Written Comments of John Pletcher

I am John Pletcher. Peggy and I came to Alaska in 1969 following my graduation from Law School at the University of Colorado. I was the last law clerk to Chief Justice Buell Nesbett. I was the lead attorney of the Pletcher, Weinig law firm from 1975 through 2002.

We practiced in the field of insurance defense handling accident claims.

I invested in two title insurance agencies in Anchorage in the mid 1980's. One feature of title insurance is to assure that only rights owned are transferred. This seems to be a major problem in the ARTA transfer. The Department of the Interior ARTA transfer clouds existing patent easements which survive ARTA with a new easement akin to ownership. This is wrong-minded and is contrary to the intention of those involved in the 1982 transfer.

My authority for stating the correct intention is conversations with Cong. Young and several of those persons who were on the "transition team" of federal and state employees assigned to facilitate the transfer. All agree that existing property rights were not to have been impaired. It is stated outright in the Memorandum of Understanding of the Interim Conveyance in 1982.

What the Dept. of the Interior did can only be called "bizarre".

Peggy and I bought our house next to the railroad and Ocean View Park in 1980. One hundred feet of the 200 foot- wide ROW is on our property. We pay extra taxes through a higher assessment because of the view and separation from others of the easement. Our assessment is considerably higher than comparable houses in the neighborhood not contiguous to the ROW. Our protests to the assessor fall on deaf ears.

The railroad pays no taxes. It is exempt but likes to claim that we pay no taxes on the easement. Foxes and henhouses come readily to mind.

Safety:

I would like to address the safety issue as a reason for exclusive use

The trespass Issue

There is no doubt that safety is important. We have never had an indication that anything we were doing is causing a safety issue. We are reasonable users of a portion of the 100- foot ROW on our property not being used by the railroad. We have a lawn and garden.

We are not trespassers and those who seek access to trespass do not cross our property to access the tracks. Based on observations made over decades, the problem comes from public areas, the park, the Ocean View Drive crossing, the gun range, the Seward Highway. The railroad has pointed to the matter of an Asian lady killed on the tracks while taking pictures. This occurred south of the Rabbit Creek Range south of Anchorage. She apparently got out of her car along Turnagain Arm and got onto the tracks.

This is the area, next to a public highway.

The railroad has been hampered in the past in controlling trespass by a substantial question about the authority of the railroads security personnel to issue trespass citations. Craig Medred was prosecuted years ago and seems to have successfully argued the point. That argument is now closed. The Court of Appeals ruled in the Forsyth case in 2017 that the security personnel are peace officers and fully qualified.

The railroad should have now an augmented capacity to prosecute. But an open question remains as to what constitutes trespass on the tracks. The railroad has publically announced that simply crossing the tracks is not trespass. Given the fact that ARTA 1202(6) carries the right to fence off this might be a moot issue if the railroad gets enough federal monetary support, but the Legislature might consider helping the railroad in creating a specific trespass law, lest arbitrariness raise its ugly head.

Landowner Uses and Safety

Our uses as a landowner are allowed under the common law and should pose no problem for the railroad. It is not trespassing, but a part of the property, although burdened by the easement for the railroad purposes First a description of the easement uses starting at the centerline and moving laterally. The track is of standard width. A standard load max width without special handling is 10 foot 8 inches according to the FRA website. The ARRC clears back maybe 25 feet each side of the centerline.

There is a 3-5 ft ditch and moose bushes next to that, followed 50 feet or more away from the centerline by our lilac bushes.

In Hansen v Harris 220 P.2d 911 the Alaska Supreme Court discussed that vey usage. The court said

[1] "An easement creates a nonpossessory property right to enter and use land in the possession of another [the servient estate owner] and obligates the possessor [of the burdened land] not to interfere with the uses authorized by the easement." RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2(1) (2000).

The railroad claims the need for exclusive use on private land for safety reasons. Bullwinkle in front of the green house does not consider himself much of a menace.

The left corner of the greenhouse shown in the picture is 94 feet from the centerline. The door is at the easement line.

Bullwinkle's use is approved by the Supreme Court in the Godspeed case because it maximizes land use.

The railroad is somewhat correct in its claim that the easement is of a different variety than most. They call is an "exclusive" use in the general sense that the railroad needs somewhat more control than other easements. For example, one might plant grass or park a car on a sewer easement, while for safety and common- sense reasons this would not be appropriate for an owner to do on a train track easement. I share that view of a need for control.

The general view of somewhat enhanced control of exclusive use, even in the RTT/ROW, while somewhat closer to the point, should not be confused with the claim of the "exclusive use" definition in ARTA 1202(6). The latter specific definition is a specific concoction of ARTA that allows the railroad to dictate. In this definitional section the railroad may without any consultation fence off and bar any other users. It is essentially ownership in a thin disguise.

The railroad complains of benign activity compared to that which it allows for itself and the state.

The ARRC allows a 37- ton rotary snow plow to sit next to the siding at the Potter Station for tourists to inspect. The ramp for the tourists is less than 40 feet from the siding. This is apparently considered safe and I would not argue against that. In the lower 48 one sees trails and bike paths similarly located.

At the Rabbit Creek Rifle Range there are cars parked within 40 feet of the track centerline. They contain ammunition and firearms. People walk among the cars. This seems reasonable. The chances of a derailment are slight.

Claim of being inherently dangerous justifying exclusive use

The railroad advances “exclusive use” on the theory that railroads are “inherently dangerous”. Some arguments are simply more mysterious than others but this one is really perplexing, suggesting that no response is necessary. On one level the observation could be made that if it is so dangerous it should be banned. Another possible reaction might be an improvement in maintenance, training or general approach to operations in correction thereof.

One issue has been the possibility that things may fall off the train and may harm someone. At the risk of prosecution by the railroad, but also recognizing that the statute of limitations may have expired, I admit to having walked down the tracks a number of times since 1980. It was safe. I was careful. I would stay off trestles and out of tunnels though. I have never seen anything that fell off the train. We have looked for a lump of coal and found none. It is a standing neighborhood joke that those looking for such are wasting their time.

Good loading and the load does not seem to care if the easement is exclusive or created under the 1914 Act.

But there have been times when the railroad has been its own worst safety enemy. And in this the railroad has made others pick up the financial burden through hold harmless agreements requiring others to pay for railroad negligence. This was a part of the RRUP Permit: 2 1/2 pages of it. I and other balked at signing. And for good reason.

The MOA did not. I did the insurance defense work at times for the MOA. The MOA operates the Coastal Trail, some of which is in the ROW. There is a hold harmless requiring the MOA to hold harmless the railroad from its own negligence. At Christmas time close to 30years ago there was a hole in the fence between the track and the trail. The train employees were throwing candy off the train. Enticed by this, a number of young people climbed through the hole to get the candy. One fell on the track and lost a leg. The MOA paid $500k. The hold harmless arose because of the dictatorial position the ARRC holds over all of us through claims of "ownership", "exclusive use" in a general sense or in the specific sense of ARTA 1202(6).

Many of problems caused by the claim of exclusive use are explored and discussed in the Ombudsman's Special report of Nov 16, 1989. Because his investigation began only 3 years after the interim conveyance there was no way he could have known that he faced the 1202(6) "exclusive use" and so it was not named as the culprit.

The specificity of the statutory definition of ARTA 1202(6) allowing fencing and barring of others places the railroad in the seat of a dictator. Exclusive use ejects the courts as a forum for resolution of disputes and places all power in the hands of the railroad. Exclusive use was to be curtailed in the 1999 amendment to AS 42.40.285. But the railroad stepped right around that minor problem. It is not too much to speculate that the railroad claims exclusive control of itself to the exclusion of the legislature. Time will tell.

An interesting read is the book entitled "Railroaded" by Prof. Richard White of Stanford University. While concerning the transcontinental lines of the Lincoln era the operational style described in this book will be familiar.

In the meantime, HJR 38 is a correct step.

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