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Via Regular U.S. Mail

July 24, 2012

Roy L. Longacre, Esq.
Longacre Law Offices, Ltd.
425 G Street, Suite 910
Anchorage, Alaska 99501

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

uses and the prevention of any new residential uses, but also recognizes that adjoining land owners have developed such uses and, in some cases, maintained them for relatively long periods. That situation, coupled with ARRC's need to control its ROW, gave rise to the proposed TRLUP and its system of residential use permits.

2. The Proposed Policy Would Not Constitute a Taking.

You assert that the proposed TRLUP would constitute a taking of the Slaibys' property interest. Given the nature of ARRC's interest in its ROW, however, that is not the case. Because ARRC possesses an exclusive use easement in the portions of Lots 13 and 14 that are in the ARRC ROW, which includes the right to exclude all others from the ROW, the proposed TRLUP would not constitute a taking. Since the Slaibys do not have the right to occupy or use any land in the ARRC ROW absent ARRC's permission to do so, requiring them to have and to pay for a permit to use the ROW for residential purposes would not deprive them of any property interest.

3. The Individual History of Lots 13 and 14 Do Not Affect the Nature of ARRC's Exclusive Use Easement in the ROW.

Your letter describes the Slaibys' property as unique with respect to the ownership of land on the bluff and the lack of a setback of their home from the ROW boundary. Although the conveyance histories of various properties along this section of the ARRC ROW vary, those histories do not change the fact that ARRC has, at a minimum, an exclusive use easement in all portions of its ROW. Whatever the underlying history of that portion of the ROW, therefore, ARRC's right to exclusive use and possession of the land in its ROW, including the relevant portions of Lots 13 and 14, remains the same.

4. Applying the Proposed Policy to the ROW Adjoining the Slaibys Would Not be Arbitrary and Capricious.

You also assert that the application of the proposed TRLUP to the area of the ROW near the Slaibys would be "arbitrary and capricious." We disagree. The TRLUP's permitting system would be a perfectly rational approach to addressing the railroad safety and operations issues raised by existing residential uses of the ARRC ROW and also would protect other statutory purposes of the ROW. In addition, under the proposed policy, all adjoining properties and property owners would be treated similarly, which is reasonable given that the exclusive nature of ARRC's interest in its ROW is consistent throughout its length.

5. Addressing the Slaibys' Security Concerns.

Your letter mentions the Slaibys' desire to protect themselves from "uninvited guests who access their property on the railroad's easement." If trespassers are seen using the ARRC ROW in the vicinity of the Slaibys' residence, or anywhere else in the

neighborhood, we ask that they be reported to ARRC's Security Department at 265-2245 or 1-877-RAILCOP (1-877-724-5267). The ARRC Security Department has jurisdiction over trespassers and other security threats on the ARRC ROW. ARRC is always ready to work with its neighbors to enhance safety and security in the ROW.

6. The Slaibys' Request to Purchase ARRC's Property Interest.

Your letter raises the issue of the Slaibys purchasing ARRC's interest in the portion of the property on the bluff. Given that the federal government owns the underlying interest in the property, any conversation regarding purchase of this portion of the ROW would more properly be had with the Bureau of Land Management. ARRC's Land Services Manager, Rob Hahn, has been working with BLM's Deputy State Director, Michael Schoder on matters relating to the ARRC ROW in the vicinity of Potter Hill. Mr. Schoder can be reached by telephone at 907-271-5481 or by email at mschoder@blm.gov. That said, ARRC would generally be opposed to any request by an adjoining landowner to purchase either ARRC's or the federal government's interest in the ARRC ROW. The land in question continues to be needed by ARRC in order to maintain and protect railroad safety and operations, as well as other statutory priority purposes.

I hope this letter has provided useful information regarding the proposed TRLUP and its application to the ROW in the vicinity of the Slaibys' property. As noted above, additional communications regarding developments on the proposed policy will be forthcoming soon.

Very truly yours,

Andy Behrend

Andy Behrend
Senior Attorney, Real Estate & Environmental

Enclosures

cc: William R. Hupprich, Vice President & General Counsel, ARRC (via email)
Wendy Lindskoog, Vice President, Corporate Affairs, ARRC (via email)
Karen Morrissey, Director, Real Estate, ARRC (via email)
Michael Schoder, Deputy State Director, BLM (via email and U.S. Mail)