That does not include capital investment to improve docks and buildings, as well as rails, ties, ballasts, engineers, rolling stock and all the rest. They have made great strides on the deferred maintenance problem, but it will not go away overnight. Certain aspects in all probability will never be fixed, no matter who owns the railroad. The important thing is that this railroad has never been safer, no matter which statistic they look at, whether personal injury, workers' compensation payout or derailment frequency.

MR. HATFIELD advised members that about a month ago they had a situation where not one employee was losing time due to an injury; that was the first time in 18 years. He suggested that Mr. Blasingame could fill in information about the eight or ten years preceding that.

MR. HATFIELD returned to profit motive. He pointed out that every dime they earn goes back into rails, ties, ballasts and all the rest on the assumption that someday this may be sold. However, right now it is a performing asset, and it is building in value. They clear their own snow, fix their own bridges, fix their own

equipment, pay fuel taxes, and pay for all maintenance and capital improvements. They do that in the traditional way, borrowing money and then paying it back. While some operations are not compensatory, the rest are. They compete fairly and often lose business, as it is a "tough, tough deal" out there. Mr. Hatfield stated his belief that the public benefits from having its railroad. The whole state, not just the Railbelt, benefits because much of the fuel transported for Mapco gets burned all over the state. He pointed out that they operate under better standards than the federal standards for the industry.

CHAIRMAN MARTIN agreed about the standards. He referred to a 1981 report and indicated it had a good chapter on deferred maintenance problems.

BOB HATFIELD said the railroad has never compromised safety, and it never will. He added, "But I can make $100 million disappear, and ... you'd never see where it went. ... Those are the sorts of things that we can do. The question is: Do you have to do it?"

CHAIRMAN MARTIN brought attention back to HB 136, asking about its perceived strengths and weaknesses. [Mr. Allen and Mr. Tesh apparently came forward at this point, and they may be the unidentified speakers in many of the following portions.]

MR. ALLEN said he believes the state could have gone three different ways. One was to do nothing. Two was the Senate bill to sell the railroad. He told members, "I don't believe the state is in a position yet to know what it is they're selling, as we discussed this morning. And this seems to be a good first step in trying to resolve the Alaska Railroad issue. It's not a problem; it's just something that has to be resolved, backed by all the stakeholders in the railroad. As far as provisions in it, there's one in there, the 20-year provision whereby the owner ... must operate for 20 years. That's going to affect the price, clearly."

MR. ALLEN suggested that another provision should be in there, after hearing this recent conversation: having an opportunity for the 600,000 shareholders to comment. Discussions in each legislative districts would go a long way towards informing people statewide as to what the railroad commission thinks. He stated, "And that's something that I wanted to add. But other than that, I think basic provisions (indisc.), and they're the kind of things that one need to be looked at. I think that some of them, probably

once you got into them, would be expanded. And two, the conditions on the buyer have to -- you have to have some guarantee. And, again, any conditions you put in, no matter what, it is going to affect the price. Conditions on passenger service, for example, you've got to run it "x" number of years if that's decided to go along with the package, you have a separate, as is done actually now, but not with locomotives. The railroad would lease their lines, give trackage rights to the tour operator, but provide their own locomotives and cars to pay the railroad for a certain amount per mile for usage. That's one way to do it, make it a franchise. But these are the kinds of things that need looked at in here, and that's just one option. Arnie [Tesh} may have some stuff on the railroad studies part of this."

CHAIRMAN MARTIN asked about the existing contracts pending with the railroad, such as with Mapco or coal suppliers. He further asked whether something could be put into law about a continuation of a contract, especially if the real estate is taken away.

MR. ALLEN replied that a buyer of the railroad might want to renegotiate contracts; it requires a legal opinion.

MR. TESH stated that he is not sure whether the contracts have a transient clause. If he were a shipper, he would want to ensure that he was protected.

MR. TESH said notwithstanding the 5.5 times (indisc.), he is not sure why a valuation would be put down on paper. Any buyer would want to review the contracts for due diligence. A buyer could look at the contracts as an opportunity to renegotiate. The railroad would not be bought in a vacuum.

CHAIRMAN MARTIN wondered, if those things were put into law, whether it would kill any buyer.

MR. TESH replied yes. Although it doesn't need to be put into law, it needs to be looked at. It might have more of a chilling effect on the sale.

MR. TESH stated that when the railroad was transferred under ARTA, it was not to take into consideration any specific covenants, restrictions or special benefits that would only relate to Alaska. Therefore, the price that Alaska paid was not particular to the state. There are, however, many issues and benefits to the people

of Alaska that go beyond the value of the railroad, as well as the liabilities. A private investor, therefore, will adjust for the restrictions under which the state has to operate in order to provide those benefits, or those benefits will have to change, or there will have to be special benefits which only apply to that particular investor, but which cannot be envisioned right now.

MR. ALLEN said if the benefits only apply to that investor, he or she is not going to pay for them.

MR. TESH replied that is A negotiable thing. He stated, "In negotiating with any third party, if you recognize that they get a special benefit, you do your best to make it pay for it, even if you don't enjoy it. And, vice versa, they make you pay for something that you're getting rid of that they don't have to deal with." He said there are a number of issues, regardless of what the state decides to do with the railroad; for example, operating and non-operating acreage need to be looked at closely. In addition, transfer of interests doesn't necessarily always mean a sale, and there are a number of ways to accommodate a partnership between the private and public sectors. He is not suggesting anything in particular, however.

MR. TESH stated that he is not sure of the railroad's inventory right now. There are documents from 1983, 1984 and today, but the same number doesn't appear twice, indicating that the division of property between the operating and non-operating property is not precise. Therefore, to some extent the bill [HB 136] effectively deals with that issue.

CHAIRMAN MARTIN explained that Representative James had crafted HB 136 in the House State Affairs Standing Committee, even though he himself had introduced it.

MR. TESH stated that he doesn't want to prejudge the outcome of any study leading to the sale of the railroad. It is just something that must be done in order to look at the options and start the dialogue.

CHAIRMAN MARTIN said that is what he wants to do, to look at what the railroad has, what has been inherited, and what the future looks like on behalf of the citizens. He would like a green or amber light from the committee members for Randy Welker to work with Mr. Tesh and Mr. Allen as "retainers," in order to continue

discussion of the legislature's role and the sale of the railroad.

SENATOR PHILLIPS made a motion to hire Mr. Tesh and Mr. Allen as consultants to look into an evaluation on the sale of the Alaska Railroad.

CHAIRMAN MARTIN said he would have Mr. Welker work on it.

MR. WELKER pointed out that there wasn't a quorum.

CHAIRMAN MARTIN said that he just wanted a general motion now, and that he knew he needed six members.

MR. WELKER stated the belief that this will give the committee a general consensus on where it is heading. He said he would check to make sure that the committee is in compliance with the chairman (indisc.).

REPRESENTATIVE DAVIS expressed concern about the motion because HB 136 is still out there requiring a contract relationship. He wondered about the direction of the committee.

SENATOR PHILLIPS explained that if HB 136 is vetoed, this motion will kick in, to get possible recommendations on options available. He thinks this is the responsible way to do it.

CHAIRMAN MARTIN suggested it is an amber light right now.

REPRESENTATIVE JAMES said there needs to be a decision, but not without thoroughly investigating the whole issue. However, she applauds the effort.

CHAIRMAN MARTIN noted that there is a better chance of doing this during the interim than during session. He said he would appreciate a general consensus of approval on doing this.

REPRESENTATIVE DAVIS asked Mr. Welker whether a formal vote is needed or whether a consensus of the committee is appropriate. [Mr. Welker's reply was indiscernible.]

CHAIRMAN MARTIN asked whether there was any objection to the motion; he noted that none was heard. He then asked Mr. Sheffield whether anything had been left out.

MR. SHEFFIELD said nothing had been left out that couldn't wait until next year or later.

SENATOR ADAMS stated that one of the Alaska Railroad Corporation newsletters addressed the issue of discussing what to do with the money in the event of a sale. He stated, "Now, we ain't gonna quit operating the railroad when it stops, but ... my proposal would be that if we wanted a general opinion to go out, I would state that 50 percent goes into the permanent fund, which would go into each of the 600,000 shareholders, and ask you if you .... The other 50 percent would go back into AIDEA [Alaska Industrial Development and Export Authority] to do more research development around the state of Alaska. And so, you ask, 'Would you like the sale of the Alaska Railroad?' And that, of course, would go into your permanent fund dividend. What's wrong with that? There's nothing wrong with that. I think the people in the state would vote for it."

CHAIRMAN MARTIN wondered whether the people would vote objectively.

SENATOR ADAMS said he would like to write the ballot question.

REPRESENTATIVE DAVIS wondered about the guy in Homer who wants to just take his share, not have it put it into the permanent fund.

CHAIRMAN MARTIN said he still likes Senator Rieger's bill that ensures Alaskans a share if the railroad is privatized.

ADJOURNMENT

CHAIRMAN MARTIN adjourned the Joint Committee on Legislative Budget and Audit meeting. [time unspecified]

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Via Certified Mail

April 25, 2014

John W. Pletcher III
13608 Jarvi Drive
Anchorage, Alaska 99515

Re: Your Letter of March 23, 2014 (Received April 2, 2014)

Dear Mr. Pletcher:

Thank you for your letter dated March 23, 2014, to Bill O'Leary, President and CEO of the Alaska Railroad Corporation (ARRC). Your letter, which was postmarked on April 1 and received by Mr. O'Leary on April 2, 2014, raises issues relating to ARRC's Residential Right-of-Way Use Policy (RRUP) and ARRC's right-of-way (ARRC ROW). Mr. O'Leary appreciates you sharing your concerns about those issues with him and values the input of all of ARRC's residential neighbors on these issues. Because many of the points and concerns you raise involve legal matters, Mr. O'Leary has asked me to respond to the points and concerns raised in your letter.

Your letter raises specific issues regarding the RRUP and also more general issues regarding the legal status of the ARRC ROW. Because the nature of ARRC's legal interest in the ARRC ROW is fundamental to addressing your concerns about the RRUP, we will address the more general property interest issues first. Then we will address your specific concerns about the RRUP.

II. ARRC's Legal Interest in its Right-of-Way.

You raise a number of arguments disagreeing with ARRC's position that it has exclusive occupancy and use rights in its ROW. You contend that ARRC holds a "simple easement" in the ROW which allows it only a "non-possessory use." You assert that this "simple easement" is non-exclusive and allows landowners adjacent to the ROW to use it in any manner that does not interfere with railroad operations. You invoke the U.S. Supreme Court's recent decision in the *Brandt* case in support of these arguments and also state that BLM's conveyance of property interests in municipalities contradicts the Alaska Railroad Corporation Act, AS 42.40 (ARCA). You accuse ARRC of engaging in a plan to attack the property rights of adjacent property owners. While we appreciate your detailed explanation of your position, we respectfully disagree with each of your assertions for the reasons stated below.

The assertions in your March 23 letter regarding the legal status of the ARRC ROW largely track assertions you made in late 2012 to the office of Representative Wes Keller and others. At that time, ARRC drafted a comprehensive memorandum addressing those issues and explaining that ARRC holds fee simple interest in most of the ARRC ROW, and at least an exclusive use easement in all of it. Copies of that memorandum were distributed to Representative Keller, Representative Craig Johnson and other public officials who had expressed interest in the nature of ARRC's legal interests in its ROW. We understand you also received a copy of it. We respectfully refer you to our earlier memorandum, which addresses many of the issues raised in your March 23 letter. Because your letter raises additional points, however, we will recap our earlier analysis to provide context for discussing these new points.

A. Summary of the History of the Alaska Railroad and its ROW.

In order to understand the nature of ARRC's interest in its ROW, a general understanding of the histories of the Alaska Railroad and its ROW is critical. The Alaska Railroad is the only railroad ever constructed, owned and operated by the federal government. During the early 1900s, several privately-owned railroads were built and operated in the Territory of Alaska, but ultimately failed or faced dire financial circumstances. Having seen the difficulties faced by private entities constructing and operating railroads in Alaska, and recognizing the importance of rail service to the development of the Territory, Congress took a different approach. It passed legislation (Act of 1914) authorizing the creation of a federally owned and operated railroad in Alaska. The Act of 1914 authorized and directed the President to take a broad range of actions to construct, own and operate such a railroad. The Act of 1914 provided that "[t]erminal and station grounds and rights of way through the lands of the United States in the Territory of Alaska are hereby granted for the construction of railroads, telegraph and telephone lines authorized by this Act, and in all patents for lands hereafter taken up, entered or located in the Territory of Alaska there shall be expressed that there is reserved to the United States a right of way for the construction of railroads, telegraph and telephone lines to the extent of one hundred feet on either side of the center line of any such road . . . ."

The federal government quickly complied with Congress's directive. Rights-of-way were designated on federal land and otherwise acquired between Seward and Fairbanks. Construction began in 1915 and the "golden spike" was driven by President Harding in Nenana in 1923. For the next several decades, the federal government owned and operated the Alaska Railroad, moving both freight and passengers. By the early 1980s, however, the federal government began discussing the concept of transferring the Alaska Railroad to another entity.

In 1982, the legislation was introduced in Congress authorizing the transfer of the Alaska Railroad, including all of its land, to the State of Alaska. As the proposed legislation worked its way through Congress, the issue of the appropriate level of title to

the Alaska Railroad ROW to be transferred to the State of Alaska was prominent among the points under discussion. There was general agreement in Congress that most land of the federally-owned Alaska Railroad, including its ROW, was held in fee simple title by the United States and that most land therefore would be transferred to the State in fee.[1] Congress did recognize that some Alaska Railroad lands were subject to third party claims, including claims by holders of homestead patents issued before portions of the Alaska Railroad ROW were designated on the patented land. Congress recognized that any transfer legislation must set forth a process for quickly determining any third-party claims, but that it was critical that the United States provide the State with exclusive control of the entire ROW.[2] Otherwise, the State's ability to maintain and operate a safe and economical railroad would be undermined.[3] Consequently, a minimum interest to be conveyed to the State, called an "exclusive use easement" was developed "to insure that the State-owned railroad will receive exclusive and complete control over land traversed by the right-of-way."[4]

ARTA was enacted on January 14, 1983. It requires the United States to convey to the State all federal right, title and interest in all lands of the Alaska Railroad upon the date of transfer of the Railroad to the State. Under ARTA, therefore, ARRC received the entire federal interest in the ROW, which as discussed above included fee simple title in most of it. ARTA mandated several types of interim and permanent conveyances of Alaska Railroad properties to the State, with the ultimate requirement being to issue patents to ARRC for all lands, including ROW, located outside Denali National Park. Even interim conveyances were required to "convey to and vest in the State exactly the

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[1] *See, e.g.*, Report No. 97-479, Senate Committee on Commerce, Science and Transportation, 97th Congress, 2d Session, June 22, 1982, at 5 (Under the proposed ARTA, the United States "would convey to the State a fee interest in the 200-foot strip comprising the railroad track right-of-way, amounting to roughly 12,000 acres. This fee estate is recognized by the Committee to be the current interest of the Alaska Railroad derived from common practice and authorized under section 1 of the March 12, 1914 Alaska Railroad Act.").

[2] *See, e.g.*, Congressional Record-Senate, Dec. 21, 1982, at 2 ("On the date of the transfer [under ARTA], the State would be granted fee title to lands not subject to such [unresolved] claims [of valid existing rights] and, with respect to lands so subject, an operating license to insure that operations of the railroad are not affected in any way by the new process."); *id.* ("The concept of an exclusive use easement . . . represents the minimal interest the State is to receive in the Alaska Railroad right-of-way following completion of the expedited adjudication process. . . . It is also the interest the State will receive through the Denali National Park and Preserve. In other areas, where the right-of-way crosses land owned in fee by the Federal Government, the full fee title to the right-of-way will be transferred to the State."

[3] *See, e.g.*, Report No. 97-479, Senate Committee on Commerce, Science and Transportation, 97th Congress, 2d Session, June 22, 1982, at 5 ("[T]ransfer of the railroad right-of-way in fee simple is essential to the continued operation of the railroad, and . . . the actual physical characteristics of the railroad (e.g., the right-of-way and reserves) [should] be maintained to the extent required to assure the transfer of an economically viable railroad operation.").

[4] Congressional Record-Senate, Dec. 21, 1982, at 2.

same right, title, and interest in and to the rail properties identified therein as the State would have received had it been issued a patent . . . ."[5]

As required by Congress, BLM began issuing ARRC patents to the ROW and other lands after transfer of the Alaska Railroad under ARTA. The issuance of patents has continued to this day as BLM has concluded surveys of lands that were unsurveyed at transfer. By the mid-2000's, the entire federal interest in most of the ROW had been patented to ARRC; only a few portions of the ROW remain to be conveyed by patent.

B. The Exclusivity of the ARRC ROW

As noted above, patents granted to ARRC by the United States under ARTA conveyed the entire federal interest in those lands to ARRC. As also noted, fee simple interest was transferred with respect to most of the ROW. Moreover, ARTA, 45 U.S.C. §1205(b)(4), guarantees conveyance of at least an exclusive use easement in all portions of the ROW that left federal ownership before January 14, 1983, or as to which a claim of valid existing rights existed as of that date. ARTA specifically explains why this guarantee was made: "The 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."[6] Further underscoring Congress's recognition that it was critical to provide the State with exclusive rights in the ROW, ARTA specifically requires the federal government to defend the State's title in the ROW against claims that it had less than an exclusive use easement.[7]

The exclusive use easement required by ARTA, 45 U.S.C. § 1202(6), as the minimum interest conveyed to the State in the ROW provides broad exclusive rights:

> "[E]xclusive-use easement" means an easement which affords to the easement holder the following:
>
> (A) the exclusive right to use, possess, and enjoy the surface estate of the land subject to this easement for transportation, communication, and transmission purposes and for support functions associated with such purposes;
>
> (B) the right to use so much of the subsurface estate of the lands subject to this easement as is necessary for the transportation, communication, and transmission purposes and associated support functions for which the surface of such lands is used;

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[5] *See* 45 U.S.C. §1203(b)(3).

[6] *See* 45 U.S.C. §1205(b)(4)(A)(ii).

[7] *See* 45 U.S.C. §1205(b)(4)(B).

> (C) subjacent and lateral support of the lands subject to the easement; and
>
> (D) the right (in the easement holder's discretion) to fence all or part of the lands subject to this easement and to affix track, fixtures, and structures to such lands and to exclude other persons from all or part of such lands.

ARTA therefore requires the United States to convey to the State at least the exclusive right to use and occupy the ROW for transportation, communication and transmission purposes, including the right to exclude all other persons and entities from it.

As demonstrated above, the ARRC ROW, as first designated by the United States for the construction and operation of the federally-owned Alaska Railroad, and as subsequently conveyed to ARRC pursuant to ARTA, provided exclusive rights to possess and use the ROW. Because most of the ROW was owned in fee simple by the United States, that fee simple title was transferred to ARRC. Even in those exceptional circumstances where a third-party claim was pending at the time of transfer, Congress guaranteed that ARRC would receive at least an exclusive use easement. All of this settled law contradicts your assertion that ARRC owns no more than a non-exclusive easement and that adjoining landowners can occupy and use the ROW. It also supports ARRC's position that it has the authority to require permits for adjoining landowners to enter and use the ROW.

It is worth noting that Congress' requirement that ARRC receive an exclusive use easement is consistent with settled law indicating that railroad ROWs generally, whether or not characterized as easements, provide railroads with exclusive possession and use:

> Generally, after a railroad company's right of way has been located and constructed, it has the right to the uninterrupted and exclusive possession, use, and control of the surface of the land constituting its right of way and necessary for conducting its business. . . . As long as the railroad company occupies any portion of its right of way, it has the exclusive use and right of control coextensive with its boundaries.[8]

As stated by another commentator:

> A railroad right-of-way includes the actual possession or the right to the actual possession of the entire surface for every proper use and purpose in construction and operation of the road.[9]

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[8] 74 C.J.S. Railroads § 225 (2002) (emphasis added; footnotes omitted). *See also* 65 Am.Jur.2d, Railroads, §104, at 403 (Railroad right-of-way easement is essentially different from any other in that it requires exclusive occupancy).

[9] G. Thompson, Commentaries on the Modern Law of Real Property (1965), §381, at 503, 512

The basis for the exclusivity of a railroad easement, even where a separate underlying fee owner is present, lies in the nature and risk of railroad operations:[10]

> The inherent risk facing trespassers around the operation of railroad tracks precludes any safe uses of the land available to the landowner holding the underlying fee. The danger to a trespasser from a fast-moving train, lacking the ability to stop suddenly, is the basis for the exclusivity of use. An easement for a railroad right-of-way differs in important respects from other easements, [in] that the right of possession of the right-of-way is exclusive in the railroad.[11]

As noted above, Congress recognized these concerns in ARTA and specifically explained that exclusive control over the right-of-way by the Alaska Railroad was and is necessary to protect safe and economic operation of the railroad.[12] As a Senior Attorney in the Alaska office of the U.S. Solicitor put it recently in a memo relating to the ARRC ROW, "[e]xclusive control is necessary to insure uninterrupted and safe operation of the railroad and to protect members of the public from physical harm."[13]

C. Neither the Brandt Decision Nor Other Act of 1875 Cases Apply to the ARRC ROW.

You invoke the U.S. Supreme Court's recent decision in *Brandt Revocable Trust v. United States*, which involved an abandoned railroad right-of-way. You assert that Brandt supports your position that ARRC does not own exclusive rights to occupy and use its ROW. For the reasons discussed below, however, the *Brandt* decision neither applies to nor affects ARRC's property rights in its ROW.

Brandt involved the question of whether the federal government retained ownership of a railroad ROW granted under the federal General Right-of-Way Act of 1875 (Act of 1875) when that ROW was abandoned by the private railroad company that had operated on it. The Supreme Court decided the abandoned land was owned not by the federal government, but instead by the landowner who had received a patent for the parcel of land crossed by the right-of-way.

(emphasis added).

[10]The railroad operating environment is inherently a hazardous one. Trespassing along railroad rights-of-way is the leading cause of rail-related fatalities in America, resulting in approximately 500 deaths each year.

[11] Jeffery M. Heftman, Railroad Right-of-Way Easements, Utility Apportionments, and Shifting Technological Realities, 2002 Univ. of Illinois Law Review, Vol. No. 5 at 1409 (citing cases; emphasis added).

[12] *See* 45 U.S.C. §1205(b)(4)(A)(ii).

[13] We provided you with a copy of that memorandum in January 2013.

To understand why the *Brandt* decision does not apply to the ARRC ROW, one must understand the background in that case. The ROW at issue in *Brandt* was granted to a private railway in 1908 under the Act of 1875. The ROW was owned by a series of private railways, which operated railroads on it until it was abandoned in 2004. In the meantime, in 1976, the United States had patented an 83-acre parcel in fee simple title to Melvin Brandt. The railroad ROW described above crossed and was included in that parcel. The patent stated that the land was granted subject to the ROW. When the railroad ROW was abandoned, the United States claimed title to it where it crossed Mr. Brandt's parcel. Mr. Brandt contested that claim, arguing that he now owned the ROW in fee simple because he owned the underlying fee interest in the entire parcel by virtue of the 1976 patent. The Supreme Court ultimately agreed with Mr. Brandt.

The fundamental reason that the *Brandt* decision neither applies to nor affects the ARRC ROW is that it involved a ROW granted under the Act of 1875. *Brandt* is expressly limited to ROWs granted under that Act. The ARRC ROW, on the other hand, is almost entirely composed of land designated by the federal government for the ROW of the federally-owned and operated Alaska Railroad under the Act of 1914. That Act did not mention, much less incorporate in any way, the Act of 1875 or use its language to describe ROWs to be designated for the Alaska Railroad. In sum, the Act of 1914 is entirely unrelated to the Act of 1875, and therefore the *Brandt* decision has no impact on ROWs designated under the Act of 1914.

Nor are ROWs established under the Act of 1914 analogous to Act of 1875 ROWs. Whereas the Act of 1875 granted railroad ROWs across federal lands to private railroad companies, the Act of 1914 directed the establishment on federal lands in Alaska ROWs that would continue to be owned by the federal government and for its use in operating the Alaska Railroad. Consequently, almost all of the Alaska Railroad ROW never left federal ownership before it was transferred to ARRC in 1985. Therefore, as discussed above, the federal government owned almost all of the Alaska Railroad ROW in fee simple at the time of transfer. Therefore, the vast majority of the Alaska Railroad ROW passed to ARRC in fee simple title. In other words, most of the ARRC ROW is not an easement, but instead is a strip of land owned outright by ARRC. The fact that ARRC owns fee simple title in most of its ROW makes that ROW completely different from ROWs granted to private railway companies under the Act of 1875.

ARTA confirms the critical differences between Act of 1875 ROWs and the Alaska Railroad ROW. As discussed above, ARTA's legislative history shows that Congress found the vast majority of the Alaska Railroad ROW to be owned by the United States in fee simple. That history also demonstrates that Congress intended that the State of Alaska would receive fee simple title to nearly all of the Alaska Railroad ROW.

Moreover, unlike the patent at issue in *Brandt*, homestead patents granted to residents located adjacent to already-existing portions of the Alaska Railroad ROW did not include the land located within the ROW itself. This further cements the conclusion that the decision in *Brandt* is inapplicable to the ARRC right-of-way.

D. BLM's Issuance of Patents to ARRC for Land Located in Municipalities Does Not Run Afoul of Alaska State Law.

Your March 23 letter invokes a provision in ARCA, AS 42.40.285(5), which requires legislative approval before ARRC can apply for or accept a grant of federal land within a municipality. You assert this provision precludes ARRC from acquiring property rights in any ROW within municipalities without legislative approval. This interpretation of the statute is incorrect for two reasons. First, the inapplicability of AS 42.40.285(5) here is established by AS 42.40.285(5)(c), which expressly excepts from the legislative approval requirement "a conveyance of rail properties of the Alaska Railroad under [ARTA] . . . ." Because the Alaska Railroad ROW existed in 1983, when ARTA took effect, land within the ROW is included among the "rail properties of the Alaska Railroad" as that term is defined in 45 U.S.C. §1202(10). Consequently, a transfer of land in the ROW by the United States to ARRC constitutes a conveyance of a rail property under ARTA, and therefore falls squarely within the exception in AS 42.40.285(5). Moreover, subsection AS 42.40.285(5) was not included in AS 42.40.285 until 1999; consequently, this subsection could not have applied to the transfer of the ROW pursuant to ARTA in 1985 by means of interim and permanent conveyances.

E. The Patents Issued by BLM to ARRC for the ARRC ROW are Not Only Proper, They are Required.

Your letter suggests that BLM and ARRC are involved in inappropriate activity with respect to the patents for the ARRC ROW issued by BLM. Respectfully, that assertion is belied by the authorities described above. In fact, in patenting to ARRC at least an exclusive use easement in ROW lands, BLM is doing exactly what Congress required it to do in ARTA. ARTA requires BLM to convey to ARRC not less than an exclusive use easement to all lands located within the ROW and provides that final conveyances be made via patent. Moreover, that obligation exists regardless of the United States' legal interest in the Property, as underscored by the statutory guarantee that the United States will defend ARRC's title against claims that it owns less than an exclusive use easement in the ROW. It would contravene ARTA for BLM to convey to ARRC anything less than a patent for an exclusive use easement in the ROW.

II. The RRUP is a Proper Exercise of ARRC's Authority and Obligation to Preserve the ARRC ROW.

You also assert in your letter that ARRC's adoption of the RRUP was improper. You claim that RRUP asserts an exclusive interest in the ROW that ARRC does not possess, that RRUP is part of a scheme to attack the property rights of ARRC's neighbors and that public sentiment was strongly in opposition to the RRUP.[14] We respectfully disagree with all of those assertions.

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[14] You also suggest that ARRC is publically funded, "perhaps too generously." But

ARRC's exclusive interest in the ROW, including the right to exclude other parties from it, is well established above. The balanced residential use permit program provided for in the RRUP is fully in line with both that exclusive interest and ARRC's desire to accommodate its neighbors in a safe and workable manner. Far from being an attack on adjoining property owners' property interests, which stop at the boundary of the ROW, RRUP accommodates existing uses that are compatible with railroad safety and operations. That said, it was incumbent upon ARRC us to develop the RRUP for the safety of our neighbors, customers and employees and to protect the ability of ARRC to use the ROW for the purposes required by Alaska law.

You also assert that ARRC, in enacting RRUP and taking other actions to protect the ROW, has acted "piecemeal so as to avoid stirring up opposition." We completely disagree. The RRUP was developed as the result of probably the most extensive public outreach and participation process ever undertaken in conjunction with the passage of an ARRC Board policy. Starting in 2011, ARRC employees went door-to-door, meeting our neighbors in Anchorage to discuss the prospect of ARRC reducing or eliminating residential use of ARRC ROW. ARRC sent postcards to residential properties that abut ARRC ROW informing them of our program to mark the ROW during the summer of 2011. In 2012, as required by our by-laws, we advertised in three newspapers of record in Anchorage, Seward and Fairbanks the opportunity for public comment on a proposed draft RRUP to be considered by the ARRC Board of Directors (ARRC Board) at a June 2012 board meeting. We also sent mailers to residential properties that abut ARRC ROW inviting residents to comment on the proposed policy at the June 2012 meeting. These mailings are not required by our by-laws and were an attempt to ensure that residents who could be affected by the policy were aware of its development.

Many of our residential neighbors took the opportunity to comment on the draft RRUP at that time, including a large number—including you—who attended and commented at the June 2012 board meeting. After considering those comments, the ARRC Board sent the draft policy back to ARRC staff for substantial changes that addressed many of the issues raised by the public.

After significant revisions to the policy, we again sent mailers to potentially affected residential properties inviting residents to comment on the revised RRUP in writing, by telephone or at public meetings in Anchorage, Wasilla and Fairbanks in November 2012. The Anchorage meeting attracted residents from neighborhoods around Anchorage and many more residents commented in writing or by telephone. Yet more revisions were made to the RRUP in response to those comments. In October 2013, we sent two rounds of postcards to potentially affected residents notifying them that a revised RRUP was again going before the ARRC Board and inviting comments.

ARRC is a public corporation that receives no operating funds from the State of Alaska and is required to turn a profit like private corporations. ARRC's recent financial woes due to the closure of the Flint Hills refinery and other factors are well-documented.

We expanded the comment period at the request of community councils, in addition to providing required public notice of the RRUP in the newspapers.

At the November 12, 2013 ARRC Board meeting, we once again took public comment and made ARRC staff available to answer questions about the proposed policy. Notwithstanding your impression that the public largely opposed the RRUP, many of the comments at the November 12 meeting were positive and applauded ARRC's public outreach efforts and its willingness to modify the RRUP to address public concerns. After the RRUP was approved by the Board at that meeting, we again reached out via postcards to explain to our neighbors when and how the RRUP's permit requirements would take effect.

In conclusion, please be assured that ARRC appreciates that this situation has been and continues to be frustrating to you. We understand that you are sincere in your legal position regarding the respective property interests of ARRC and neighboring landowners, although we disagree with that position. We also are genuinely sorry that you believe that ARRC has acted "wrongfully" and with improper "motives and methods." We respectfully submit, however, that ARRC's acceptance of required ARTA conveyances and its passage of the RRUP have been undertaken aboveboard and fully in line with ARRC's obligation under Alaska law to preserve the integrity of its ROW. At the same time, we have worked very hard to solicit and take into account the public's input into the RRUP process and to accommodate our neighbor's desire to continue to use the ROW where that can be accomplished safely.

I hope that the foregoing adequately responds to the concerns expressed in your letter and explains ARRC's legal position in this matter. I will be happy to discuss it with you at your convenience.

Very truly yours,

Andy Behrend

Andy Behrend
Senior Attorney, Real Estate and Environmental

cc: Bill O'Leary, President & CEO, ARRC (via email)

Interim Conveyance

Anchorage Recording District

WHEREAS, pursuant to Sec. 604(b)(1)(B) of the Alaska Railroad Transfer Act of 1982 (96 Stat. 2556 et seq.; hereinafter referred to as "ARTA"), the Alaska Railroad Corporation is entitled to an interim conveyance for real property of the Alaska Railroad including both the right-of-way of the Alaska Railroad (railroad right-of-way) and other railroad lands (railroad parcels); this interim conveyance is hereby issued for the real property described below:

Railroad Parcels:

Seward Meridian, Alaska

Tps. 8 and 9 N., R. 3 E. (Portage)

(PLO 571/835) - all right, title and interest: A tract of land 1420 feet wide and 3.30 miles long, 1320 feet on the east side of and parallel to and 100 feet on the west side of and parallel to the centerline of the present main line of The Alaska Railroad between mileage 61.30 and 64.60, bounded on the south by the southerly boundary line of the Turnagain Arm Townsite Reserve, established by E.O. 8480, dated July 12, 1940, the north boundary being a line at right angles to the centerline of the railroad at mileage 64.60.

Containing approximately: 575.00 acres.

(PLO 571/835) - all right, title and interest: A tract of land 1/2 mile wide and 1.81 miles long, 1/4 mile on each side of and parallel to the centerline of The Alaska Railroad Passage Canal Connection, between mileage F-10.12 and F-11.93, bounded on the southeast by the easterly boundary line of the Turnagain Arm Townsite Reserve, established by E.O. 8480, dated July 12, 1940, and bounded on the northwest by the easterly boundary line of the parcel described above.

Containing approximately: 579.00 acres.

T. 9 N., R. 3 E.

(PLO 1425) - all right title and interest: A tract of land approximately 3,200 feet long and 720 feet wide, lying easterly of the main tract of the Alaska Railroad near Portage, Alaska, and more specifically described as follows:

Beginning at a point on the easterly side of the Alaska Railroad Reserve, Parcel No. 1, PLO 571 which bears N. 09°15' W., 600 feet from the northwesterly corner of Parcel No. 2, PLO 571; thence northwesterly, 1,250 feet along the easterly boundary of Parcel No. 1 to the southeasterly bank of Twentymile River; northeasterly, 2,800 feet along the southeasterly bank of Twentymile River; S. 49°21'15" E., 720 feet; S. 40°38'45" W., 3,200 feet to the point of beginning.

Containing approximately: 46.00 acres.

(PLO 5576) - all right, title and interest: In the SW4 Sec. 28, T. 9 N., R. 3 E. (unsurveyed), beginning at what will be, when surveyed, the section corner common to Sections 28, 29, 32 and 33; thence east 759.00 feet; thence north 721.00 feet to a point which is the true point of beginning; thence north 220.00 feet; thence east 495.00 feet; thence south 220.00 feet; thence west 495.00 feet to the point of beginning.

Containing approximately: 2.50 acres.

T. 8 N., R. 4 E., (Whittier)

U.S. Survey No. 2559 - all right, title and interest:

Excluding lot 2, Block 2;

Also excluding the following described lands:

Beginning at the point for corner No. 1, located on line 2-3, U.S. Survey No. 2559, and on the westerly right-of-way of Midway Avenue; thence N. 17°30' E., on the westerly right-of-way of Midway Avenue, approximately 22.57 chains (1,489.70 feet) to corner No. 2, identical with the northeast corner of Lot 17, Block 1, U.S. Survey No. 2559; thence S. 78°51' E.,

approximately 9.31 chains (614.43 feet) to corner No. 3; thence N. 11°09' E., approximately 1.14 chains (75.00 feet) to corner No. 4; thence S. 78°51' E., approximately 2.35 chains (155.00 feet) to corner No. 5; thence N. 11°09' E., approximately 0.61 chains (40.00 feet) to corner No. 6, located on line 1-9, U.S. Survey No. 2559, and approximately 9.09 chains (600.00 feet) N. 89°51' W., of corner No. 9, U.S. Survey No. 2559; thence S. 89°51' E., on a portion of line 1-9, U.S. Survey No. 2559, approximately 9.09 chains (600.00 feet) to corner No. 7, identical with corner No. 9, U.S. Survey No. 2559; thence N. 76°29' E., 0.64 chains (42.18 feet) to corner No. 8; thence N. 55°39' E., approximately 21.60 chains (1,425.77 feet) to corner No. 9; thence N. 34°21' W., approximately 0.23 chains (15.00 feet) to corner No. 10, on line 9-8, U.S. Survey No. 2559, approximately 1.52 chains (100.00 feet) S. 55°39' W., of corner No. 8, U.S. Survey No. 2559; thence N. 55°29' E., on line 9-8, approximately 1.52 chains (100.00 feet) to corner No. 11, identical with corner No. 8, U.S. Survey No. 2559; thence S. 34°21' E., on line 8-7, U.S. Survey No. 2559, approximately 6.67 chains (440.00 feet) to corner No. 12, identical with corner No. 7, U.S. Survey No. 2559; thence S. 55°39' W., on line 7-6, U.S. Survey No. 2559, approximately 18.56 chains (1,224.97 feet) to corner No. 13, identical with corner No. 6, U.S. Survey No. 2559; thence S. 81°19' W., on line 6-5, approximately 14.14 chains (933.47 feet) to corner No. 14, identical with corner No. 5, U.S. Survey No. 2559; thence S. 48°00' W., on line 5-4, U.S. Survey No. 2559, approximately 14.21 chains (937.68 feet) to corner No. 15, identical with corner No. 4, U.S. Survey No. 2559; thence S. 36°00' W., on line 4-3, U.S. Survey No. 2559, approximately 7.73 chains (510.04 feet) to corner No. 16, identical with corner No. 3, U.S. Survey No. 2559; thence N. 78°50' W., on a portion of line 3-2, U.S. Survey No. 2559, approximately 6.55 chains (432.10 feet) to corner No. 1, the point of beginning.

Containing approximately: 27.05 acres.

PLO 1410 - all right, title and interest:

Beginning at Corner No. 2 of PLO 1056, dated January 18, 1955, which bears N. 02°29.75' E., 630.60 feet thence N. 11°09' E., 337.20 feet from U.S.L.M. No. 2559, Whittier Townsite; thence, from the point of beginning N. 11°09' E., 375.00 feet; thence S. 68°00'17" E., 713.43 feet to Corner No. 4 of PLO 1056; thence S. 56°09' W., 500 feet to Corner No. 3 of PLO 1056; thence N. 60°51' W., 365.00 feet to Corner No. 2 of PLO 1056, the point of beginning.

Containing approximately: 4.88 acres.

PLO 1056 - all right, title, and interest:

Beginning at the point of intersection of the line of mean high water of Passage Canal with the easterly boundary line of Parcel No. 6 as described in PLO 587 of May 23, 1949, which is located N. 11°09' E., 372.57 feet from a point in the center line of the main track of the Alaska Railroad at Survey Station "B" 15 plus 68.00. From the point of beginning, U.S.L.M. No. 2559, Whittier Townsite, bears S. 2°29.75' W., 630.69 feet; thence from the point of beginning N. 11°09' E., 337.20 feet; S. 60°51' E., 365.00 feet; N. 56°09' E., 500.00 feet; S. 61°21' E., 280.00 feet; S. 56°09' W., 809.73 feet to a point on line of mean high tide. Northwesterly, 405.00 feet approximately along line of mean high tide to point of beginning.

Containing approximately: 6.52 acres.

PLO 1113 - all right, title and interest:

Beginning at a point which bears S. 88°39' W., 200 feet from the most southerly corner of Parcel No. 7 of Public Land Order No. 587 as withdrawn on 23 May 1949; thence N. 88°39' E., 200 feet to said most southerly corner of Parcel No. 7; thence N. 34°21' W., 77.20 feet to the most westerly corner of Parcel No. 7; thence N. 55°39' E., along the northwest line of Parcel No. 7 a distance of 1,746.18 feet to a point on said northwest line whih is S. 55°39' W., 25.95 feet from the most northerly corner of Parcel No. 7; thence S. 70°09' W., 1,846.96 feet to a point; thence N. 60°51' W., 300 feet to a point; thence S. 56°09' W., 525 feet more or less to a point on the

south line of the West Camp access road; thence in a southeasterly direction along the south line of said access road 885 feet more or less to the point of beginning, excluding any lands above the mean high water mark of Passage Canal.

Containing approximately: 15.93 acres.

Seward Meridian, Alaska

T. 13 N., Rs. 3 and 4 W. (Anchorage)

Certificate of Approval in accordance with the conditions set forth in the Tideland Agreement entered into by the Alaska Railroad and the City (Municipality) of Anchorage, on March 3, 1975, as depicted on the map recorded in the Anchorage Recording District - Book 691, page 135.

Containing approximately: 350.00 acres.

Parcels aggregating approximately: 1606.88 acres.

Railroad Right-of-way as defined by Section 603(11) of ARTA:

U.S. Survey No. 4597, Tract A excluding PLO 835 - all right, title and interest.

Containing approximately: 2.33 miles or 56.48 acres.

Seward Meridian, Alaska

Potter Hill (located within T. 12 N., R. 3 W.) - all right, title and interest:
All that portion of Tract One (1) Block One (1), TURNAGAIN PARK SUBDIVISION, according to Plat P-160 included within a parcel of land in the Anchorage Recording District, Third District, State of Alaska, described as follows: Beginning at the most Westerly corner of said Tract 1, and running thence N. 49°59'50" E. along the Northwesterly boundary of said Tract 1 for a distance of 78.02 feet; thence S. 42°57'00" E. 123.90 feet; thence S. 30°34'00" W. 78.38 feet to a point on Southwesterly boundary of said Tract 1; thence in a Northwesterly direction along the Southwesterly boundary of said Tract 1 for a distance of 150.00 feet, m/l, to the point of

beginning; all bearings being based on the Alaska State Plane Coordinate System Zone 4; said parcel of land being situated in the Northeast one-quarter (NE 1/4) of the Southeast one-quarter (SE 1/4) of Section 32, T. 12 N., R. 3 W., Seward Meridian.

Containing approximately: 0.24 acre.

All that portion of Tract Two (2), Block One (1), TURNAGAIN PARK SUBDIVISION, according to Plat P-160 lying southwesterly of the line designated as "Take Line", on that certain map titled Potter Hill Relocation, Alaska Railroad, designated as Plat 64-108 in the Anchorage Recording District, Third District, State of Alaska.

Containing approximately: 0.29 acre.

All that portion of Tract Three (3), Block One (1), TURNAGAIN PARK SUBDIVISION, according to Plat P-160 lying southwesterly of the line designated as "Take Line", on that certain map titled Potter Hill Relocation, Alaska Railroad, designated as Plat 64-108 in the Anchorage Recording District, Third District, State of Alaska.

Containing approximately: 0.22 acre.

All that portion of Tract Four (4), Block One (1), TURNAGAIN PARK SUBDIVISION, according to the recorded plat thereof, lying southwesterly of the line designated as "Take Line", on that certain map titled Potter Hill Relocation, Alaska Railroad, designated as document #64-108 in the Office of the Recorder, Anchorage Recording District, Third District, State of Alaska.

Containing approximately: 0.40 acre.

All that portion of Tract Five (5), Block One (1), TURNAGAIN PARK SUBDIVISION, according to the recorded plat thereof, lying southwesterly of the line designated as "Take Line" on that certain map titled Potter Hill Relocation, Alaska Railroad, designated as document #64-108 in the Office of the Recorder, Anchorage Recording District, Third District, State of Alaska.

Containing approximately: 0.26 acre.

All that portion of Tract Six (6), Block One (1), TURNAGAIN PARK SUBDIVISION, according to the recorded plat thereof, lying southwesterly of the line designated as "Take Line", on that certain map titled Potter Hill Relocation, Alaska Railroad, designated as document #64-108.

Containing approximately: 0.26 acre.

All that portion of Tract Seven (7), Block One (1), TURNAGAIN PARK SUBDIVISION, according to Plat P-160, lying Southwesterly of the line designated as "Take Line", on that certain map titled Potter Hill Relocation, Alaska Railroad, designated as Plat 64-108, in the Anchorage Recording District, Third District, State of Alaska.

Containing approximately: 0.25 acre.

All that portion of Tract Eight (8), Block One (1), TURNAGAIN PARK SUBDIVISION, according to Plat P-160 lying southwesterly of the line designated as "Take Line", on that certain map titled Potter Hill Relocation, Alaska Railroad, designated as Plat 64-108 in the Anchorage Recording District, Third District, State of Alaska.

Containing approximately: 0.29 acre.

All that portion of Tract Nine (9), Block One (1), TURNAGAIN PARK SUBDIVISION, according to the recorded plat thereof, lying Southwesterly of the line designated as "Take Line", on that certain map titled Potter Hill Relocation, Alaska Railroad, designated as document #64-108, in the Office of the Recorder, Anchorage Recording District, Third District, State of Alaska.

Containing approximately: 0.28 acre.

All that portion of Tract Ten (10), Block One (1), TURNAGAIN PARK SUBDIVISION, according to Plat P-160 lying southwesterly of the line designated as "Take Line", on that certain map titled Potter Hill Relocation, Alaska Railroad, designated as Plat 64-108 in the Anchorage Recording District, Third District, State of Alaska.

Containing approximately: 0.28 acre.

All that portion of Tract Eleven (11), Block One (1), TURNAGAIN PARK SUBDIVISION, according to the recorded plat thereof, lying southwesterly of the line designated as "Take Line", on that certain map titled Potter Hill Relocation, Alaska Railroad, designated as document #64-108 in the Anchorage Recording District, Third District, State of Alaska.

Containing approximately: 0.23 acre.

All that portion of Tract Twelve (12), Block One (1), TURNAGAIN PARK SUBDIVISION, according to Plat P-160, lying Southwesterly of the line designated as "Take Line", on that certain map titled Potter Hill Relocation, Alaska Railroad, designated as Plat 64-108 in the Anchorage Recording District, Third District, State of Alaska.

Containing approximately: 0.02 acre.

All that portion of the Southwest one-quarter (SW 1/4) of Section 29, T. 12 N., R. 3 W., Seward Meridian, Alaska, included within a tract of land described as follows:

BEGINNING at the most westerly corner of Lot Twenty-One (21) in Block Three (3), SUNSET HILLS WEST SUBDIVISION, according to the recorded plat thereof, and running thence N. 89°51'30" E. 47.81 feet along the northerly line of said Lot 21; thence N. 46°45'00" W. 233.84 feet; thence
N. 43°15'00" W. 392.94 feet; thence
N. 39°45'00" W. 294.74 feet; thence
N. 36°35'00" W. 294.73 feet; thence
S. 36°26'20" E. 525.41 feet; thence
S. 40°35'00" E. 455.00 feet; thence
S. 46°28'00" E. 204.81 feet to the point of beginning, all bearings being based on the Alaska State Plane Coordinate System, Zone 4.

Containing approximately: 0.441 acre.

Lots Six (6), Eleven (11), and Twelve (12) in Block Three (3) of SUNSET HILLS WEST SUBDIVISION, according to the official plat thereof recorded July 17, 1961, under Plat No. P-600 in the Anchorage Recording District, Third District, State of Alaska.

Containing approximately: 1.08 acres.

Lot Ten (10) in Block Three (3) of SUNSET HILLS WEST SUBDIVISION, according to the official plat thereof recorded July 17, 1961, under Plat P-600 in the Anchorage Recording District, Third District, State of Alaska.

Containing approximately: 0.355 acre.

Lot Five (5), in Block Three (3), of SUNSET HILLS WEST SUBDIVISION, according to the official plat thereof filed July 17, 1961, under Plat No. P-600 in the Anchorage Recording District, Third District, State of Alaska.

Containing approximately: 0.45 acre.

Lot Seven (7), Block Three (3) of SUNSET HILLS WEST SUBDIVISION, according to the official plat thereof filed July 17, 1961, under Plat No. P-600 in the Office of the District Recorder for the Anchorage Recording District, Third District, State of Alaska.

Containing approximately: 0.35 acre.

Lot Eight (8), Block Three (3) of the SUNSET HILLS WEST SUBDIVISION, according to the official plat thereof filed July 17, 1961 under Plat No. P-600 in the Office of the District Recorder for the Anchorage Recording District, Third District, State of Alaska.

Containing approximately: 0.35 acre.

Lot Nine (9) in Block Three (3) of SUNSET HILLS WEST SUBDIVISION, according to the official plat thereof filed July 17, 1961, under Plat No. P-600 in the Office of the District Recorder for the Anchorage Recording District, Third District, State of Alaska.

Containing approximately: 0.35 acre.

All that portion of Lot Nineteen of Block Three, SUNSET HILLS WEST SUBDIVISION, according to the recorded plat thereof, lying southwesterly of the line designated as "Take Line", on that certain map titled Potter Hill Relocation, Alaska Railroad, designated as document #64-105 in the Office of the Recorder, Anchorage Recording District.

Containing approximately: 0.35 acre.

All that portion of Lot Twenty-One (21), Block Three of the SUNSET HILLS WEST SUBDIVISION, according to the official plat thereof filed October 9, 1964, under Plat P-600, lying southwesterly of the line designated as "Take Line", on that certain map titled Potter Hill Relocation, Alaska Railroad, designated as document #64-105 in the Office of the District Recorder, Anchorage Recording District, Third District, State of Alaska.

Containing approximately: 0.51 acre.

T. 10 N., R. 2 E.

That portion of Tract A more particularly described as protracted:

Secs. 19, 20, 29, 32 and 33 - not less than an exclusive use easement.

Containing approximately: 4.00 miles or 96.96 acres.

T. 11 N., R. 2 W.

Secs. 30 to 33, inclusive - not less than an exclusive use easement.

Containing approximately: 3.24 miles or 78.54 acres.

T. 11 N., R. 3 W.

Secs. 4, 9, 10, 15, 22, 23, 25 and 26 - not less than an exclusive use easement.

Containing approximately: 6.42 miles or 155.62 acres.

T. 12 N., R. 3 W.

Secs. 6 and 7 - not less than an exclusive use easement;

Sec. 18, and the West seventeen feet of that portion of lots 6, 7, 8 and 9, WILSON SUBDIVISION, according to the official plats thereof on file in the Office of the District Recorder, Anchorage Recording District, Alaska, located East of the Alaska Railroad right-of-way - not less than an exclusive use easement;

And the West seventeen feet of that portion of the N2SE4SE4 located East of the Alaska Railroad right-of-way - not less than an exclusive use easement;

And a strip of land located within Tract 13A, NIGH SUBDIVISION, according to the official plat thereof on file in the Office of the District Recorder, Anchorage Recording District, Alaska, described as follows:

Beginning at the Southwest corner of Tract 13A; thence S. 62°03'36" E., 18.50 feet; thence N. 10°37'16" W., 150.78 feet; thence S. 04°41'22" E., 140.00 feet to the point of beginning - not less than an exclusive use easement;

Sec. 19, and the West seventeen feet of that portion of Block 3, lots 1-10, inclusive, TURNAGAIN SUBDIVISION No. 2, and lot 3, JUNCTION SUBDIVISION, according to the official plats thereof on file in the Office of the District Recorder, Anchorage Recording District, Alaska - not less than an exclusive use easement;

And the West seventeen feet of that portion of the NE4NE4 located East of the Alaska Railroad right-of-way - not less than an exclusive use easement;

Sec. 20, 29, 30 and 32 - not less than an exclusive use easement.

Containing approximately: 5.83 miles or 146.66 acres.

T. 12 N., R. 4 W.

Sec. 1 - not less than an exclusive use easement.

Containing approximately: 0.40 mile or 9.69 acres.

T. 13 N., R. 4 W.

Secs. 23, 24, 25 and 26 - not less than an exclusive use easement;
Sec. 34, lot 12, SE4NE4, SE4NW4 - not less than an exclusive use easement;
Sec. 35, lots 3 and 4, NE4, N2S2 - not less than an exclusive use easement;
Sec. 36 - not less than an exclusive use easement.

Containing approximately: 6.99 miles or 139.14 acres.

T. 15 N., R. 2 W.

Sec. 24 - not less than an exclusive use easement;
Sec. 25, NW4 - not less than an exclusive use easement.

Containing approximately: 1.50 miles or 36.36 acres.

T. 15 N., R. 1 W.

Sec. 5, lots 3, 14, 17, 25, 26, 31, 53 and 65 - not less than an exclusive use easement;
Sec. 7, lots 8, 19, 24, 25, 34, 35, 40, 41, 63, 70, 71, 91, 92 and NE4NE4 - not less than an exclusive use easement;
Sec. 18, lots 11, 27, 28, 42, 57, 76, 88, 108, 118, 138, 144, 162, 164, 185 and 200 - not less than an exclusive use easement;
Sec. 19, lot 4 - not less than an exclusive use easement.

Containing approximately: 2.534 miles or 42.844 acres.

T. 16 N., R. 1 W.

Sec. 24, lot 4, SE4NE4, SW4SW4 and S2NW4SE4 - not less than an exclusive use easement;
Sec. 25, W2NW4 - not less than an exclusive use easement.

Containing approximately: 0.93 mile or 22.54 acres.

T. 16 N., R. 1 E.

Sec. 19, lots 4, 5, NE4SW4 and W2NW4SE4 - not less than an exclusive use easement.

Containing approximately 0.545 mile or 13.21 acres.

Aggregating approximately: 34.72 miles or 805.30 acres.

Total aggregate for parcels and right-of-way: 2412.18 acres.

NOW KNOW YE that the United States of America has given and granted, and by these presents in conformity with ARTA does give, grant and convey unto the Alaska Railroad Corporation, its assigns and successors the real property described above to have and to hold forever. The right, title, and interest hereby granted and conveyed in and to the real property described above are the full and complete right, title and interest of the United States in and to said real property, subject to the Reservations and Conditions

set out below. Pursuant to Sec. 606(b)(4)(B) of ARTA, the right, title and interest granted by the United States in the above-described real property that is located within the right-of-way of the Alaska Railroad shall not be less that an exclusive-use easement as defined in Sec. 603(6) of ARTA.

The force and effect of this interim conveyance is to vest in the Alaska Railroad Corporation exactly the same right, title and interest in and to the real property described above as the Alaska Railroad Corporation would have received had it been issued a patent for said real property.

Upon completion of the survey of the real property hereby granted and conveyed, a patent for said real property will be issued by the United States to the Alaska Railroad Corporation pursuant to Secs. 604(b)(2) and (3) of ARTA.

Reservations and Conditions

1. Pursuant to Sec. 610 of ARTA, this conveyance is subject to the following conditions:

   a. Pursuant to Sec. 610(a) of ARTA, if, within ten years after the date of transfer, the Secretary of Transportation finds that all or part of the real property transferred to the State of Alaska under said Act is converted to a use that would prevent the State-owned railroad from continuing to operate, the real property (including permanent improvements to the real property) shall revert to the United States, or at the option of the State (as defined in Sec. 603(14) of ARTA), the State shall pay to the United States an amount determined to be the fair market value of that property at the time its conversion prevents continued operation of the railroad.

   b. Pursuant to Sec. 610(b) of ARTA, if, after January 5, 1985, the State discontinues use of any land within the right-of-way, the interest hereby conveyed in such land shall revert to the United States when:

      (1) The Governor of Alaska delivers to the Secretary of the Interior a notice of such discontinuance, including a legal description of the property subject to the notice, and a quitclaim deed thereto; or

(2) The State has made no use of the land for a continuous period of eighteen years for transportation, communication, or transmission purposes. Pursuant to Sec. 610(b)(2) of ARTA, notice of such discontinuance shall promptly be published in the Federal Register by the Secretary of Transportation, the Secretary of the Interior, or the Secretary of Agriculture, and reversion shall be effected one year after such notice, unless within such one year period the State brings an appropriate action in the United States District Court for the District of Alaska to establish that the use has been continuing without an eighteen-year lapse. Any such action shall have the effect of staying reversion until exhaustion of appellate review of the final judgment in that action or termination of the right to seek such review, whichever first occurs.

2. Pursuant to Sec. 604(c)(2) of ARTA, the following existing easements for administration are reserved to the United States under the jurisdiction of:

Secretary of Agriculture:

Portage Creek Trail which is a 25-foot wide trail within U.S. Survey 4597, Tract A (PLO 835) (AA-953).

Secretary of Defense:

An easement for a pipeline within T. 10 N., R. 2 E., Tract A, Seward Meridian (A-067518).

Such easements and the use of such easements shall not interfere with railroad operations or support functions of the State-owned railroad, as defined in Sec. 603(14) of ARTA.

3. The grant of the above-described real property is subject to the following rights and interests granted by the United States prior to this conveyance:

a. The granted license under Power Project 2170 as to those lands herein conveyed within U.S. Survey No. 4597 (PLOs 571/835), Tract A (Tps. 8 and 9 N., R. 3 E., Seward Meridian); T. 10 N., R. 2 E., Tract A, Seward Meridian.

b. Any interest in the Anchorage International Airport Road transferred to the State of Alaska by the quitclaim deed dated June 30, 1959, executed by the Secretary of Commerce under the authority of the Alaska Omnibus Act, Public Law 86-70 (73 Stat. 141) as to Secs. 34, 35 and 36, T. 13 N., R. 4 W., Seward Meridian.

c. Any interest in the Glenn Highway transferred to the State of Alaska by the quitclaim deed dated June 30, 1959, executed by the Secretary of Commerce under the authority of the Alaska Omnibus Act, Public Law 86-70 (73 Stat. 141) as to Sec. 19, T. 16 N., R. 1 E., Seward Meridian.

d. Any interest in the Seward/Anchorage Highway transferred to the State of Alaska by the quitclaim deed dated June 30, 1959, executed by the Secretary of Commerce under the authority of the Alaska Omnibus Act, Public Law 86-70 (73 Stat. 141) as to U.S. Survey No. 4597, Tract A (Tps. 8 and 9 N., R. 3 E., Seward Meridian); T. 10 N., R. 2 E., Tract A; Secs. 30 to 33, inclusive, T. 11 N., R. 2 W.; Secs. 10, 15, 22, 23, 25 and 26, T. 11 N., R. 3 W.; Secs. 19, 20, 29 and 30, T. 12 N., R. 3 W., Seward Meridian.

e. Any interest in the Spenard Road transferred to the State of Alaska by the quitclaim deed dated June 30, 1959, executed by the Secretary of Commerce under the authority of the Alaska Omnibus Act, Public Law 86-70 (73 Stat. 141) as to Sec. 25, T. 13 N., R. 4 W., Seward Meridian.

f. There is excepted and reserved any element of ownership from Secs. 24 and 25, T. 16 N., R. 1 W., and Sec. 19, T. 16 N., R. 1 E., Seward Meridian, conveyed by the United States pursuant to the Alaska Communications Disposal Act approved November 14, 1967 (40 U.S.C. 771-792) (AA-6187).

g. A right-of-way, AA-8095, for highway purposes, issued to the State of Alaska, Department of Highways (now Department of Transportation and Public Facilities) within Sec. 19, T. 16 N., R. 1 E., Seward Meridian, under the Act of August 27, 1958, as amended (23 U.S.C. 317).

h. A right-of-way, A-021429, for a transmission line, issued to the Matanuska Electric Association, Inc. within Sec. 5, T. 15 N., R. 1 W., Seward Meridian, under the Act of February 15, 1901 (43 U.S.C. 959).

i. A right-of-way, A-029885, for an electric distribution line, issued to the Chugach Electric Association, Inc., within T. 10 N., R. 2 E., Tract A; Sec. 25, T. 11 N., R. 3 W., Seward Meridian, under the Act of February 15, 1901 (43 U.S.C. 959).

j. A right-of-way, A-059784, for a transmission line issued to Chugach Electric Association, Inc. within PLO 835 (T. 8 N., R. 3 E., Seward Meridian) under the Act of February 15, 1901 (43 U.S.C. 959).

k. A right-of-way, A-051647, for a natural gas pipeline, issued to the Alaska Pipeline Company, within Sec. 10, T. 11 N., R. 3 W., Seward Meridian, under the Act of February 25, 1920 (30 U.S.C. 185).

l. A right-of-way, A-064192, for highway purposes, issued to the State of Alaska, Department of Highways (now Department of Transportation and Public Facilities) within U.S. Survey No. 4597, Tract A (T. 9 N., R. 3 E., Seward Meridian), under the Act of August 27, 1958, as amended (23 U.S.C. 317).

4. Pursuant to Sec. 604(c)(1) of ARTA, there is excluded from this conveyance any unexercised right-of-way that may exist under 43 U.S.C. 975(d).

Definitions

1. "Real property," as used herein, means land and all of the appurtenances, hereditaments, improvements, facilities, trackwork, roadbed, buildings, franchises, ways, waters, minerals, rights, privileges, fixtures, licenses, lease-holds, reversions, easements, rights under operating, trackage and joint facilities agreements, rents, issues, profits and other interests and items belonging to or in any way appertaining to the above-described land.

2. All of the terms used in this instrument that are defined in Sec. 603 of ARTA have the same meaning herein as provided in said section including but not limited to the following terms:

a. "Exclusive use easement," as used herein, means as provided by Sec. 603(6) of ARTA an easement which affords to the easement holder the following:

(1) the exclusive right to use, possess, and enjoy the surface estate of the land subject to this easement for transportation, communication, and transmission purposes and for support functions associated with such purposes;

(2) the right to use so much of the subsurface estate of the lands subject to this easement as is necessary for the transportation, communication, and transmission purposes and associated support functions for which the surface of such lands is used;

(3) subjacent and lateral support of the lands subject to the easement; and

(4) the right (in the easement holder's discretion) to fence all or part of the lands subject to this easement and to affix track, fixtures, and structures to such lands and to exclude other persons from all or part of such lands;

b. "Right-of-way," as used herein, means as provided in Sec. 603(11) of ARTA:

(1) an area extending not less than one hundred feet on both sides of the centerline of any main line or branch line of the Alaska Railroad; or

(2) an area extending on both sides of the centerline of any main line or branch line of the Alaska Railroad appropriated or retained by or for the Alaska Railroad that, as a result of military jurisdiction over, or non-Federal ownership of, lands abutting the main line or branch line, is of a width less than that described in subparagraph (1) of this paragraph.

IN WITNESS WHEREOF, the undersigned authorized officer of the Department of Transportation has in the name of the United States, set his/her hand and caused the seal of the Department to be hereunto affixed on this 5th day of January, 1985, in Nenana, Alaska.

UNITED STATES OF AMERICA

Secretary of Transportation,
by the Administrator of the
Federal Railroad Administration

Accepted:

ALASKA RAILROAD CORPORATION

By: _____
Its: Chairman of the Board
Dated January 5, 1985

BOOK 1212 PAGE 0278

ALASKA RAILROAD CORPORATION

Pouch 7-2111
Anchorage, Alaska 99510-7069

January 9, 1985

Dear District Recorder,

After recording please return the attached documents to:

Alaska Railroad Corporation

Pouch 7-2111

Anchorage, Alaska 99510-7069

Attention: James O. Campbell, Chairman
Board of Directors

Thank you.

85-001597
N.C

RECORDED-~~FILED~~
ANCHORAGE REC.
DISTRICT

JAN 8 2 19 PM '85

REQUESTED BY ALASKA RAILROAD CORP.

ADDRESS _____