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December 21, 2012

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425 G Street, Suite 910
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Re: Peter and Rejani Slaiby
Your Letter of December 6, 2012

Dear Mr. Longacre:

This letter responds to yours of December 6, 2012, regarding the legal status of Alaska Railroad Corporation's right-of-way ("ARRC ROW"), both generally and specifically as to the portion of the ROW adjoining the property of Peter and Rejani Slaiby.[1] We understand that your clients' position is that they have a right to enter and use that portion of the ROW as long as they do not interfere with railroad operations. We have considered your arguments but find that we must respectfully disagree with your legal conclusions for the reasons discussed below.

Our letter to you of July 24, 2012, summarized legal authorities supporting ARRC's position that it has at least an exclusive use easement, as defined in the Alaska Railroad Transfer Act ("ARTA"), in the portion of the ROW adjacent to the Slaibys' property. This letter expands upon that legal analysis and addresses the broader issues raised in your December 6th letter as compared to your June 6, 2012 letter.

Our July 24th letter described the history of the transfer of the ROW from the federal Alaska Railroad to ARRC in 1985. It also discussed the history of the portion of the ROW on Potter Hill acquired by the United States in the mid-1960's in the wake of damage caused to the ROW by the 1964 earthquake. Your December 6th letter broadens that discussion to include consideration of the Act of March 12, 1914 ("Act of 1914"), which dedicated the initial right-of-way and other public lands for use by the federal Alaska Railroad. This letter addresses that issue and its relationship to the current status of the ROW.

You contend that neither the Act of 1914 nor the 1965 warranty deed from Mr. and Mrs. Jarvi to the United States (the "Jarvi Deed") nor ARTA established or conveyed an exclusive right-of-way to the federal Alaska Railroad or ARRC. Rather, you assert that said laws and deed resulted in a non-exclusive easement limited

[1]The Slaibys and ARRC appear to agree that the property at issue here includes only those 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.

narrowly to operating a railroad and related telegraph and telephone lines. As explained below, however, extensive legal authorities demonstrate that the right-of-way established by the 1914 Act, the Jarvi Deed and the interest guaranteed by Congress to ARRC in ARTA all provide ARRC with the exclusive right to use and control the ROW. Moreover, as has long been recognized and as is expressly confirmed by findings in ARTA, exclusive control of the ROW is critical to ARRC's ability to safely and economically operate a railroad and to conduct other uses allowed in the ROW. The following sections explain why the ROW, including the portion adjoining the Slaibys' property, is subject to ARRC's exclusive use and control.

A. The Act of 1914 Authorized a Railroad ROW that is Exclusive.

In the Act of 1914,[2] Congress authorized and directed the President to take a broad range of actions in order for the federal government to construct, own and operate a railroad on a route of up to 1,000 miles in the Territory of Alaska. Among the many and varied actions authorized by the Act were (1) "to designate and cause to be located a route or routes for a line or lines of railroad in the Territory of Alaska . . . ."; (2) to "construct and build" a railroad or railroads along such route or routes; (3) "to purchase or otherwise acquire all real and personal property necessary to carry out the purposes of this Act"; (4) "to exercise the power of eminent domain in acquiring property for such use"; (5) "to acquire rights of way, terminal grounds, and all other rights; and (6) "to construct, maintain and operate telegraph and telephone lines so far as they may be necessary or convenient in the construction and operation or the railroad or railroads . . . and they shall perform generally all the usual duties of telegraph and telephone lines for hire." (emphasis added). With respect to the ROW, the 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 . . . . (emphasis added).

Even though the word "easement" does not appear anywhere in the Act of 1914, you appear to assert that pursuant to the Act, ARRC's property right in the ROW consists of a non-exclusive easement and that as a result, adjoining landowners retain rights of use and possession. The fundamental mistake in this interpretation of the Act of 1914 is your apparent assumption that the term "right of way" as used in the Act means a non-exclusive easement. What you fail to recognize is that the term "right of way" has a twofold meaning. Black's Law Dictionary defines the term as follows:

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[2] 43 U.S.C. 975 *et seq.*; 38 Stat. 305.

> **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 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. Black's Law Dictionary, 5th Edition 1979 (emphasis added).

The U.S. Supreme Court recognized the twofold meaning of "right-of-way" in Joy v. St. Louis, 138 U.S. 1 (1891):

> Now, the term 'right of way' has a twofold signification. It is sometimes used to describe a right belonging to a party, a right of passage over any tract; *and it is also used to describe that strip of land* which railroad companies take upon which to construct their roadbed. That is, the land itself, not a right of passage over it. So this court in [Missouri, Kansas & Texas] Railway Co. v. Roberts, 152 U.S. 114, 14 S.Ct. 496 [38 L.Ed. 377], passing on a grant to one of the branches of the Union Pacific Railway Company of a right of way 200 feet wide, decided that it conveyed the fee. (Blatchford, J; italics in original).

Importantly, the Act of 1914 did not convey any type of property interest in federal land to anyone. It merely authorized the federal government to construct, own and operate a railroad on federal land in Alaska and it withdrew or appropriated land from the public domain for that purpose. Under those circumstances, the term "right of way" as it is used in the Act simply describes the physical space on federal land upon which the federal government was authorized to construct and operate a railroad as opposed to creating a right of passage over the land. Simply put, nothing in the Act of 1914 purports to quantify or limit the federal government's interest in the ROW to a non-exclusive easement in which parties other than the federal government retained rights of possession or use of the underlying land. The Act's right-of-way language instead constitutes a congressional dedication of a 200' wide strip of federal land from Seward to Fairbanks to serve as a railroad right-of-way. Indeed, with respect to portions of the ROW located on federal lands that were not disposed of after the Act was passed, no third parties would have any rights in the lands comprising the ROW since fee simple title and the corresponding rights of exclusive possession and use remained with the federal government.[3] As discussed in Section C, below, even portions of the ROW located on federal lands that were taken up, entered, located or otherwise transferred out of federal ownership after the Act of 1914, the ROW located on such lands was exclusive to the federal Alaska Railroad before transfer and remains exclusive to ARRC after transfer.

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[3] §615 of ARTA expressly repealed the Act of 1914.

B. ARTA Conveyed to ARRC an Exclusive Interest – Either Fee Simple or an Exclusive Use Easement – in the ROW.

It should be noted that the determination of the level of ARRC's title in its ROW is complicated. Legal memoranda obtained by the State of Alaska before transfer and later by ARRC after transfer concluded that ARRC received an exclusive interest in its ROW, either by receiving fee simple interest or, at a minimum, by receiving the exclusive use easement required by ARTA. These memoranda point out the complexity of determining whether ARRC's interest in its ROW is in fee simple, as the federal Alaska Railroad always maintained, or whether that interest amounts to an exclusive use easement, as the Department of Interior has sometimes maintained and as is required, at a minimum, by ARTA.[4] But, as discussed below, the answer to that question does not matter for the purposes of the present analysis. The key feature of the ROW, ARRC's right of exclusive use and possession, is the same whether it owns the ROW in fee simple or under an exclusive use easement. ARRC owns most of its ROW in fee simple because where the underlying federal land crossed by the ROW appropriated by the Act of 1914 was not conveyed to any other party between 1914 and the passage of ARTA, the federal government owned the underlying fee interest in the ROW. However, even with respect to those relatively small portions of the ROW that ARRC does not own in fee simple (e.g. the portion abutting the Slaibys' property), it holds exclusive rights to the ROW.

ARTA required the federal government to convey to the State of Alaska:

> [A]ll right, title, and interest of the United States to lands . . . in which there is an interest reserved, withdrawn, appropriated, owned, administered or otherwise held or validly claimed for the Alaska Railroad by the United States or any agency or instrumentality thereof as of January 14, 1983.

45 U.S.C. §1202(10); *see also id.*, §1205(b)(4)(B). Under ARTA, therefore, ARRC received a fee simple interest in portions of the ROW not taken up or entered by, or patented to, another party before January 14, 1983.

Even where ARRC did not receive fee simple title to a portion of the ROW, it still received an exclusive use easement. ARTA required the United States to convey to ARRC at least an exclusive use easement with respect to all property in the ROW

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[4]For example, in a March 28, 1985 letter to the U.S. Department of Justice from the Solicitor of the Dept. of Interior responding to an inquiry concerning the title and width of the ARRC ROW, the Solicitor concluded that (1) where the ROW passes over land owned by the United States in fee at the time of transfer, ARRC received a fee interest in the ROW by virtue of the conveyances under ARTA; (2) where a third party (e.g. homesteader or State of Alaska) entered or selected the property occupied by the ROW prior to transfer, the third party received conveyance of the underlying fee estate; (3) that in such circumstances, the federal Alaska Railroad retained an exclusive use easement for the ROW that "is very similar to, if not identical to, the exclusive use easement defined in ARTA . . ." and it was this interest that was transferred to ARRC under ARTA; and (4) the width of the ROW is generally 200', subject to the exceptions specified in section 603 of ARTA.

where the land in question left federal ownership before January 14, 1983, the effective date of ARTA, or as to which a valid third-party claim otherwise existed as of that date. *See* 45 U.S.C. §1205(b)(4)(B). The portions of Lots 13 and 14 within the ROW left federal ownership in the early 1950's and then were reacquired by the United States in 1965. As such, they are subject to ARTA's guarantee to ARRC that it would receive at least an exclusive use easement.

As described in my July 24th letter, an exclusive use easement under ARTA expressly provides ARRC with broad rights of exclusive use and possession in the ROW, including the right to exclude all others via fencing or other means. ARTA also expressly explains why Congress guaranteed at least an exclusive use easement:

> 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.

See 45 U.S.C. §1205(b)(4)(A)(ii). ARTA also requires the federal government to defend ARRC's title against claims that it had less than an exclusive use easement. *See* 45 U.S.C. §1205(b)(4)(B).

ARRC disagrees with several assertions and implications in your letter regarding ARTA's exclusive use easement provisions. First, you state that those provisions apply only to Denali National Park. This is incorrect. You overlooked 45 U.S.C. §1205(b)(4)(B) which requires that the United States "grant not less than an exclusive use easement" 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 Corporation . . . ." This provision does not apply to Denali Park, which is still federal land and which is specifically dealt with elsewhere in ARTA.[5] Rather, the quoted exclusive use easement provision applies to any section of the ROW lacking continuous federal ownership of the underlying land (e.g. the Slaiby situation) or as to which a third-party claim exists.

Second, your analysis necessarily implies that where ARTA did not grant an exclusive use easement to a section of ROW, it granted only a non-exclusive easement. But that would mean that ARTA provides for lesser title in lands that have been in continuous federal ownership than in lands which left federal ownership or were subject to third-party claims. Besides being illogical, that interpretation flips ARTA on its head. Rather than the exclusive use easement provisions acting as a ceiling to ARRC's rights, those provisions function as a **floor** to guarantee ARRC exclusive use and possession of **all** portions of the ROW. Congress specifically justified the need for this floor when it found exclusive control of the ROW "has been and continues to be necessary to afford sufficient protection for safe and economic operation of the railroad."[6]

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[5] *See* 45 U.S.C. §1203(b)(1)(D).

[6] 45 U.S.C. §1205(b)(4)(A)(ii).

Finally, your letter asserts that ARTA's guarantee to ARRC of at least an exclusive use easement is improper because the federal government could not convey a greater interest than it possessed. This assertion fails for two reasons. First, as discussed above, the United States possessed exclusive rights to the entire ROW at the time of transfer to ARRC. Second, even if the United States had not owned at least an exclusive use easement, it would still be required to convey the land with a guarantee of at least such an interest, resulting in an inverse condemnation by operation of statute, as discussed below.

C. Railroad Easements are Universally Held to be Exclusive Use Easements.

Assuming solely for the sake of argument that the Act of 1914 (or the Jarvi Deed) created only a railroad easement in the ROW, settled law and public policy demonstrate that railroad easements are considered a special category of easements which provide exclusive possession and use that has many of the hallmarks of fee title:

> 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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> It would seem to be true generally that a railroad right-of-way partakes more of the nature of an estate in fee than an easement. 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.

G. Thompson, Commentaries on the Modern Law of Real Property (1965), §381, at 503, 512 (emphasis added). As stated by another commentator:

> [A railroad right-of-way easement] is essentially different from any other [in that it] requires exclusive occupancy and a railroad company is entitled to the uninterrupted and exclusive possession and occupancy of its tracks and all of its right-of-way necessary for conducting its business.

65 Am.Jur.2d, Railroads, §104, at 403 (emphasis added). The U.S. Supreme Court has agreed with this interpretation:

> A railroad right-of-way is a very substantial thing. It is more than a mere right of 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. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given.

Western Union Telegraph Co. v. Pennsylvania Railroad Co., 195 U.S. 540, 570 (1904) (emphasis added).

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:[7]

> 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.

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).

The legal authorities cited above demonstrate that railroad easements, as a matter of law, provide a railroad with exclusive use and possession of its right-of-way. This exclusive easement functions similarly to fee title. Such exclusive rights are critical to ensure the safe and economic railroad and utility corridor operations in the ROW. ARRC's exclusive rights in the ROW necessarily mean that adjoining landowners do not hold any interest that allows them to use the ROW without ARRC's permission.

D. The Perpetual Right-of-Way and Easement Granted in the Jarvi Deed Provided the Alaska Railroad Exclusive Rights in the ROW.

The Jarvi deed does not vary the conclusion that ARRC has exclusive rights to the portions of Lots 13 and 14 located within the ROW. The United States Solicitor's Office recently determined, while developing a legal opinion regarding several lots in the ROW on Potter Hill, that the Jarvi Deed granted at least an exclusive use easement.

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[7]The railroad operating environment is inherently a hazardous one for which railroad employees have the benefit of extensive safety training. Trespassing along railroad rights-of-way is the leading cause of rail-related fatalities in America, resulting in approximately 500 deaths each year. Sadly, there have been at least eight such fatalities along the ARRC ROW since transfer. Additional risks to rail passengers and railroad employees result from emergency stops due to trespasser and other impediments on the tracks.

The Jarvi Deed conveyed to the United States "[a] perpetual right of way and easement to construct, reconstruct, operate and maintain a railroad line and appurtenances, including telephone and telegraph lines . . . ." The U.S. Solicitor found that this grant of right contained terms similar to ARTA's definition of an exclusive use easement. It provided the right to operate and maintain a railroad line, to lay new or additional tracks and to use the ROW for communication purposes. Although the terms of the right-of-way and easement granted in the Jarvi Deed are not as detailed as ARTA's exclusive use easement definition, it undoubtedly granted a perpetual railroad right-of-way/easement. As discussed above, exclusive control of railroad rights-of-way is necessary to ensure railroad operations will be safe and unimpeded and to protect the safety of the public, passengers and railroad employees. Such rights-of-way have long been interpreted to grant exclusive rights. In short, the railroad right-of-way and easement granted by the Jarvi Deed is exclusive.

The U.S. Solicitor also pointed out that even if the Jarvi Deed granted less than an exclusive use easement, ARTA obligates the United States to convey to ARRC at least an exclusive use easement. This guarantee means that ARRC must receive an exclusive use easement regardless of the actual interest held by the United States. If in fact the actual interest held by the United States is less than an exclusive use easement, the conveyance of such an easement to ARRC would likely result in an inverse condemnation by the United States of the portion of the interest necessary to deliver an exclusive use easement. Whether the Slaibys would have a claim for "just compensation" for such an inverse condemnation would be a matter between them and the United States.[8]

E. Provisions of the Alaska Railroad Corporation Act ("ARCA") Cited in Your Letter Do Not Support the Slaibys' Position.

Your letter cites to provisions of ARCA that you assert demonstrate that ARRC does not have an exclusive use easement in Lots 13 and 14. But those provisions do not have the effect you assign to them.

You assert that AS 42.40.250(19), which provides that ARRC "may . . . assume all rights, liabilities, and obligations of the Alaska Railroad in accordance with [ARTA]," prevents ARRC from obtaining a greater interest in the ROW than the federal Alaska Railroad had. But this provision is permissive rather than mandatory.[9] More importantly,

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[8]Any party aggrieved by an inverse condemnation has recourse against the United States under the Tucker Act, 28 U.S.C. §1491. See Myers v. United States, 323 F.2d 580 (9th Cir. 1963) and 378 F.2d 696, 697 (Ct. Cl. 1967). The statute of limitations under the Tucker Act is six years.

[9]You assert this provision "required the State" to assume the federal Alaska Railroad's rights, liabilities and obligations. However, the language of the statute actually states that ARRC, not the State in general, "may" assume the stated rights, liabilities and obligations.

it also expressly states that the rights, liabilities and obligations are to be assumed by ARRC "in accordance with [ARTA]." As explained above, however, ARTA requires that ARRC receive at least an exclusive use easement in the ROW. Because the United States has the power of eminent domain, Congress could legally make that guarantee and ARRC can take advantage of it without contravening AS 42.40.250(19).

You also invoke AS 42.40.285(5), which provides that legislative approval is required before ARRC can apply for or accept a grant of federal land within a municipality. You assert this provision precludes ARRC from acquiring property rights in Lots 13 and 14 without legislative approval. This interpretation of the statute is incorrect for two reasons. First, the inapplicability of AS 42.40.285(5) here is established by AS 42.40.285(5)(C), which expressly excepts from the legislative approval requirement "a conveyance of rail properties of the Alaska Railroad under [ARTA] . . . ." Because Lots 13 and 14 were part of the ROW in 1983, when ARTA took effect, that property is included among the "rail properties of the Alaska Railroad" as that term is defined in 45 U.S.C. §1202(10). Second, subsection (5) was not included in AS 42.40.285 until 1999. *See* §4, ch. 59 SLA 1999. Consequently, this subsection could not have applied to the transfer of the ROW pursuant to ARTA in 1985.

Lastly, you invoke ARCA's eminent domain provision, AS 42.40.385(d), arguing that the governor would have to approve the exercise of eminent domain before ARRC could have an exclusive use easement in Lots 13 and 14. But no such exercise of eminent domain power by ARRC was necessary for ARRC to receive an exclusive use easement. Such an easement was guaranteed by Congress in ARTA. If any exercise of eminent domain power was needed to fulfill that guarantee, it would be exercised by the United States, not by ARRC.

In sum, none of the ARCA provisions cited in your letter change the fact that ARRC has an exclusive use easement in Lots 13 and 14.

F. Patent No. 50-2006-0363 is Neither Illegal Nor Relevant to the Slaibys' Situation.

Your letter asserts that Patent No. 50-2006-0363, which conveyed title to a portion of the ROW in the vicinity of Potter Hill to ARRC, is "illegal" because it conveyed to ARRC an exclusive use easement in a portion of the ROW that you contend is non-exclusive pursuant to the Act of 1914 and the 1965 Jarvi Deed.[10] But that patent is neither illegal nor relevant to Lots 13 and 14.

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[10]The statute of limitations for challenging the validity legality of a patent is six years. 43 U.S.C. §1166. Once the time period for challenging a patent expires, the patent becomes "unassailable." State of Alaska v. First Nat'l Bank of Anchorage, 689 P. 2d 483, 486 n. 12 (Alaska 1984). While we disagree with your assertion that the subject patent is illegal, even if it was improperly issued, it is now "unassailable" because more than six years have elapsed since it was issued.

The patent is not relevant to Lots 13 and 14 because it involves different land. The patent conveys title to Lots 1 to 8 of U.S. Survey No. 9015 and to all land included in U.S. Survey No. 9016. Although a portion of Survey No. 9015 comprises a section of the ARRC ROW in the vicinity of Potter Hill, it does not include any portion of Lots 13 and 14. This recently was confirmed by the U.S. Solicitor's Office, which concluded that the federal interest in Lots 13 and 14 has not yet been conveyed to ARRC by patent.

The patent is not illegal because it complies precisely with Congress' guarantee in ARTA to convey at least an exclusive use easement to ARRC. In fact, if the Department of Interior had conveyed anything less than an exclusive use easement, it would have been in contravention of ARTA. Based on your position that the Jarvi Deed granted less than an exclusive use easement, you assert that ARTA could not result in the United States conveying an exclusive use easement because that would mean it conveyed a greater interest than it possessed. Even setting aside the parties' disagreement about the exclusivity of the right-of-way granted in the Jarvi Deed, we disagree with that conclusion.

Congress guaranteed conveyance of at least an exclusive use easement to ARRC because it found 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." 45 U.S.C. §1205(b)(4)(A)(ii). If the United States lacks some aspect of an exclusive use easement in a particular portion of the ROW, it can fulfill the federal statutory guarantee by exercising its eminent domain power. Or, if it does not exercise that power at the time of conveyance, the conveyance would effectively function as an inverse condemnation. If either of those scenarios occurred, the property owner whose interest was taken might be entitled to compensation from the United States.[11] However, even if a taking resulted from a proper conveyance under ARTA, that would not make the patent illegal.

G. ARRC's Position is Not Contrary to the Title Report it Obtained.

Your December 6th letter asserts that the existence of an exclusive use easement in Lots 13 and 14 would directly contravene the title report obtained by ARRC. Again, we disagree. As we noted in our July 24th letter, that 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 exclusive use easement guaranteed to ARRC in Lots 13 and 14 is the result of a statutory grant under ARTA. That easement clearly falls within the title report's special exception for rights of a governmental agency in the ROW. Moreover, the perpetual railroad ROW and easement conveyed in the Jarvi Deed, which also is set out as a special exception in the title report, provides ARRC with an exclusive use easement, as explained in Section D, above.

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[11] *See* Cook v. United States, 37 Fed. Cl. 435 (1997), in which the court held that the enactment of a federal statute that eliminated a vested property interest held by the plaintiffs constituted a taking under the Fifth Amendment thereby entitling the plaintiffs to just compensation from the government.

H. Neither the Proposed Right-of-Way Use Policy Nor ARRC's Assertion of Exclusive Use Rights in the ROW Constitutes an Unauthorized Taking by ARRC.

You assert that ARRC's proposed Residential Right-of-Way Policy ("RRUP") and any attempt to exclude the Slaibys from the ROW would constitute a taking of the Slaibys' property interest. But, as discussed above, ARRC's possession of an exclusive use easement includes the right to exclude all others from the ROW. Therefore, adjoining property owners do not have the right to occupy or use the ROW. Accordingly, neither permits issued under the RRUP nor exclusion of adjoining owners from the ROW would take any property interest currently held by those individuals. Nor is the proposed RRUP arbitrary and capricious. The RRUP's permitting system would be a rational approach to addressing the railroad safety and operations issues created by existing, unregulated residential uses of the ROW and would protect other allowed priority uses of the ROW.[12]

I. Other Issues Pertaining to Property Interests in Lots 13 and 14.

Another issue may be relevant to the Slaibys' claims to the portions of Lots 13 and 14 in the ROW. As reflected in materials we submitted with our July 24th letter, the warranty deed received by the Slaibys when they purchased their property expressly excluded the portions of Lots 13 and 14 in the ROW (i.e., the portions to the southwest of the "Take Line"). In fact, every owner of the property from 1972 through 2012 received deeds that expressly excluded those portions of Lots 13 and 14.

We are aware that the Slaibys received a quit claim deed in May 2012 from an alleged successor in interest to the 1972 sellers of the property purporting to "correct the legal description" of the property. Even with that development, the question remains whether adjoining property owners' interest in the portion of Lots 13 and 14 in the ROW was lost or abandoned between 1972 and 2012. Notably, during the 40 year period that no adjacent property owner held a deed to those portions of Lots 13 and 14, the ROW was conveyed to ARRC under ARTA and railroad, communication and transmission uses were continuously made in the ROW.[13] Because this issue is not critical for the

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[12]A development that may be of interest to your clients is that the latest revision of the draft RRUP, a copy of which was sent to all adjoining landowners in October, allows an adjoining landowner with an existing residential use in the ROW to continue that use indefinitely if he or she obtains and complies with a use permit and the use remains compatible with railroad operations and other priority uses. The permitted use is also transferable to a purchaser of the adjoining property.

[13]It is generally held that a government body can acquire title to land by adverse possession. Annotation, Acquisition of Title to Land by Adverse Possession by State or Other Governmental Unit or Agency, 18 A.L.R.3d 678 (1968); 7 R. Powell and P. Rohan, Powell on Real Property §1015 at 91-92 (1987). It is also generally held that the public may acquire a right to use land for highways by prescription. 4 H. Tiffany, Law of Real Property §1211 (1975); 2 G. Thompson, Thompson on Real Property §342 at 208–209 (1980).

current analysis given the existing exclusive railroad easement, we have not researched it carefully. Nevertheless, this issue may be important in determining the Slaibys' property interest in the ROW.

J. Proposed Purchase of a Portion of the ROW.

Your recent letter reiterates the Slaibys' request to be allowed to purchase the portion of Lots 13 and 14 north of the toehold. You appear to threaten litigation against ARRC if that request is refused. But as we explained in our July 24th letter, the United States has not completed the conveyance of the property interest that the Slaibys seek to purchase.[14] Accordingly, ARRC could not accede to the Slaibys' purchase request even if it wanted to do so. As we also noted in our earlier letter, ARRC would generally be opposed to any request to purchase either ARRC's or the United States' interest in the ROW. The land in question continues to be needed by ARRC in order to maintain and protect railroad safety and operations and other allowed uses of the ROW.[15]

Another reason why the sale of the subject property is not a viable option is that such a sale would require legislative approval.[16] The ARRC ROW is an essential and extremely valuable part of the State's transportation network that serves several important public purposes. AS 42.40.350 defines the ROW as a 200' wide "railroad utility corridor" that is to be used for "transportation, communication, and transmission purposes." Because of its importance to the long-term economic growth and development of Alaska, State law requires ARRC to preserve the "integrity" of the ROW for these priority uses.[17] For these reasons, we believe that there would not be a sound legal or policy basis for the legislature to approve the sale of land within the ROW.

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[14]We understand that the U.S. Solicitor's Office is about to issue a legal opinion relating to the United States' interest in several lots in the ROW on Potter Hill, including Lots 13 and 14. We have mentioned above our understanding of the Solicitor's conclusions. We understand that the Solicitor's opinion, once finalized, may be released to ARRC and adjoining landowners at the discretion of the Solicitor. Once the opinion issues, we understand BLM will issue a proposed patent and provide the Slaibys and adjoining landowners with notice of the patent and their rights of appeal. It is our understanding that this will be the only time that the Slaibys will be allowed to assert their legal claims to the subject property. If they fail to exercise their appeal rights, it is likely that they will be estopped from thereafter challenging the patent. As noted in our earlier letter, questions about the BLM's progress on this issue can be directed to Michael Schoder at (907) 271-5481 or mschoder@blm.gov.

[15]Although you characterize the area of the ROW at the top of the bluff as "unneeded," maintenance of the stability and integrity of the embankment in the Potter Hill area depends on such factors as the maintenance of natural vegetation and controls on the amount of water applied to the top of the bluff.

[16]*See* AS 42.40.285 & AS 42.40.350(b).

[17]*See* §1 ch. 153 SLA 1984.

K. ARRC Has the Legal Right to Enforce the Exclusive Use Easement.

Footnote 1 of your letter asserts that ARRC does not have the ability to enforce the exclusive use easement that abuts the Slaibys' property because it has not received the patent for such easement from BLM. This argument is without merit. ARRC obtained "equitable title" to all of the rail properties of the federal Alaska Railroad including the portion of the ROW that abuts the Slaibys' property on January 5, 1985 when the state paid $22,271,000 to the federal government for the purchase of the Alaska Railroad. At that time, all rights of ownership of the ROW vested in ARRC including the exclusive easement rights specified in ARTA.

The U.S Supreme Court has held that the "equitable title" principle applies to transfers of federal land. In Benson Mining Co. v. Alta Mining Co., 145 U.S. 428, 431 (1862), which addressed the question of when under the public land laws a right to the land becomes vested, the Supreme Court stated:

> When the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of business in the Land Department causes delay. But such delay, in the mere administration of affairs, does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties.
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> It is a general rule, in respect to the sale of real estate, that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the Land Department of the government; and the ruling has been uniform, that whenever, in cash sales, the price has been paid, or, in other cases, all of the conditions of entry performed, the full equitable title has passed, and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership. (emphasis added).

Based upon the foregoing authority, ARRC clearly has the right to enforce its exclusive easement rights in the portion of the ROW that abuts the Slaibys' property.

In conclusion, please be assured that ARRC appreciates that this situation has been and continues to be frustrating for your clients. We understand that they are sincere in their legal position regarding their property interests, although we disagree with that position. Please also be assured that by defending its property interests in the ROW, ARRC does not seek to "grab" anyone's interest in their land. Rather, it seeks to safeguard through its existing exclusive use and possession rights in the ROW safe and

uninterrupted railroad operations as well as preserving the "integrity" of the ROW for "transportation, communication, and transmission purposes" as it is required to do by state law.

I hope that the foregoing adequately explains ARRC's legal position in this matter. I will be happy to discuss it with you at your convenience.

Very truly yours,

Andy Behrend

Andy Behrend
Senior Attorney, Real Estate & Environmental

cc: Michael Schoder, Deputy State Director, BLM (via email and U.S. Mail)
John Pletcher, Esq. (via email and U.S. Mail)
Craig Johnson, Representative, Alaska Legislature (via email and U.S. Mail)
Lesil McGuire, Senator, Alaska Legislature (via email and U.S. Mail)
Mead Treadwell, Lieutenant Governor (via email and U.S. Mail)
Don Young, U.S. House of Representatives (via email and U.S. Mail)
Lisa Murkowski, U.S. Senate (via email and U.S. Mail)
Mark Begich, U.S. Senate (via email and U.S. Mail)
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