

HB136: Railroad Utility Corridors

House Judiciary Committee

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ALASKA
RAILROAD

Background: Legal Precedent and Industry Standards

Alaska R.R. Corp V. Flying Crown Subdivision

Quiet title action to legally define ARRC's property interest in the ROW by answering two questions:

1. What was the interest reserved by the federal government in the ARRC ROW?
2. What interest in the ROW was conveyed to ARRC by ARTA?



What ROW interest was reserved by the federal government?

- 1914 Alaska Railroad Act passed by U.S. Congress does not define nature of property interest in ROW
- In *Flying Crown* analysis, courts looked to case law:
 - What is legal precedent for Lower 48 railroads?
 - How does the original federal ownership of the Alaska Railroad impact this consideration?

What is standard for Lower 48 Railroads?

- Prior to 1875 General Railroad Right-of-Way Act, railroads were granted ROW in fee simple by federal government
- 1875 Act granted easement, not fee. Two Supreme Court rulings related to limits of 1875 Act easements:
 - 1875 Act railroads do not possess **subsurface mineral rights**
Great Northern Railway Company v United States
 - If 1875 Act railroad abandons ROW, the court confirmed **reversionary rights** to underlying property owner
Marvin M. Brandt Revocable Trust v. United States
- Tenth Circuit ruled 1875 Act railroads had the right to exclude from ROW under the 1875 Act, in congruence with *Great Northern* and *Brandt*, because “[a] railroad easement is exclusive in character”
LKL Associates., Inc., v. Union Pacific Railroad Co.

How does original federal ownership affect consideration?

- The Alaska Railroad was unique: the only railroad in the country wholly owned and operated by the federal government
- In 1914 Act, federal government was reserving ROW to itself
- Difficult to imagine the federal government would have reserved a lesser property interest for itself than that granted to 1875 Act railroads
- Established precedent: where land grants are ambiguous, such ambiguity must be resolved in favor of the sovereign grantor – the federal government
- 1982 Congress clearly found the federal government held either fee simple or exclusive use easement in ROW



What interest in the ROW did Congress convey to ARRC?

1982 Alaska Railroad Transfer Act: *“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.”*

Congress is unambiguous in reserving and defining exclusive use easement in ARTA:

ARTA specifies that the federal government must grant the State an easement that is "not less than an exclusive-use easement"

ARTA Definition: *"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;



Flying Crown Court Decisions

District Court and Ninth Circuit found fully in favor of ARRC, upholding the exclusive use easement as defined in ARTA. The Supreme Court declined to hear the case.

Excerpt from the Ninth Circuit opinion:

Safe and efficient operation requires railroads to have the ability to exclude anyone, including the servient estate owner, at any time.

Railroad rights-of-way are necessarily different than traditional easements because of the purpose of the easement.

Logically, the scope of an easement intended to facilitate the passage of large, fast-moving machinery differs from, say, an easement to walk across a neighbor's land to access the beach.

The purpose of the 1914 Act—to provide a railroad for the territory of Alaska—is best served by an exclusive-use easement.

HB136

Proposed bill language:

“The corporation shall allow **an owner of real property** subject to an easement in favor of the corporation... to use the property in a manner that **does not unreasonably interfere** with the corporation's use of the property.

The corporation may require the owner of real property subject to an easement in favor of the corporation to **obtain a permit from the corporation to construct a railroad crossing** within the easement and may charge the owner a **revenue-neutral fee** associated with issuing the permit and developing and maintaining the crossing.”

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Bill Sponsor’s presentation implied the above bill language would:

- Undermine ARRC’s exclusive use easement
- Require ARRC to assume the expense of road crossings burdening the rail line even when permitted to entities without property interests in the ROW
- Allow ARRC to use ROW for Railroad, Telegraph and Telephone purposes only (ARTA allows for Transportation, Communication and Transmission)
- Address “Outdoor recreationists being denied access to public property”

HB136 - Concerns

- Lack of clarity of practical impact of HB136, and suggestion from bill sponsor's presentation of impacts well beyond plain reading of bill language
- Undermining ARRC's exclusive use easement would be well outside legal precedent and industry standards
- Applying a thumb to the scale of approving 'non-interfering' uses of the ROW brings operational and safety concerns
- ARCA defines ARRC as separate legal entity from State of Alaska; if State asserts greater management of ROW, could increase State liability and regulatory obligations
- Implication of restricting ARRC use of ROW to Railroad, Telegraph and Telephone only would disrupt many current permitted utilities
- Promoting private usage and development of ROW erodes available land within continuous utility corridor – incredibly valuable and irreplaceable asset for benefit of Alaskans

HB136 - Concerns

Proposed Fish Creek Trail in Anchorage illustrates limited resource of ROW corridor

- Homes adjacent to ROW with lawns extending well within corridor (dating to federal ownership of railroad)
- These lawns do not present safety or operational concerns to railroad operations – but do conflict with other uses of corridor (Fish Creek Trail)
- Promoting similar private usage and development along ROW will inhibit future public benefit uses – trails, pipelines, other utilities – that ARRC is statutorily mandated to protect for benefit of Alaskans



HB136 - Concerns

Potential Unintended Consequences to Adjacent Homeowners

- Adjacent homeowner is not necessarily underlying property owner within ROW; in some cases, large homestead patents were subdivided into smaller parcels that did not include land underlying ROW
- ARRC does not require proof of underlying property ownership; adjacent homeowners may use outer edges of ROW for residential lawns and gardens when it does not interfere purpose of utility corridor
- Unclear how HB136 would affect use of ROW when adjacent homeowner and underlying property owner are two different parties

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Current ARRC Policies and Practices:

- ARRC does not charge fees or require permits for residential lawn and garden use of the ROW by adjacent homeowners if no safety or operational interference
- ARRC charges revenue-neutral fees associated with crossing permits, development and maintenance as required by state law and federal regulations
- ARRC is charged by enabling statute to “preserve the integrity of the railroad utility corridor for transportation, communication, and transmission purposes”
- State ownership allows for effective and meaningful channels for public feedback on ARRC policies



HB136 – Final Thoughts

- ARRC believes we are already meeting the plain reading of HB136 – allowing free use of the ROW by adjacent homeowners that does not interfere with the purpose of the utility corridor
- ARRC does not assert fee simple ownership of entire ROW, and fee simple ownership and an exclusive use easement are distinct property interests
- Undermining ARRC's exclusive use easement would represent a clear departure from established legal precedent and railroad industry standards
- Promoting private usage and development along ROW will inhibit future public benefit uses ARRC is statutorily mandated to protect for benefit of Alaskans
- ARRC shares goal of positive relationships with adjacent property owners, and believes uncertainty created by HB136 is counterproductive to that goal