

HISTORY: ALASKA RAILROAD EASEMENT

IT IS A PROBLEM OF STATEWIDE CONCERN

A BRIEF HISTORY:

Easement Act of 1898: provided for a 200 ft. wide easement in Alaska for anyone willing to build a railroad. No takers.

Alaska Railroad Act of March 12, 1914: 200 ft. wide easement, 100ft each side of centerline for “railroad, telephone, telegraph”. RR was owned by the Fed. Govt.

Pre –statehood this easement is found in patents issued by the Dept. of the Interior to homesteaders along the line.

Post statehood the RR continued to be owned and operated by the Fed. Govt. 45 USC 1201-1214.

The 1982 ARRTA transferred the rights of the Fed Govt to the State.

1 Transfer of existing real property under Sec. 2003.

2 Allowed for the State to acquire future easements of several varieties. Sec. 2008.

3 left the 1914 easements as they were: Sec. 1212.

4 Reversion to adjacent property owners: Sec. 1209 repealed in 2003. Corrected as to the Eilson Spur in the last session.

In 2006 AK RR solicits and acquires from Dept of the Interior patents converting 1914 -conveyed and sec. 2003 -transferred easements into 2008 easements. This changes a simple easement for certain uses into virtual ownership.

THE TWO BASIC ISSUES

ONGOING USE

RIGHT OF REVERSION

Railroad Issues

The purpose of this flyer is to give you a small amount of information regarding the issues with the railroad. This document is not intended to provide any legal advice or legal assistance to you.

There are 2 general issues going on with the railroad's new policy:

The 1st is **the use of the involved property by the railroad and competing uses by adjacent landowners.**

The situation can vary along the railroad property depending on the circumstances. For example, as far as the railroad yard downtown goes, the railroad may own the property outright. The railroad's ownership rights along its track might be various depending upon the locality involved. The railroad was deeded a "right-of-way" for "railroad telephone and telegraph" in some areas. This is not outright ownership. The usage follows the language of the right-of-way document. A right-of-way is simply a type of easement.

It is my understanding that a right-of-way confers upon the owner of that right-of-way the right to use that right-of-way for the purposes stated in the right-of-way document which created it. Typically, the property owner of the property adjoining the right-of-way or the owner of the property over which the right-of-way traverses has a right of reasonable use of the right-of-way conveyed, which uses are not unreasonably inconsistent with the right-of-way holders use. In a dispute between the right-of-way holder and others, the question of whether or not the uses are reasonable and not inconsistent becomes a fact issue during litigation, on occasion. That is an issue on a case-to-case basis where there are many users along a right-of-way, and different uses under consideration.

The owner is not required to apply for or pay for a permit to use the property, as the railroad is now attempting to require. Likewise, the right to use the right-of-way in a manner not inconsistent with the right-of-way holder's use is not subject to being terminated unless the creating document calls for that.

The 2nd issue **involves what is technically called “reversion”**. This commonly occurs where an easement or right-of-way is abandoned. Although there may be exceptions, the right-of-way which is the “dominant estate” commonly “reverts” back to the servient estate that it crosses if the ROW is abandoned. A thorough explanation of this as related to the railroads on a national basis is contained in a website of the National Association of Reversionary Property Owners (NARPO): links: home.earthlink.net/~dick156/row.htm. and prfamerica.org/speeches/3rd/RailsToTrailsMovement.html. This website and information deals with the reversion right as impacted by the “Rails to Trails Act” which was an attempt to circumvent the reversion right.

This issue is very complicated on a national basis and is further complicated locally by statutes having to do with the creation of the Alaska Railroad, the creation of their rights-of-way for track, the 1982 Alaska Railroad Transfer Act which transferred the Alaska Railroad from the federal government to the state of Alaska, some other federal statutes having to do with the reversion right, and a state statute that was passed in the last session of the legislature having to do with the Eielson Spur line.

I will not attempt to analyze all of this here but only point all this out to indicate that the matter is not simple. The attempt by the railroad to fit all of this into one new policy of the railroad may infringe on our rights which you and others have to reversionary rights.

At this juncture I simply recommend that we get organized, perhaps combining to acquire legal resources and other assistance. This assistance could also involve marshaling political assets.

I hope that this has been helpful and will advance the discussion.

ROADMAP TO THE PRESENT CONFUSION

A. PRE -1982 RIGHT OF WAY: ALL WERE GRANTED UNDER THE 1914 RR ACT AND ARE FOR "RAILROAD, TELEPHONE AND TELEGRAPH".

B. 1982 TRANSFER ACT: 3 CATEGORIES OF TRANSFERS THERE:

1. SECTION 1203 TRANSFERS: "RAIL PROPERTIES" (see; sec.1202(10) for the definition): THIS CONVEYED THE RIGHT OF WAY OWNED BY THE USA THROUGH THE RR. ALL SUCH PRE-82 EASEMENTS WERE UNDER THE 1914 ACT.

2. SECTION 1208 TRANSFERS: THE FEDS AGREED TO MAKE FED LAND AVAILABLE FOR FUTURE RAIL LINES AFTER 1982. (These were to be in a form as close as possible to the language of the 1914 Act and 1202(6), depending on the circumstances. See: 1208(a).

3. SECTION 1208(b)(1)(D). APPLICABLE TO DENALI PARK: THIS IS AN "EXCLUSIVE USE" EASEMENT AS DEFINED BY 1202(6) (See cheat sheet for the restrictions) This is the only place in the Act where such a "restricted use" easement is conveyed. The key word here is "CONVEYED". Other than Denali Park all pre-82 easements were simply passed through to the State since that was what the Feds owned.

C. PATENT AA 55129-9: (issued in 2006) This patent is for lands in Anchorage. The same may have occurred in the Valley, Fairbanks, etc. Note that it is issued with the restricted use language of Denali Park because it uses the 1202(6) rather than the 1202(10) language.

THE RR WITH BLM HELP HAS CONVERTED 1914 EASEMENTS INTO A COMPLETELY DIFFERENT OWNERSHIP INTEREST BY CONFLATING 1914 EASEMENT LANGUAGE WITH DENALI PARK EXCLUSIVE USE LANGUAGE.

THE RR CLAIMS THAT IT HAS THE FIDUCIARY DUTY TO
MAXIMIZE RR PROPERTY OWNERSHIP AND THAT THE 2006
PATENT OPERATES AS AN INVERSE CONDEMNATION LEAVING
ALL PROPERTY OWNERS TO SUE FOR COMPENSATION

THE RR ACCOMPLISHED BOTH GOALS ON PAPER

BUT.....

(1) AS TO THE LAND GRAB CHANGE FROM 1914 TO AN
EXCLUSIVE USE EASEMENT SEE:

AS 42.40.285

“Unless the legislature approves the action by law, the corporation may not

....

(5) apply for or accept a grant of federal land within a municipality; before approving an action under this paragraph, the legislature must determine that the federal land is required for essential railroad purposes; this paragraph does not apply to the application for or acceptance of a grant of federal land associated with.....

(C) a conveyance of rail properties of the Alaska Railroad under the original Alaska Railroad Transfer Act of 1982 as set out in Title VI, P.L. 97-468; in this subparagraph, "rail properties of the Alaska Railroad" has the meaning given in 45 U.S.C. 1202(10).”

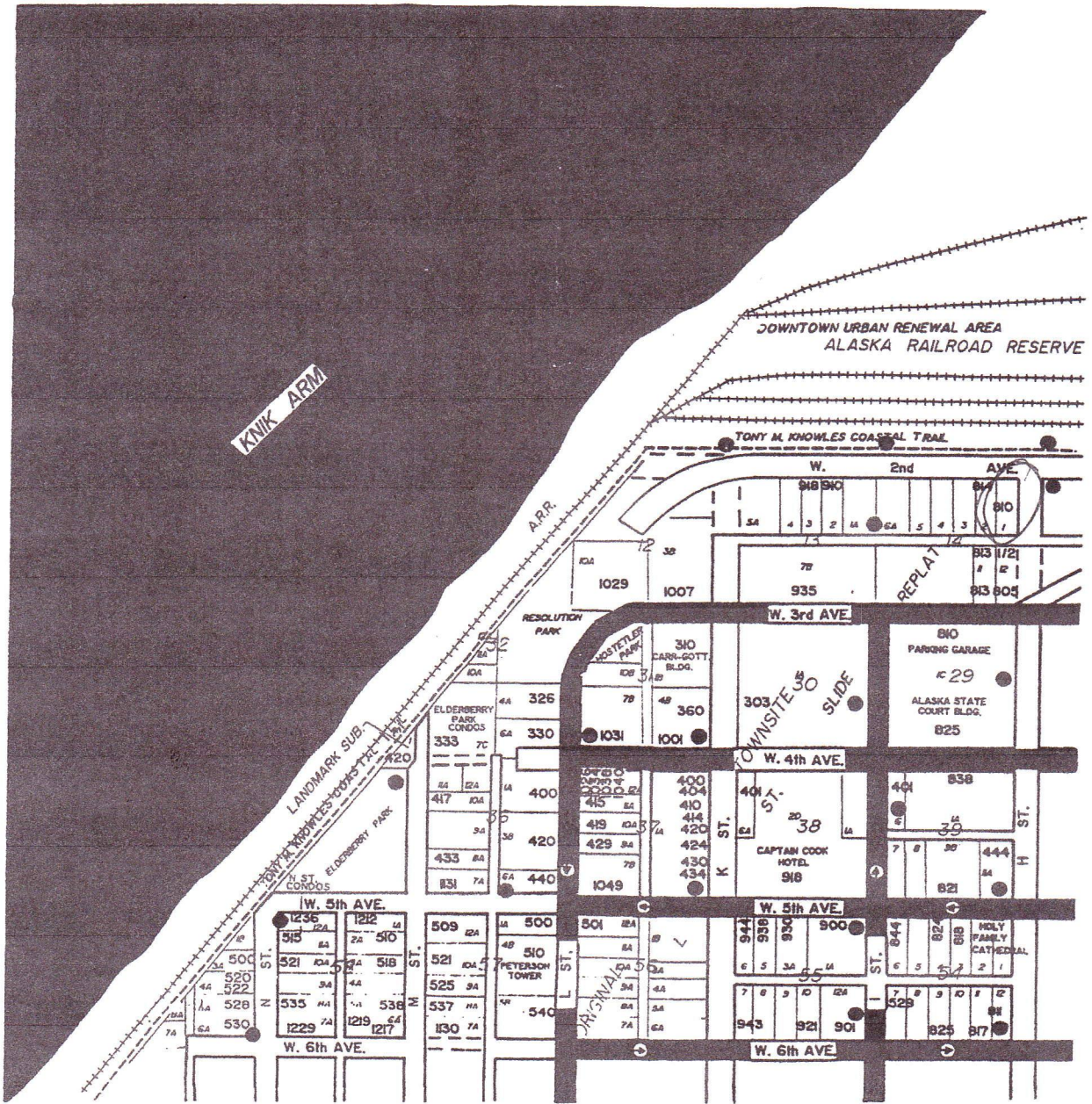
AA55129-29 IS IN A MUNICIPALITY AND MUST CARRY THE 1914 ACT AND 1202(10) LANGUAGE, NOT (6) AS IT DOES, AT LEAST NOT WITHOUT LEGISLATIVE APPROVAL. DID THE LEGISLATURE APPROVE? DID IT EVEN KNOW?

(2) AS TO CONDEMNATION CAUSED BY THE PATENT SEE: AS 42.40.385

(d) The exercise of the power of eminent domain requires the prior approval of the governor.

THE CONVEYANCE FOR DOWNTOWN EXAMPLE

The situation is identical along the line in Anchorage. The Oceanview area conveyance of 1949 is identical in form



GR. 1229

NE 1/4 SEC. 13, T13N R4W

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SEE OVERVIEW MAP "F"

ANCHORAGE 09620

RECEIVED
U. S. LAND OFFICE
ANCHORAGE, ALASKA
DATE 9-19-40
HOUR 2 p m

THE UNITED STATES OF AMERICA,

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

WHEREAS, there has been deposited in the General Land Office of the United States evidence whereby it appears that Simon Hellenenthal is entitled to a patent for the Lot one of Block thirteen in the Townsite of Anchorage, Alaska

According to the approved Plat of the Survey of said Townsite on file in the General Land Office, containing seven thousand square feet:

Now KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said Simon Hellenenthal the Tract of land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said Simon Hellenenthal and to his heirs and assigns forever; subject to any vested and accured water rights for mining agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts. But excepting, nevertheless, and reserving unto the United States, rights of way over, across and through said lands for canals and ditches constructed by its authority, all in the manner perscribed and directed by the Act of Congress approved August 30, 1890 (26 Statl, 391) And there is, also, reserved to the United States a right of way for the construction of railroads, telegraph and telephone lines in accordance with the Act of March 12, 1914 (38 Stat. 305).

IN TESTIMONY WHEREOF, I, Franklin D. Roosevelt, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed. GIVEN under my hand, at the City of Washington the Twenty-seventh day of August in the year of our Lord one thousand nine hundred and forty and the Independence of the United States the one hundred and Sixty-Fifth.

(SEAL) BY the President: BY the President Franklin D. Roosevelt

By Louise By Jeanne Kavanagh Secretary

R. S. Clinton
Chief, Patents Division, General Land Office
Recorder of the General Land Office

RECORDED: Patent Number 1109127

The foregoing instrument was filed for record at 11 o'clock A. M. November 27, 1940, at the request of Simon Hellenenthal.

Thos. LePrie
District Recorder

DOWNTOWN
1940

NEIGHBOR'S PROBLEM



SOON TO BE OURS



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Via Regular U.S. Mail

July 24, 2012

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**Re: Peter and Rejani Slaiby
ARRC Transitional Residential Land Use Policy**

Dear Mr. Longacre:

This letter responds to yours of June 6, 2012, which was submitted electronically as a public comment regarding the proposed adoption by the Alaska Railroad Corporation ("ARRC") of the ARRC Transitional Residential Land Use Policy ("TRLUP"). Those public comments were submitted pending potential action on that proposed policy at the ARRC Board of Directors meeting on June 7, 2012.

As I believe you know from speaking to Karen Morrissey, ARRC's Real Estate Director, the ARRC Board decided at the June 7 meeting to return the proposed policy to the Board's Right-of-Way Committee for further consideration and possible revision. A letter was recently sent to adjoining property owners, including the Slaibys, informing them of that development. Any additional developments regarding the proposed policy will be communicated to adjoining property owners at a later date.

We wanted to respond separately to your letter in order to address your specific comments relating to the respective property rights of the Slaibys and ARRC. As we proceed to develop and revise the proposed policy, it is important that ARRC and its residential neighbors have a common understanding of those issues.

A. History of ARRC's Right-of-Way (ROW) and Its Property Interest in the ROW.

In order to understand the Slaibys' specific situation, it is necessary to understand the history and legal status of ARRC's ROW. ARRC obtained its ROW from the federal government as a result of the Alaska Railroad Transfer Act, 45 U.S.C. §§ 1201 et seq. (ARTA) and the Alaska Railroad Corporation Act, AS 42.40 (ARCA). In ARTA, Congress provided that the State of Alaska would receive all of the United States' interest, but at a minimum an exclusive use easement, in the Alaska Railroad right-of-way. See 45 U.S.C. § 1203(b) (providing for the conveyance to the State of title to all lands within the Alaska Railroad right-of-way). In ARCA, the Alaska Legislature established ARRC and provided that the railroad lands to be conveyed under ARTA would be conveyed to ARRC. See AS 42.40.350.

Beginning in 1985, the federal government began the process of conveying the ROW to ARRC. The conveyance process included the initial step of interim conveyances by the federal government of much of the land in the ROW to ARRC, wherein ARRC received at least an exclusive use easement in its ROW. Since the initial conveyances, the federal government, through the Bureau of Land Management, has engaged in an incremental process of patenting the land in the ROW to ARRC. As a result of this conveyance process, ARRC holds an exclusive interest in the entire ARRC ROW. The nature of ARRC's interest in the ARRC ROW ranges from a fee simple interest for much of the ROW to, at a statutory minimum, an exclusive use easement.

Even the exclusive use easement, the minimum interest ARRC owns in its ROW, provides ARRC with exclusive rights of possession and use in the ROW. As provided in ARTA, 45 U.S.C. § 1202(6):

"[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;

(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.
(Emphasis supplied)

Under this statutory definition of an exclusive use easement, ARRC has - at a minimum - the exclusive right to use and possess the ARRC ROW for transportation, communication and transmission purposes. Moreover, ARRC has the right to fence the ARRC ROW and to exclude all other persons and entities from all or any of it.

ARRC's right to possess its ROW and to use it for railroad purposes is "exclusive." And ARRC not only has the right to exclude all other persons from the ARRC ROW, it exercises that right. It fences portions of the ROW in busy areas, places

prominent "No Trespassing" signs, cites unauthorized persons on the ROW as trespassers, and takes other measures to keep people off the ROW. Another clear reflection of ARRC's exercise of control of access to the ROW is the fact that ARRC requires agencies, entities and individuals wishing to cross, occupy or use any portion of the ROW to qualify for and obtain paid permits to do so.

B. ARRC's Interest in the ROW Adjacent to the Slaibys' Property.

The portion of the ARRC ROW adjacent to the Slaibys' property includes portions of Lots 13 and 14 in Block 3 of the Sunset Hills West Subdivision ("Lots 13 and 14") lying to the southwest of the "Take Line" shown on the plat of Potter Hill Relocation according to Plat 64-105. This land was acquired by the federal government in 1965, following the 1964 earthquake, which caused the bluff in the vicinity of what is now Jarvi Drive to slide. The federal Alaska Railroad determined that it needed to acquire additional property on the bluff side of the ROW to provide for a stable and secure right-of-way in that area. Accordingly, the federal government "took" additional land in the Potter Hill area for use in the ROW, receiving deeds conveying land in that area in exchange for payment of compensation.

One of those deeds conveyed to the federal government the portions of Lots 13 and 14 lying to the southwest of the "take line." A copy of that warranty deed is enclosed. The interest granted to the federal government in those lots was "[a] perpetual right-of-way and easement to construct, reconstruct, operate and maintain a railroad line and appurtenances, including telephone and telegraph lines" The deed stated that "the above-described premises are being acquired for the Alaska Railroad, Department of the Interior." A title report obtained by ARRC with respect to Lots 13 and 14 confirms that grant of a perpetual right-of-way and railroad easement constitute a special exception to the Slaibys' title to Lots 13 and 14. A CD containing a copy of that title report and the documents upon which it is based is enclosed for your convenience.

Pursuant to ARTA, the portions of Lots 13 and 14 southwest of the "take line" were included among the lands to be transferred to ARRC to be occupied and used as part of its ROW, just as that land had been used and occupied by the federal Alaska Railroad. The intent of the federal government is that this land will be finally conveyed to ARRC pursuant to ARTA, although that final conveyance has not yet occurred. Consequently, although ARRC has an exclusive right to occupy and use the land for its ROW, both to operate a railroad and for the other statutory purposes identified in ARCA, the federal government still owns this portion of the ARRC ROW. As Patrick Kelly, ARRC's former Land Services Manager, informed both Mr. Slaiby and Scott Jones of SAJJ Architecture in April 2012, and Rob Hahn, Mr. Kelly's successor, mentioned to you in an email of June 6, 2012, the U.S. Bureau of Land Management currently is reviewing Plat 64-105 for transfer of Lots 13 and 14 to the ARRC. Copies of those communications are enclosed.

The fact that the federal government still owns the portions of Lots 13 and 14 in the ARRC ROW does not affect ARRC's exclusive rights to occupy and use that land. Consistent with ARTA, ARRC has, at a minimum, an exclusive use easement in the land. Notably, the enclosed title report includes a special exception stating that title to Lots 13 and 14 is subject to the "rights of the Public and/or governmental agencies, in and to any portion of said land lying within the boundaries of the Alaska Railroad right-of-way." The rights of ARRC in the portions of Lots 13 and 14 lying to the southwest of the "Take Line" include the statutory grant of, at a minimum, an exclusive use easement under ARTA. Accordingly, as discussed above, ARRC has the right to exclude others from the land, including by means of fencing the boundary of the ROW. Relative to that right, ARRC also has the right to prohibit or to require a permit for any residential uses of or structures in that portion of the ROW. This portion of the ROW, therefore, is subject to the proposed TRLUP.

C. Responses to Individual Points in Your June 6 Letter.

1. Slaibys Do Not Have the Right to Occupy or Use the ARRC ROW Without ARRC's Permission.

Your June 6 letter characterizes the portion of Lots 13 and 14 falling within the ARRC ROW adjacent to the Slaibys' property (i.e., the portion of those lots lying to the southwest of the "Take Line") as "property owned by the Slaibys" in which ARRC has an easement for specific purposes. Apparently referring to the ARRC's tracks, your letter states that "the railroad runs through the extreme edge of [the Slaibys'] property." You also state that the Slaibys "are free to use the easement area of their property so long as it does not interfere with ARRC's utility corridor easement." With due respect, however, those statements inaccurately describe the Slaibys' rights with respect to the portions of Lots 13 and 14 within the ARRC ROW.

First, as detailed above, the current owner of the land in question is the federal government rather than the Slaibys. Moreover, ARRC has, at a minimum, an exclusive use easement in its ROW, including the portion of the ROW comprised of the portions of Lots 13 and 14 southwest of the "Take Line." An exclusive use easement gives ARRC the right to exclude anyone other than ARRC from the ROW, to fence the land if it chooses and to require any others to purchase permits before using or occupying the ROW.

ARRC's long-standing policy has been not to grant permits to third parties to occupy the ROW with respect to uses that are not related to the operation or use of the railroad or to other statutory purposes under ARTA and ARCA. But residential uses, some authorized but many unauthorized, have arisen in portions of the ROW. Those uses pose safety risks arising from railroad operations and the potential to interfere with other statutory uses of the ROW (i.e., transportation, transmission and communication). The ARRC Board is concerned with the problems raised by such existing residential