Ownership and Exclusive Control of the Alaska Railroad Right-of-Way.

The proponents of HJR 38 assert that the federal government, when it transferred Alaska Railroad lands to the Alaska Railroad Corporation ("ARRC"), included in that transfer exclusive rights to the Alaska Railroad right-of-way ("ROW") that the federal government did not own. The proponents further assert that despite this supposedly improper transfer, the ARRC ROW is a non-exclusive common law easement that allows adjoining landowners to use the ROW in any manner that does not interfere with railroad operations. These contentions are incorrect for several reasons enumerated below. The ARRC does, in fact, have exclusive control of its ROW.

ARRC holds exclusive rights in its ROW for several important reasons. First, the federal government transferred most of the ARRC ROW in fee simple title, which it acquired as a result of the 1914 congressional act that created the Alaska Railroad and which it retained during its subsequent operation of the Alaska Railroad. In passing the Alaska Railroad Transfer Act, 45 U.S.C. §§ 1200 et seq. ("ARTA") in 1982, Congress expressly found that most of the ARRC ROW was owned fee simple by the federal government. Second, as guaranteed in ARTA, the federal government transferred at least an exclusive use easement in all of the ARRC ROW to ARRC in 1985. This was consistent with Congress' express finding in ARTA that exclusive control of the Alaska Railroad ROW by the Alaska Railroad had been and would remain necessary for the operation of the Alaska Railroad as a safe and economically viable railroad. Third, even if ARRC had not received fee simple title or at least an ARTA exclusive use easement in its ROW—which it did as noted above—railroad easements have been consistently held to provide railroads with exclusive rights to their ROWs for well over 100 years.

This memorandum explores the above issues. The upshot is that the federal government properly conveyed exclusive control of the Alaska Railroad ROW to ARRC, which retains that control today. And just as Congress determined in 1982, exclusive control of the ARRC ROW remains critical for ARRC to operate a safe and economical railroad.

A. The Federal Government Owned Exclusive Rights in the Alaska Railroad ROW at the Time the Alaska Railroad was Transferred to ARRC.

The federal government owned most of the Alaska Railroad ROW in fee simple title, and had at least an exclusive use easement in all of it, when the Alaska Railroad was transferred to ARRC. Congress recognized this fact and drafted ARTA accordingly. The following sections explain how this came about.

1. The Federally-Owned Alaska Railroad

The Alaska Railroad is the only railroad ever constructed, owned and operated by the United States federal government. Accordingly, the history of its establishment, operation and eventual transfer to the State of Alaska is unique.

During the early 1900s, several privately-owned railroads were built and operated in the Territory of Alaska. Each of these railroads ultimately failed or faced dire financial circumstances.[1] Having seen the difficulties faced by private entities constructing and operating

[1] The Alaska Railroad: Probing the Interior, by Charles Michael Brown (ed. Michael S. Kennedy), October 1975 ("Brown"), at 27-28.

railroads in Alaska, and recognizing the importance of rail service to the development of the Territory, Congress took a different approach. It passed legislation authorizing the creation of a federally owned and operated railroad in Alaska.[2]

The Act of 1914 authorized and directed the President to take a broad range of actions to locate, construct and operate a railroad on a route of up to 1,000 miles in the Territory of Alaska. The purpose of the railroad route was to "provide transportation of coal for the Army and Navy, transportation of troops, arms, munitions of war, the mails, **and for other governmental and public uses.**"[3] Among the actions authorized by the Act of 1914 were (i) "to purchase or otherwise acquire all real and personal property necessary to carry out the purposes of this Act"; (ii) "to exercise the power of eminent domain in acquiring property for such use"; and (iii) "to acquire rights of way, terminal grounds, and all other rights . . . ."[4] The 1914 Act went on to provide that:

> 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 . . . .[5]

The 1914 Act further authorized the federally-owned Alaska Railroad "**to make and establish rules and regulations for the control and operation of said railroad**" and "**to lease the said railroad, or any portions thereof**, including telegraph and telephone lines, after completion, under such terms as he [the Secretary of the Interior] may deem proper."[6]

The federal government wasted no time in complying with Congress's directives in the Act of 1914. Rights-of-way were established between the seaport of Seward and the interior mining community of Fairbanks and preliminary construction began on the railroad in 1915.[7] The Alaska Railroad's "golden spike" was driven by President Harding in Nenana in July 1923.[8]

The proponents of HJR 38 analogize the Alaska Railroad right-of-way granted in the 1914 Act to the right-of-way grants made pursuant to the General Railroad Right-of-Way Act of March 3, 1875.[9] But the 1914 Act does not mention, much less incorporate, the 1875 Act, nor is the 1914 Act analogous to the 1875 Act. That is not surprising since the purposes of those two Acts were completely different.

The 1875 Act, which provided for the grant of railroad right-of-way easements to private railroad companies, was designed to provide those private companies with adequate control of

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[2] Act of March 12, 1914, 43 U.S.C. 975 *et seq*.; 38 Stat. 305 ("1914 Act"), repealed by ARTA, Pub.L. 97-468, Title VI, §615(a)(1).
[3] 1914 Act, Section 1 (emphasis added).
[4] 1914 Act, Section 1.
[5] 1914 Act, Section 1 (emphasis added).
[6] 1914 Act, Section 1 (emphasis added).
[7] Brown at 35-41.
[8] Brown at 49.
[9] 18 Stat. 482 (43 U.S.C. §§ 934-39) ("1875 Act").

their ROWs without granting them fee title. This approach deviated from previous land grant railroad acts that arguably did confer fee title on private companies. This change was made in reaction to complaints regarding the amounts of federal public land that had been granted in fee to large private railroads. Although ROWs granted pursuant to the 1875 Act were within the exclusive control of the railroads that held them, as discussed below, the underlying fee title was retained by the federal government.

The very nature of the 1914 Act – authorizing and directing the federal government to designate federal lands for a railroad to be owned and run by the federal government for various "governmental and public uses" – is completely different from the purposes of the 1875 Act and other acts that granted lands to private railroad companies. The 1914 Act did not grant federal land to any private railroad. The land designated for the Alaska Railroad stayed in federal ownership. Nor was the land used by any private railroad; the Alaska Railroad was owned and directly operated by the federal government. For all of these reasons, the public policy considerations that spurred Congress to pass the 1875 Act and subsequent private railroad ROW land grant acts were not implicated by the creation of the federally-owned Alaska Railroad pursuant to the 1914 Act. The 1914 Act and the 1875 Act are two separate laws with different language and different purposes.

For the next several decades, the federal government owned and the U.S. Department of Transportation operated the Alaska Railroad, moving freight and passengers between Seward, Anchorage and Fairbanks. During this time, the Alaska Railroad ROW was also used as a utility corridor. By the early 1980s, however, with the Alaska Railroad having generally been a money-loser with dated infrastructure under federal control, the federal government began discussing the concept of transferring it to another entity.

2. The Alaska Railroad Transfer Act (ARTA)

In 1982, legislation was introduced in Congress authorizing the transfer of the Alaska Railroad, including all of its real and personal property, 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 and other lands to be transferred to the State of Alaska was prominent among the points under discussion.

a. The Legislative History of ARTA Confirms that the Federal Government Owned Exclusive Rights in the Alaska Railroad ROW and Intended to Convey Those Rights to the State.

Congressional committees determined that that most land of the federally-owned Alaska Railroad, including its ROW, was held in fee simple title by the United States. The original intent of Congress in passing ARTA, therefore, was that most federal Alaska Railroad land would be transferred to the State in fee simple. As the Senate Committee on Commerce, Science and Transportation stated a year before ARTA was enacted, under the proposed ARTA, the United States:

> [W]ould 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.**[10]

Therefore, the Committee recognized that the 1914 Act and the operation and use of the ROW by the federal Alaska Railroad from the creation of the Alaska Railroad onward resulted in the federal government owning fee simple title in the ROW. The Committee went on to explain the reason for conveying the ROW in fee: "The reported bill . . . ensures conveyance of the track right-of-way in fee **so that the State can continue to operate the railroad.**"[11] The word "continue" in this context indicates that Congress understood that the federal Alaska Railroad operated the ROW subject to a fee simple interest and intended for the State of Alaska to continue to do the same.

These materials demonstrate that from the early discussions that ultimately led to ARTA, Congress determined both that the federal government owned a fee simple interest in the Alaska Railroad ROW and that exclusive control of the ROW was necessary for viable railroad operations. As the proposed ARTA progressed through Congress, however, it was recognized that some Alaska Railroad lands could be subject to third party claims.[12] Congress recognized not only that the proposed transfer legislation must set forth a process for determining any such third-party claims, but also that it was critical that the United States provide the State with exclusive control of the ROW.[13] As Senator Ted Stevens explained in describing ARTA's third-party claims adjudication process on the floor of Congress just a few weeks before ARTA passed Congress:

> On the date of the transfer, **the State would be granted fee title to lands not subject to such claims of valid existing rights pending expedited adjudication, 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**.[14]

Senator Stevens made it clear, however, that the claims adjudication process would not interfere with the State-owned railroad receiving exclusive rights in the ROW:

> The concept of an exclusive use easement also is introduced in the substitute. **This defined interest 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

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[10] *See* Report No. 97-479, Senate Committee on Commerce, Science and Transportation, 97th Congress, 2d Session, June 22, 1982 ("Report No. 97-479"), at 8; see also Report No. 97-479 at 1 ("provides for the conveyance of the track right-of-way in fee"; Report No. 97-479 at 14 ("The track right-of-way is to be transferred in fee simple"). Notably, the 12,000-acre estimate for the area of the ROW to be transferred in fee simple contained in Report No. 97-479 nearly equals the approximate extent of the entire Alaska Railroad ROW transferred to ARRC in 1985.

[11] Report No. 97-479 at 8 (emphasis added).

[12] *See* Report No. 97-479 at 7.

[13] *See* Congressional Record-Senate, Dec. 21, 1982 ("12/21/1982 Congressional Record"), at S 15956 (remarks of Senator Ted Stevens).

[14] 12/21/1982 Congressional Record at S15956.

> crosses land owned in fee by the Federal Government, **the full fee title to the right-of-way will be transferred to the State**.[15]

Senator Stevens went on to describe the purpose of the defined minimum interest the State would receive in the ROW under ARTA:

> Essentially, [the exclusive use easement] is defined **to insure that the State-owned railroad will receive exclusive and complete control over land traversed by the right-of-way**.[16]

Senator Stevens' remarks on the floor of the Senate confirmed Congress's intent to provide the State-owned railroad with exclusive control over the entire ROW, including portions of the ROW, if any, where a fee interest could not be obtained before the adjudication process.[17] As discussed below, the plain language of ARTA both reflects and accomplishes that intent.

b. The Plain Language of ARTA Tracks with the Federal Government's Intent to Transfer Exclusive Rights in the ROW to the State.

ARTA's plain language confirms that the State-owned railroad was to receive exclusive control of the entire ROW. That language includes the following Congressional finding that unequivocally establishes the reason for that requirement:

> 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**."[18]

ARTA provided that all of the federal government's interest in Alaska Railroad lands would be transferred to the State-owned railroad. As even the proponents of HJR 38 concede, and the legislative history of ARTA recounted above confirms, where the ROW consisted of or traversed lands that had never left federal ownership, the interest in the ROW that would be transferred would be fee simple. But the intent to provide exclusive control of the ROW even where some portion of it had left federal ownership at some point is equally clear. This exclusive control provision specifically applies to any areas of the ROW that left federal ownership prior to the enactment date of ARTA, which is what the proponents of HJR 38 are claiming with respect to the ROW adjacent to their properties:

> **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

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[15] 12/21/1982 Congressional Record at S15956. *See also* Report No. 97-479 at 9 (in adjudicating third party claims, the Secretary of the Interior "is directed to consider the findings and policies of this legislation, including the importance of transferring the right-of-way in fee to the continued operation of the railroad . . . . [T]his determination is critical to the future of the railroad and must be made expeditiously.")

[16] 12/21/1982 Congressional Record at S15956.

[17] The proponents of HJR 38 contend that all Senator Stevens said about the ROW was that portions of it that never left federal ownership would be transferred in fee, but that is incorrect as shown by the quotations above. What Senator Stevens actually said confirms that Congress intended to transfer at least an exclusive use easement to the State for the entire ROW.

[18] 45 U.S.C. § 1205(b)(4)(A)(ii) (emphasis added).

> 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**.[19]

This statement alone undermines the proponents' contention that Congress did not intend to convey at least an exclusive use easement in the entire ROW. Underscoring the mandatory nature of the federal government's obligation to convey to ARRC at least an exclusive use easement is ARTA's requirement that the federal government defend the State-owned railroad's title in the ROW against any actions challenging that title.[20]

The proponents of HJR 38 argue that ARTA only provided for the transfer of exclusive use rights in the ROW in isolated cases, with the remainder of the ROW being transferred as a non-exclusive easement. Under that view, the exclusive use easement defined in ARTA acts as a ceiling, providing exclusive control of the ROW only in Denali National Park and areas affected by unspecified Native claims. But that interpretation is wrong, undermined by both the language of ARTA and its legislative history. In fact, situation is just the opposite. The exclusive use easement provisions of ARTA function not as a ceiling, but instead as a protective floor that ensures that the State-owned railroad will have the exclusive control of the ROW necessary to operate a safe and economical railroad.

The plain language of ARTA and the legislative history make it clear that the exclusive use easement requirement does not apply only to Denali Park and areas affected by Native claims. ARTA states that exclusive control of the ROW, not just certain parts of the ROW, are necessary to operate a safe and economical railroad.[21] As described above, Senator Stevens' remarks on the Senate floor demonstrate that an exclusive use easement was to be the "minimal interest the State is to receive in the Alaska Railroad right-of-way" and "**also** the interest the State will receive through the Denali National Park and Reserve," while other areas of the ROW would be transferred in fee.[22] Finally, ARTA's express provision that "not less than an exclusive use easement" was the interest to be transferred in portions of the ROW that left federal ownership before ARTA was passed or that were subject to a valid existing claim by a party other than a Native Village Corporation leaves no doubt that this requirement was broader than applying simply to Denali National Park and areas near Native claims.[23]

The argument that the ARTA exclusive use easement provisions operate as a ceiling, rather than as a floor, also defies logic. Congress expressly found that exclusive control of the ROW is necessary for safe and economical railroad operations. The proponents' argument supposes that statement is only true in Denali National Park and in the vicinity of some undefined Native claims. But a chain is only as strong as its weakest link, and a railroad ROW

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[19] 45 U.S.C. §1205(b)(4)(B) (emphasis added).

[20] 45 U.S.C. §1205(b)(4)(B).

[21] 45 U.S.C. § 1205(b)(4)(A)(ii).

[22] 12/21/1982 Congressional Record at S15956 (emphasis added).

[23] The example of Denali National Park actually shows that the exclusive use easement provision was intended to act as a floor for rights in the ROW. The federal government owned fee simple title to land in Denali National Park and could have transferred fee title to the ROW in the Park to the State-owned railroad. But Congress chose to hold back some of the rights in the ROW to provide the National Park Service with some continuing ownership rights, while still providing the State-owned railroad with exclusive control adequate to allow viable railroad operations.

is akin to a chain. If exclusive control of the ROW is necessary to operate a safe and economical railroad, then such control must apply to the full length of the ROW. Any break in the chain – in the form of non-exclusive ROW – would necessarily undermine the safety and economics of rail operations along the ROW as a whole. The concept of the ARTA exclusive use easement as creating a ceiling instead of a protective floor, therefore, flies in the face of the intent and findings of Congress, the plain language of ARTA and logic. Instead, ARTA provided that ARRC would obtain from the federal government exclusive control of the entire Alaska Railroad ROW.

B. The Initial Conveyances of Alaska Railroad ROW to ARRC Show That Congress Always Intended to Transfer Exclusive Rights in the ROW to the State.

The above analysis is further confirmed by what transpired from day one of the transfer of the Alaska Railroad ROW from the federal government to ARRC. In January 1985, numerous documents conveying Alaska Railroad land from the federal government to ARRC were executed. Where land had been previously surveyed, final patents were issued. Where surveys remained to be conducted, a situation which applied to much of the ROW, property interests were conveyed by means of interim conveyances. A relatively small amount of Alaska Railroad land was conveyed by exclusive licenses, which applied in areas potentially subject to third party claims.

A key feature of all of these forms of conveyance was that they all immediately conveyed to ARRC all of the federal interest in the land in question, with that interest expressly stated to be "not less than an exclusive use easement" as defined in ARTA. Each interim conveyance quoted the terms of an ARTA exclusive use easement, explained that an interim conveyance was being used in order to allow the land to be surveyed as provided in ARTA, and stated that the interest conveyed under the interim conveyance had the force and effect of a United States patent. Below is an excerpt from the interim conveyance, dated January 5, 1985, which transferred, among other land, the ARRC ROW that traverses South Anchorage:

> [T]he 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 assigned and successors the real property described above to have and 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 than an exclusive-use easement as defined in Sec. 603(6) of ARTA**.
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> 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.
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> **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.[24]

In this manner, exclusive rights in the Alaska Railroad ROW were transferred to ARRC on the first day of land transfers required by ARTA. This confirms the intent of Congress and ARTA to convey exclusive rights in the ROW to the State-owned railroad.

The proponents of HJR 38 assert that the reason the interim conveyances were called "interim" was because there was something regarding the property rights to be conveyed that still needed to be determined. That is incorrect. ARTA plainly required the conveyance of "not less than an exclusive use easement" and the interim conveyances expressly did so. The only reason for the use of interim conveyances, as expressly explained in ARTA, was the need to conduct surveys of much of the land being transferred, including much of the ROW.[25] And that reason is further confirmed by the interim conveyances themselves, as shown in the quoted language above. Only the boundaries of unsurveyed portions of the ROW, not the property interests to be held by ARRC in those areas following transfer, remained to be determined by survey. Once the surveys were completed, final U.S. Patents were issued for land, including ROW, which had previously been conveyed by interim conveyances and exclusive licenses, just as ARTA required.[26]

C. Even if the Alaska Railroad ROW is Analogous to Act of 1875 ROW, Which it is Not, the ROW Would Still be Exclusively Controlled by ARRC.

A final issue requiring exploration is the contention by the proponents of HJR 38 that the ARRC ROW is a non-exclusive common law easement that allows adjoining landowners to use the ROW in any manner that does not interfere with railroad operations. As a preliminary matter, as the preceding analysis shows, the ARRC does, in fact, have exclusive control of its ROW because it has fee simple title to most of it and at least an exclusive use easement as to all of it. Assuming solely for the sake of argument, however, that ARRC's ROW is a railroad easement analogous to such easements granted under the 1875 Act, ARRC nevertheless would still have exclusive control of the ROW. That is true because, as explained in detail below, railroad easements consistently have been held to provide railroads with exclusive rights to their ROWs for well over 100 years.

1. Railroad ROWs Can be Strips of Land or Easements.

The term "right of way" has a twofold meaning. Black's Law Dictionary defines the term as follows:

> **Right of way**. Term "right of way" sometimes is used to describe a right belonging to a party to pass over land of another [i.e. an easement], **but it is**

[24] Interim Conveyance, executed on January 5, 1985, and recorded on January 8, 1985, at Book 1212, pages 260-78 in the records of the Anchorage Recording District. This excerpt is from pages 271-72 of said Interim Conveyance. See also Interim Conveyance, Book 1212, at pages 275-76 (setting forth ARTA's definition of "exclusive use easement.").

[25] 45 U.S.C. §1203(b)(2)-(3).

[26] This analysis also refutes the contentions of the HJR 38 proponents that ARRC and the federal government improperly began converting non-exclusive easements to exclusive use easements in the mid-2000s. The transfer of exclusive rights in the ROW to the State was always the intent of Congress when it considered and passed ARTA and when the initial conveyances were made in January 1985.

> **also used to describe that strip of land upon which railroad companies construct their roadbed**, and when so used, the term refers to the land itself, not the right of passage over it.[27]

ARRC asserts that, for the reasons stated above, it primarily owns its ROW in fee simple title, i.e., ARRC owns the strip of land constituting the ROW, and that it owns at least an exclusive use easement in its entire ROW. The proponents of HJR 38, on the other hand, contend that the ARRC ROW is a railroad easement, not a strip of land owned in fee simple, and that this easement is non-exclusive. The following section explains why, even if the proponents of HJR 38 were right in contending that the ARRC ROW is akin to an Act of 1875 ROW, which they are not, ARRC would still have exclusive control of the ROW.

2. The Exclusive Nature of Railroad ROWs.

Courts and other legal authorities and commentators have consistently recognized that railroad easements, including those granted under the Act of 1875, provide railroads with exclusive control over those ROWs.

Railroad easements are by their nature broad and exclusive. As one commentator pointed out:

> **A railroad under an easement for railroad purposes acquires the right of exclusive possession and most of the qualities of a fee title** subject to the limitation that an easement must be used for railroad purposes.
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> 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**.[28]

As stated by another commentator:

> 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.[29]

The U.S. Supreme Court and other courts have agreed with this interpretation for over 100 years. In *Western Union Telegraph Company v. Pennsylvania Railroad Company*, the Supreme Court stated:

> A railroad right-of-way is a very substantial thing. It is more than a mere right of

[27] Black's Law Dictionary, 5th Edition 1979 (emphasis added).
[28] G. Thompson, Commentaries on the Modern Law of Real Property (1965), §381, at 503, 512 (emphasis added).
[29] 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).

> passage. **[A right-of-way] is more than an easement . . . . [I]f a railroad's right-of-way was an easement it was 'one having the attributes of the fee, perpetuity and exclusive use and possession'** . . . .").
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> **A railroad's right of way has, therefore, the substantiality of the fee, and it is private property, even to the public, in all else but an interest and benefit in its uses**. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation.[30]

This rule has been and continues to be well accepted. As one federal Court of Appeals noted about railroad ROW easements:

> **The decisions of the national courts and of a majority of the state jurisdictions, however, are to the effect that the railroad company is entitled to the exclusive use and possession of its right of way, and that the owner of the servient estate has no right to occupy the surface of the land conveyed for right of way, in any mode, or for any purpose, without the railroad company's consent**.[31]

That court when on to explain why such a right of exclusive use was important to the safe and economical operation of railroads:

> In order to provide such a system, recognized safety measures must be followed in the maintenance of the roadbed and right of way. The railroad company is engaged in interstate commerce. It serves, not only residents of Kansas, but people generally throughout the country. It is enjoined to exercise a high degree of care by general law. In addition to this, it is subject to certain regulations and requirements by the Interstate Commerce Commission with reference to safety in the maintenance of its right of way and the operation of its trains. **The basic reason for the majority rule is that exclusive possession is necessary to enable the railroad company to safely conduct its business and meet the duty of exercising that high degree of care which the general law and administrative rules enjoin upon it.** . . . The requirements of the railroad company in this respect are largely determined by the duties imposed upon it by general law. **These duties require it to have the exclusive possession of its right of way**.[32]

The exclusivity of railroad ROW easements includes easements granted under the 1875 Act and subsequent federal land grant statutes. As one court recently explained, "[a]s to rights-of-way granted by Congress in 1875 and beyond, the Railroad has exclusive rights to the surface and, in addition, broad and extensive rights of sub-lateral and subjacent support to prohibit interference with railroad operations and maintenance."[33] Put another way, federally-granted railroad rights-of-way under the 1875 Act and later ROW land grant acts entitle railroads

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[30] 195 U.S. 540, 570 (1904) (emphasis added).
[31] *Midland Valley R. Co. v. Sutter, et al*, 28 F.2d 163, 165 (8th Cir. 1928) (emphasis added).
[32] 28 F.2d at 167-68 (emphasis added).
[33] *Union Pacific R.R. v. Santa Fe Pacific Pipelines*, 231 Cal.App. 4th 134, 163 (Cal. Ct. App. 2014); *cf. Vieux v. East Bay Regional Park Dist*., 906 F.2d 1330, 1333 (1990) (referring to post-1871 federal railroad rights-of-way as "exclusive use easements").

to the exclusive use and occupancy of those rights-of-way, which is necessary for railroads to function.[34]

The exclusivity of control of a railroad over its ROW applies whether the railroad ROW in question is described as a "limited fee" or an "easement," as the latter term has been used to refer to 1875 Act and later federally-granted railroad ROWs. As the Tenth Circuit Court of Appeals has observed, "[w]ith the expansion of the meaning of easement to include, so far as railroads are concerned, a right in perpetuity to exclusive use and possession the need for the 'limited fee' label disappeared."[35] In short, railroads have exclusive control over the surface and substantial aspects of the subsurface of the ROWs, regardless of whether those ROWs are standard railroad easements, express exclusive use easements like those guaranteed under ARTA or owned in fee simple by the railroad.

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:[36]

> 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.[37]

It was these concerns that Congress recognized in ARTA when it guaranteed transfer to the State of at least an exclusive use easement as to all portions of the Alaska Railroad ROW.

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[34] *State v. Oregon Shortline Railroad Co*., 617 F.Supp. 207, 210 (D. Idaho 1985).

[35] *Wyoming v. Udall*, 379 F.2d 635, 639 (10th Cir. 1967); *see also State of Wyoming v. Andrus*, 602 F.2d 1379, 1382-83 (10th Cir. 1979) (citing *Wyoming v. Udall*, 379 F.2d at 640).

[36] 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 575 deaths in 2017 alone.

[37] 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).