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REPORT

April 16, 1998

Phyllis Johnson, Vice President
Alaska Railroad Corporation
PO Box 107500
Anchorage, AK 99501

RE: Ft. Wainwright to Eielson Spur Lands and Right-of-way

Dear Phyllis:

EXECUTIVE SUMMARY

As you requested, I have done an extensive review of the factual history and legal issues surrounding the right-of-way and land for construction of the railroad spur from Ft. Wainwright to Eielson Air Force Base (originally called the "Satellite Field"). In particular, I talked to Larry Swenson and reviewed the materials he has collected and the claims and arguments that he articulated. Mr. Swenson was pleasant and cooperative in explaining his research and opinions. He made a copy of his file for me. My conclusion is that the Alaska Railroad Corporation (the "Railroad" or "ARRC") does have at least a valid legal "exclusive use easement" right-of-way 100 feet on either side of the center line of the existing railroad spur through all of the

private lands between the 2 military installations (the "spur").[1]

In summary, the arguments raised by Mr. Swenson do not alter the fact that the railroad has at least an exclusive use easement 200 feet wide along the spur. The railroad's title prevails over all identified claimants for a variety of reasons, some of which vary from claimant to claimant and some of which apply to all property owners. Some reasons do not apply to particular parcels, depending on factors such as the timing of homestead entries.

The Railroad's interest in the spur land stems from two main sources--the Act of Congress dated March 12, 1914 and the Alaska Railroad Transfer Act of 1982 ("ARTA"). The Act of Congress dated March 12, 1914 provided, 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 taken up, entered, or located in Alaska after March 12, 1914, 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 100 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.*

[1] I have not researched the right-of-way within the boundaries of Ft. Wainwright or Eielson Air Force Base as thoroughly. Generally, the license on Ft. Wainwright that was transferred to the Alaska Railroad is 14 feet on either side of the center line. At its southwesterly end, the Wainwright-Eielson exclusive use easement transferred to the Railroad by the Alaska Railroad Transfer Act ("ARTA"), appears to stop at the north boundary of Section 34, T1S, R3E, Fairbanks Meridian, which is the North boundary of Eielson Air Force Base. Most of Eielson AFB was withdrawn from public lands by PLO 577 on 3/29/1949, after the railroad tracks and federal railroad right-of-way were in place. However, the ARTA Interim Conveyance and the Exclusive License do not appear to transfer any licenses or easements on Eielson to the ARRC. I have not researched this question further because the focus of this project is on lands held by private landowners.

This portion of the 1914 Act was codified as § 305 of Title 48 of the United States Code. It was later reclassified to 43 U.S.C. § 975(d). That statute was repealed by the Alaska Railroad Transfer Act ("ARTA"), after transfer of the rights to the Alaska Railroad Corporation. <u>The Act of Congress of March 12, 1914, preceded even the earliest entry found by me on the route of the spur railroad - 4/17/1919</u>. As a result, all later homestead entries along the spur route were subject to the federal government's right to later build a railroad across the property. I enclose a spreadsheet showing 26 of the most important entries along the spur route. When sorted by entry date, patent date, etc., the spreadsheets are very useful in analyzing the history of claims along the route.

The second major source of ARRC's title is ARTA. The Alaska Railroad Transfer Act provided for conveyance of the Federal Alaska Railroad properties to the State of Alaska's Alaska Railroad Corporation. That Act, and the Interim Conveyance and the Exclusive License signed and recorded by the Federal Government, convey interests in the spur land between Ft. Wainwright and Eielson Air Force Base to the Alaska Railroad Corporation. Generally speaking, the Interim Conveyance conveys a 200' wide strip of property that extends across all lands in private ownership between the two military facilities along the spur line tracks. The Exclusive License Agreement conveys a narrower (generally 28' wide) license along the tracks across Ft. Wainwright and a 200' wide license across certain small portions of Federal land held by the Federal Corps of Engineers for its flood control project.[2] The Interim Conveyance conveys an

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[2] The Interim Conveyance deals with land where there are no unadjudicated rights or claims, that is, lands where only a survey of the railroad land was required before a patent could issue. The Exclusive License generally involves lands where there was still a need to adjudicate some rights or issues before an interim conveyance could be done, and ultimately a patent could issue (perhaps reserving certain easements to the Department of Defense, etc.) Section 604 b(3) of ARTA says "the force and effect of an interim conveyance 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." So, if the Federal Government had more than an exclusive right-of-way, the Interim Conveyance also granted that full interest to the ARRC, up to and including full fee ownership. Thus the language, "not less than exclusive use easement" (which is generally defined as 200 feet wide). Currently, the Exclusive License gives the exclusive right "to use, occupy, and directly receive all benefits of the rail properties for the operation of the railroad in conformity with a Memorandum of Understanding which specifies how day-to-day operation will be handled" (such as coordination between the Army and the railroad).

interest "not less than an exclusive use easement" to the Alaska Railroad Corporation across these private lands. Under section 603(6) of ARTA, "exclusive use easement" includes the right to fence all or part of the lands and to exclude other persons from all or part of the lands in ARRC's discretion. It also includes the exclusive right to use, possess, and enjoy the surface estate of the land and to use so much of the subsurface estate of the lands as is necessary for the transportation, communication, and transmission purposes and associated support functions for which the surface of such lands is used.

ARTA is an independent source of title for ARRC, in addition to conveying portions of the federal government's interest in railroad property and rights-of-way. In 1982, the United States did own at least an exclusive use easement in the entire portion of the 200' wide spur land between Ft. Wainwright and Eielson. Even if the United States had not in fact owned at least such an estate as it conveyed in the ARTA Interim Conveyance, it in effect would have performed an inverse condemnation of that land by transferring it with a guarantee to the Alaska Railroad Corporation. See Myers v. United States, 323 F.2d 580 (9th Cir. 1963), and 378 F.2d 696, 697 (Ct. Cl. 1967). ARTA guarantees the State of Alaska that the interest conveyed for the 200' wide spur land was not less than an exclusive use easement. Any party aggrieved by such an inverse condemnation action would have recourse against the United States under the Tucker Act. 28 U.S.C. § 1491. The Statute of Limitations under the Tucker Act is six years, so any such claims would apparently now be barred as too late. The United States is obligated under ARTA to defend the State of Alaska's interest and title in the railroad land. 45 U.S.C. § 1205(b)(4)(B).

Homestead Rights- An entry by a homesteader onto public lands served to withdraw the lands from public use and established the entryman's rights in the land, if he or she subsequently received a patent to the land. In between entry and patent or cancellation or withdrawal or relinquishment of the entry, the land was not available for entry by anyone else. A patent, when issued, dates back, as against intervening claimants, to the time when the equitable title vested in the patentee by payments of the purchase price, or otherwise. Entry for the purpose of homesteading separates land from the public domain and vests the homesteader with all incidents of fee simple title as against all except the United States, which retains legal title until a patent is issued. United States v. Clarke, 529 F.2d 984 (9th Cir. 1976).

There appears to be very little case law interpreting the Act of 1914 or the similar statutes reserving rights-of-way for ditches and canals (the Act of August 30th 1890) and reserving rights-of-way for roads (the Act of Congress of July 24th 1947). The U.S. Supreme Court in Ide v. United States, 263 U.S. 497, 503, 44 S.Ct. 182, 68 L.Ed. 407, 411 (1924), said that Congress found it unsatisfactory to withdraw huge amounts of land so it repealed the withdrawal and restored lands to disposal with direction that in all patents there would be a reservation of rights-of-way for ditches and canals. The court concluded that this direction was intended to include canals and ditches constructed after the patent issues quite as much as those constructed before the patent. The court noted that the defendants in that case "were appraised of this right by the patents which passed the tracts to them. In short, they received and hold the title subject to the exercise of that right." The case of Myers v. United States, 378 F.2d 696 (Ct. Cl. 1967) similarly held that the Act of July 24, 1947, and its reservation in Alaska patents of rights-of-way for roads, allowed the roads to be constructed or modified after the land was patented to a private owner.

Because the Act of 3/12/1914 predated the first entry along the Eielson railroad spur, the U.S. clearly had the right to a 200' wide right-of-way for railroads on all of the public lands along the railroad spur between the two eventual military bases. Under the holding of the Supreme Court's Ide case, this right prevails even over the five homesteaders who received patents along the railroad right-of-way before construction of the actual railroad spur in 1947 (St. Louis, Brown, Witkopp, Wade and Jones). The point is moot as to one of those, Mary Jones, because she sold her land back to the Federal Government in 1944, before the spur was constructed.

The government's rights in the land were even more clear as to the next seven patentees, who made their entries before the railroad was constructed but received their patents after construction (Bradway, Loken, Davis, Schoentrup, Bedeff, [illegible] and Pollastrine). Each of those seven people received a letter in January of 1947 from the War Department notifying them that the spur line would traverse their property pursuant to the Act of Congress dated March 12, 1914. Each of their BLM files has a January 16, 1947 notation about the letter. The BLM or Corps of Engineers had compiled a list of 20 homestead entries which had been made along the proposed spur route before 1947. A copy is attached. These 20 are numbers 1-20 on my spreadsheet. From the

BLM records it appears that the railroad was to be finished by the Spring of 1947 so as to be ready for hauling construction materials to the 26 Mile Field for construction to be done there during the summer of 1947. I found two homestead entries which were made later in 1947, probably after the railroad was constructed. The first such entry was by Ice Clay on 5/12/1947 and the second was by Jerry Leach on July 2, 1947. Both of those claims later went to patent [Mr. Leach is not shown on the enclosed spreadsheets].

Even lower on the priority list would be those persons who made entries after 1947, when the railroad spur was definitely in place and in operation. They had obvious actual notice of the location of the railroad on their property. Still farther down the priority scale would be those persons who entered after the railroad right-of-way was formally noted on the township land serial records at the Fairbanks BLM office on February 15, 1950. Apparently the Fairbanks BLM office waited for a year or two to make the notation because it was waiting for maps and for express direction from Washington, D.C. That delay does not appear to have caused any harm. That notation on the land records was <u>not</u> required in order to give the Federal Government the right-of-way. Most patents issued after 2/15/1950 contain a separate exception from the land conveyed for the railroad already constructed. That exception was as a specific exception for the constructed tracks and right-of-way and was in addition to the general reservation stated in all Alaska patents for railroad rights-of-way.

Larry Swenson's property falls into this last category. Although he seemed to think the date was 1947, the entry or application on his property was actually made on July 7, 1952 as BLM File No. F-09752. It ultimately resulted in a patent in 1956. By the time of that entry, the Federal Act of 1912 reserving the right-of-way was in place. The actual railroad spur was constructed and in place and the notation on the BLM land records was made. There can be no doubt that the railroad has an exclusive use easement 200 feet wide through Mr. Swenson's property.

In other words, the claims as to Mr. Swenson's property are among the weakest of all. Even the strongest claims (such as Murray/Orr), by those who received a patent before the railroad spur was constructed or even designed, are still clearly subject to the railroad right-of-way under the 1914 Act and under ARTA. The property in which Hector's Welding and/or T.H.E. Company now

hold an interest was entered by Carl Finell on May 20, 1946 and thus is in a middle category. It is not clear how much construction was evident by that date. It is clear that construction was evident by January of 1947, because the BLM records reflect complaints by some entrymen that they would have trouble getting to their houses or would otherwise be inconvenienced by the proposed route. Mr. Finell was sent a letter in January of 1947 advising him of the proposed railroad and his patent does contain the general reservation and the specific exception for the railroad which had been constructed by the time of the patent.

Mr. Swenson's other arguments -- Mr. Swenson's legal arguments do not hold up to scrutiny. He notes that his patent language excepts from the conveyance "that certain railroad spur line and all appurtenances thereto, constructed by the United States, through, over, or upon the lands herein described, and the right of the United States, its officers, agents or employees to maintain, operate, repair, or improve the same, so long as needed or used for or by the United States." He points to the last phrase and says the U.S. doesn't have it anymore, so the easement is gone. First of all, this language is in addition to the general reservation for railroads which is also in his patent. The Railroad's rights cannot be less because this extra language was added. Even if no language was put in the patent, the right-of-way would still be there. United States v. Washington, 233 F.2d 811 (9th Cir. 1956). Second, the U.S. still has a reversionary interest in the railroad land under ARTA and the Interim Conveyance. If the land ceases to be used for railroad and other specific purposes, it can revert to the U.S. In some respects, the Alaska Railroad is analogous to a subcontractor for the U.S. At least, the current use and need could be deemed in some ways to be "for or by the United States." Third, ARTA and the Interim Conveyance conveyed at least an exclusive use easement 200' wide to the Alaska Railroad Corporation in January of 1985 and promised that the Federal Government would indemnify title. That is also enough to bring the need and use for or by the U.S. within the patent language, and is also a separate basis for title in the Alaska Railroad Corporation. But the real answer to this argument is found in section 604(c)(1) of ARTA:

> *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.*

The State cannot select new places to put railroads under the 1914 Act, but it otherwise has all of the reservations of rights that the U.S. had in the specified existing railroad lands.

Larry Swenson asserts that the pre-ARTA interest of the federal government in the right-of-way was non-exclusive because the patent does not say it was exclusive. I did not find any cases on point. The short answer is that it doesn't matter, because ARTA and the Interim conveyance plainly say they are giving the State exclusive use easements.

Mr. Swenson has a copy of a memorandum of opinion (attached) by Dennis J. Hopewell, Regional Solicitor for the Dept. of Interior, Alaska Region, dated July 29, 1988. Mr. Swenson believes that the memo supports his position, but it does not. The memo opines that unexercised 975d railroad reservations cannot be assigned to non-federal parties. ARTA clearly says they can't be, and repeals the Act of 1914 so that even the federal government cannot locate and construct new railroad rights-of-way anymore under that Act. However, I think Mr. Swenson believes that memo says that railroads in place cannot be assigned to non-federal parties. It does not say nor intend that, and would be wrong if it did. At page one the memo says it "does not apply to any rights-of-way that are presently in existence." At page 6 it says, "This is not to say that non-federal entities cannot be authorized to use part of an in-place, existing railroad right-of-way." The main purpose of ARTA was to assign and transfer the Alaska Railroad to ARRC. And ARTA at section 614 says, "The provisions of this title shall govern if there is any conflict between this title and any other law." So the transfer clearly was allowed and was done. In fairness to Mr. Swenson, I must say that the memo was somewhat difficult to understand until I read it several times.

Mr. Swenson told me that "the railroad" didn't like that opinion letter from the Department of the Interior, so they went

to the Department of Transportation to try to get an opinion more to their liking. He asserts that the Interim Conveyance was thus illegally signed by the Department of Transportation (instead of Interior) and is therefore invalid. Again ARTA refutes this argument. Section 604(b)(1)(B) directs "the Secretary" to deliver to the State an interim conveyance. Section 603(12) defines "Secretary" as the Secretary of Transportation. Additionally, Executive Order No. 11107, dated 4/25/1963, transferred the Alaska Railroad from the Secretary of the Interior to the Secretary of Transportation.

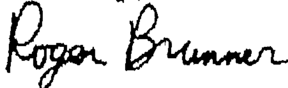
Mr. Swenson told me about the media publicity about how much the Alaska Railroad Corporation was making by hauling petroleum products for the North Pole Refinery. Because the trains go through his land, he thought he should get some of the profits. Likewise, he wanted some money for the fiber optic cables he saw buried in the right-of-way a year or two ago. He said his patent exempted the railroad spur line constructed by the United States, "through, over, or upon" his land, but not under it. The patent does reserve a right-of-way for the construction of railroads, telegraph and telephone lines. Also section 603(6) of ARTA specifically allows subsurface use for communication and transmission purposes.

Mr. Swenson also asserts that a federal Excess Right of Ways Act of 1957 somehow gave up unused rights of way and therefore limited the width of the right-of-way through his property. I could find no such act or other support for such an argument. The BLM maps, records and files contain no reference to such an Act, and they certainly should reflect such a change if it in fact had occurred. In any event, ARTA and the Interim Conveyance transferred a 200' wide exclusive use easement through Mr. Swenson's property, regardless of the existence or non-existence of an excess ROW act. I was likewise unable to find anything in the War Powers Acts which mentioned this spur, affected this situation or had any effect on the right-of-way.

Mr. Swenson told me that ARRC is making significant money from hauling from MAPCO's refinery products and from leasing fiber optic cables through "his property". He quoted figures of what he heard the ARRC was making. He wondered why the cable company was not paying him a license fee and whether he shouldn't get a portion of the MAPCO hauling fees. I do not see any basis for compensation here. ARRC is entitled to exclusive use of the easement, including subsurface rights, and has title to that easement guaranteed by the U.S. Government

Conclusion-- In summary, the Act of 1914 reserved the right of the United States to construct railroads across any public lands which were entered after March 12, 1914. All of the property now in private ownership along the spur route between Ft. Wainwright and Eielson was entered after that date and is therefore subject to that reservation. The U.S. Supreme Court has made it clear that such a reservation allows future location and construction of the railroad, even after a patent was issued. The patents contain a reservation putting the patentee on notice that his land was subject to later construction of a railroad. Even without the patent reservation, the language of the 1914 Act "granted" the rights-of-way to the U.S. Only four of the homesteaders held patents when the railroad was constructed. The other seven who entered before construction were sent a letter notifying them that the railroad would be coming through their property, and it appears that it was actually constructed before they received patents. Two other homesteaders entered in 1947, probably after construction was completed. It appears that all other entries were made after 1947, that is, after the railroad spur was constructed on the ground on which they were filing entries. In terms of current claimants, Larry Swenson has the weakest claims because his property was entered long after the tracks were laid and formal notice entered on the land records. ARRC holds (at least) a 200' "exclusive use easement" through the private lands along the spur route between Ft. Wainwright and Eielson AFB. It has the express rights to fence any part of that area that it chooses, and to exclude others from the property (with a few exceptions, such as the Alaska Highway) and to subsurface use of the property for communication and transmission purposes.

Sincerely,



Roger Brunner

RB:rd