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Via Certified Mail

April 25, 2014

John W. Pletcher III
13608 Jarvi Drive
Anchorage, Alaska 99515

Re: Your Letter of March 23, 2014 (Received April 2, 2014)

Dear Mr. Pletcher:

Thank you for your letter dated March 23, 2014, to Bill O'Leary, President and CEO of the Alaska Railroad Corporation (ARRC). Your letter, which was postmarked on April 1 and received by Mr. O'Leary on April 2, 2014, raises issues relating to ARRC's Residential Right-of-Way Use Policy (RRUP) and ARRC's right-of-way (ARRC ROW). Mr. O'Leary appreciates you sharing your concerns about those issues with him and values the input of all of ARRC's residential neighbors on these issues. Because many of the points and concerns you raise involve legal matters, Mr. O'Leary has asked me to respond to the points and concerns raised in your letter.

Your letter raises specific issues regarding the RRUP and also more general issues regarding the legal status of the ARRC ROW. Because the nature of ARRC's legal interest in the ARRC ROW is fundamental to addressing your concerns about the RRUP, we will address the more general property interest issues first. Then we will address your specific concerns about the RRUP.

II. ARRC's Legal Interest in its Right-of-Way.

You raise a number of arguments disagreeing with ARRC's position that it has exclusive occupancy and use rights in its ROW. You contend that ARRC holds a "simple easement" in the ROW which allows it only a "non-possessory use." You assert that this "simple easement" is non-exclusive and allows landowners adjacent to the ROW to use it in any manner that does not interfere with railroad operations. You invoke the U.S. Supreme Court's recent decision in the *Brandt* case in support of these arguments and also state that BLM's conveyance of property interests in municipalities contradicts the Alaska Railroad Corporation Act, AS 42.40 (ARCA). You accuse ARRC of engaging in a plan to attack the property rights of adjacent property owners. While we appreciate your detailed explanation of your position, we respectfully disagree with each of your assertions for the reasons stated below.

The assertions in your March 23 letter regarding the legal status of the ARRC ROW largely track assertions you made in late 2012 to the office of Representative Wes Keller and others. At that time, ARRC drafted a comprehensive memorandum addressing those issues and explaining that ARRC holds fee simple interest in most of the ARRC ROW, and at least an exclusive use easement in all of it. Copies of that memorandum were distributed to Representative Keller, Representative Craig Johnson and other public officials who had expressed interest in the nature of ARRC's legal interests in its ROW. We understand you also received a copy of it. We respectfully refer you to our earlier memorandum, which addresses many of the issues raised in your March 23 letter. Because your letter raises additional points, however, we will recap our earlier analysis to provide context for discussing these new points.

A. Summary of the History of the Alaska Railroad and its ROW.

In order to understand the nature of ARRC's interest in its ROW, a general understanding of the histories of the Alaska Railroad and its ROW is critical. The Alaska Railroad is the only railroad ever constructed, owned and operated by the federal government. During the early 1900s, several privately-owned railroads were built and operated in the Territory of Alaska, but ultimately failed or faced dire financial circumstances. Having seen the difficulties faced by private entities constructing and operating railroads in Alaska, and recognizing the importance of rail service to the development of the Territory, Congress took a different approach. It passed legislation (Act of 1914) authorizing the creation of a federally owned and operated railroad in Alaska. The Act of 1914 authorized and directed the President to take a broad range of actions to construct, own and operate such a railroad. The Act of 1914 provided that "[t]erminal 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 . . . ."

The federal government quickly complied with Congress's directive. Rights-of-way were designated on federal land and otherwise acquired between Seward and Fairbanks. Construction began in 1915 and the "golden spike" was driven by President Harding in Nenana in 1923. For the next several decades, the federal government owned and operated the Alaska Railroad, moving both freight and passengers. By the early 1980s, however, the federal government began discussing the concept of transferring the Alaska Railroad to another entity.

In 1982, the legislation was introduced in Congress authorizing the transfer of the Alaska Railroad, including all of its land, to the State of Alaska. As the proposed legislation worked its way through Congress, the issue of the appropriate level of title to

the Alaska Railroad ROW to be transferred to the State of Alaska was prominent among the points under discussion. There was general agreement in Congress that most land of the federally-owned Alaska Railroad, including its ROW, was held in fee simple title by the United States and that most land therefore would be transferred to the State in fee.[1] Congress did recognize that some Alaska Railroad lands were subject to third party claims, including claims by holders of homestead patents issued before portions of the Alaska Railroad ROW were designated on the patented land. Congress recognized that any transfer legislation must set forth a process for quickly determining any third-party claims, but that it was critical that the United States provide the State with exclusive control of the entire ROW.[2] Otherwise, the State's ability to maintain and operate a safe and economical railroad would be undermined.[3] Consequently, a minimum interest to be conveyed to the State, called an "exclusive use easement" was developed "to insure that the State-owned railroad will receive exclusive and complete control over land traversed by the right-of-way."[4]

ARTA was enacted on January 14, 1983. It requires the United States to convey to the State all federal right, title and interest in all lands of the Alaska Railroad upon the date of transfer of the Railroad to the State. Under ARTA, therefore, ARRC received the entire federal interest in the ROW, which as discussed above included fee simple title in most of it. ARTA mandated several types of interim and permanent conveyances of Alaska Railroad properties to the State, with the ultimate requirement being to issue patents to ARRC for all lands, including ROW, located outside Denali National Park. Even interim conveyances were required to "convey to and vest in the State exactly the

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[1] *See, e.g.*, Report No. 97-479, Senate Committee on Commerce, Science and Transportation, 97th Congress, 2d Session, June 22, 1982, at 5 (Under the proposed ARTA, the United States "would convey to the State a fee interest in the 200-foot strip comprising the railroad track right-of-way, amounting to roughly 12,000 acres. This fee estate is recognized by the Committee to be the current interest of the Alaska Railroad derived from common practice and authorized under section 1 of the March 12, 1914 Alaska Railroad Act.").

[2] *See, e.g.*, Congressional Record-Senate, Dec. 21, 1982, at 2 ("On the date of the transfer [under ARTA], the State would be granted fee title to lands not subject to such [unresolved] claims [of valid existing rights] and, with respect to lands so subject, an operating license to insure that operations of the railroad are not affected in any way by the new process."); *id.* ("The concept of an exclusive use easement . . . represents the minimal interest the State is to receive in the Alaska Railroad right-of-way following completion of the expedited adjudication process. . . . It is also the interest the State will receive through the Denali National Park and Preserve. In other areas, where the right-of-way crosses land owned in fee by the Federal Government, the full fee title to the right-of-way will be transferred to the State."

[3] *See, e.g.*, Report No. 97-479, Senate Committee on Commerce, Science and Transportation, 97th Congress, 2d Session, June 22, 1982, at 5 ("[T]ransfer of the railroad right-of-way in fee simple is essential to the continued operation of the railroad, and . . . the actual physical characteristics of the railroad (e.g., the right-of-way and reserves) [should] be maintained to the extent required to assure the transfer of an economically viable railroad operation.").

[4] Congressional Record-Senate, Dec. 21, 1982, at 2.

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 . . . ."[5]

As required by Congress, BLM began issuing ARRC patents to the ROW and other lands after transfer of the Alaska Railroad under ARTA. The issuance of patents has continued to this day as BLM has concluded surveys of lands that were unsurveyed at transfer. By the mid-2000's, the entire federal interest in most of the ROW had been patented to ARRC; only a few portions of the ROW remain to be conveyed by patent.

B. The Exclusivity of the ARRC ROW

As noted above, patents granted to ARRC by the United States under ARTA conveyed the entire federal interest in those lands to ARRC. As also noted, fee simple interest was transferred with respect to most of the ROW. Moreover, ARTA, 45 U.S.C. §1205(b)(4), guarantees conveyance of at least an exclusive use easement in all portions of the ROW that left federal ownership before January 14, 1983, or as to which a claim of valid existing rights existed as of that date. ARTA specifically explains why this guarantee was made: "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."[6] Further underscoring Congress's recognition that it was critical to provide the State with exclusive rights in the ROW, ARTA specifically requires the federal government to defend the State's title in the ROW against claims that it had less than an exclusive use easement.[7]

The exclusive use easement required by ARTA, 45 U.S.C. § 1202(6), as the minimum interest conveyed to the State in the ROW provides broad exclusive rights:

> "[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;

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[5] *See* 45 U.S.C. §1203(b)(3).

[6] *See* 45 U.S.C. §1205(b)(4)(A)(ii).

[7] *See* 45 U.S.C. §1205(b)(4)(B).

> (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.

ARTA therefore requires the United States to convey to the State at least the exclusive right to use and occupy the ROW for transportation, communication and transmission purposes, including the right to exclude all other persons and entities from it.

As demonstrated above, the ARRC ROW, as first designated by the United States for the construction and operation of the federally-owned Alaska Railroad, and as subsequently conveyed to ARRC pursuant to ARTA, provided exclusive rights to possess and use the ROW. Because most of the ROW was owned in fee simple by the United States, that fee simple title was transferred to ARRC. Even in those exceptional circumstances where a third-party claim was pending at the time of transfer, Congress guaranteed that ARRC would receive at least an exclusive use easement. All of this settled law contradicts your assertion that ARRC owns no more than a non-exclusive easement and that adjoining landowners can occupy and use the ROW. It also supports ARRC's position that it has the authority to require permits for adjoining landowners to enter and use the ROW.

It is worth noting that Congress' requirement that ARRC receive an exclusive use easement is consistent with settled law indicating that railroad ROWs generally, whether or not characterized as easements, provide railroads with exclusive possession and use:

> Generally, after a railroad company's right of way has been located and constructed, it has the right to the uninterrupted and exclusive possession, use, and control of the surface of the land constituting its right of way and necessary for conducting its business. . . . As long as the railroad company occupies any portion of its right of way, it has the exclusive use and right of control coextensive with its boundaries.[8]

As stated by another commentator:

> 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.[9]

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[8] 74 C.J.S. Railroads § 225 (2002) (emphasis added; footnotes omitted). *See also* 65 Am.Jur.2d, Railroads, §104, at 403 (Railroad right-of-way easement is essentially different from any other in that it requires exclusive occupancy).

[9] G. Thompson, Commentaries on the Modern Law of Real Property (1965), §381, at 503, 512

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:[10]

> 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.[11]

As noted above, Congress recognized these concerns in ARTA and specifically explained that exclusive control over the right-of-way by the Alaska Railroad was and is necessary to protect safe and economic operation of the railroad.[12] As a Senior Attorney in the Alaska office of the U.S. Solicitor put it recently in a memo relating to the ARRC ROW, "[e]xclusive control is necessary to insure uninterrupted and safe operation of the railroad and to protect members of the public from physical harm."[13]

C. Neither the Brandt Decision Nor Other Act of 1875 Cases Apply to the ARRC ROW.

You invoke the U.S. Supreme Court's recent decision in *Brandt Revocable Trust v. United States*, which involved an abandoned railroad right-of-way. You assert that Brandt supports your position that ARRC does not own exclusive rights to occupy and use its ROW. For the reasons discussed below, however, the *Brandt* decision neither applies to nor affects ARRC's property rights in its ROW.

Brandt involved the question of whether the federal government retained ownership of a railroad ROW granted under the federal General Right-of-Way Act of 1875 (Act of 1875) when that ROW was abandoned by the private railroad company that had operated on it. The Supreme Court decided the abandoned land was owned not by the federal government, but instead by the landowner who had received a patent for the parcel of land crossed by the right-of-way.

(emphasis added).

[10]The railroad operating environment is inherently a hazardous one. Trespassing along railroad rights-of-way is the leading cause of rail-related fatalities in America, resulting in approximately 500 deaths each year.

[11] 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).

[12] *See* 45 U.S.C. §1205(b)(4)(A)(ii).

[13] We provided you with a copy of that memorandum in January 2013.

To understand why the *Brandt* decision does not apply to the ARRC ROW, one must understand the background in that case. The ROW at issue in *Brandt* was granted to a private railway in 1908 under the Act of 1875. The ROW was owned by a series of private railways, which operated railroads on it until it was abandoned in 2004. In the meantime, in 1976, the United States had patented an 83-acre parcel in fee simple title to Melvin Brandt. The railroad ROW described above crossed and was included in that parcel. The patent stated that the land was granted subject to the ROW. When the railroad ROW was abandoned, the United States claimed title to it where it crossed Mr. Brandt's parcel. Mr. Brandt contested that claim, arguing that he now owned the ROW in fee simple because he owned the underlying fee interest in the entire parcel by virtue of the 1976 patent. The Supreme Court ultimately agreed with Mr. Brandt.

The fundamental reason that the *Brandt* decision neither applies to nor affects the ARRC ROW is that it involved a ROW granted under the Act of 1875. *Brandt* is expressly limited to ROWs granted under that Act. The ARRC ROW, on the other hand, is almost entirely composed of land designated by the federal government for the ROW of the federally-owned and operated Alaska Railroad under the Act of 1914. That Act did not mention, much less incorporate in any way, the Act of 1875 or use its language to describe ROWs to be designated for the Alaska Railroad. In sum, the Act of 1914 is entirely unrelated to the Act of 1875, and therefore the *Brandt* decision has no impact on ROWs designated under the Act of 1914.

Nor are ROWs established under the Act of 1914 analogous to Act of 1875 ROWs. Whereas the Act of 1875 granted railroad ROWs across federal lands to private railroad companies, the Act of 1914 directed the establishment on federal lands in Alaska ROWs that would continue to be owned by the federal government and for its use in operating the Alaska Railroad. Consequently, almost all of the Alaska Railroad ROW never left federal ownership before it was transferred to ARRC in 1985. Therefore, as discussed above, the federal government owned almost all of the Alaska Railroad ROW in fee simple at the time of transfer. Therefore, the vast majority of the Alaska Railroad ROW passed to ARRC in fee simple title. In other words, most of the ARRC ROW is not an easement, but instead is a strip of land owned outright by ARRC. The fact that ARRC owns fee simple title in most of its ROW makes that ROW completely different from ROWs granted to private railway companies under the Act of 1875.

ARTA confirms the critical differences between Act of 1875 ROWs and the Alaska Railroad ROW. As discussed above, ARTA's legislative history shows that Congress found the vast majority of the Alaska Railroad ROW to be owned by the United States in fee simple. That history also demonstrates that Congress intended that the State of Alaska would receive fee simple title to nearly all of the Alaska Railroad ROW.

Moreover, unlike the patent at issue in *Brandt*, homestead patents granted to residents located adjacent to already-existing portions of the Alaska Railroad ROW did not include the land located within the ROW itself. This further cements the conclusion that the decision in *Brandt* is inapplicable to the ARRC right-of-way.

D. BLM's Issuance of Patents to ARRC for Land Located in Municipalities Does Not Run Afoul of Alaska State Law.

Your March 23 letter invokes a provision in ARCA, AS 42.40.285(5), which requires legislative approval 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 any ROW within municipalities 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 the Alaska Railroad ROW existed in 1983, when ARTA took effect, land within the ROW is included among the "rail properties of the Alaska Railroad" as that term is defined in 45 U.S.C. §1202(10). Consequently, a transfer of land in the ROW by the United States to ARRC constitutes a conveyance of a rail property under ARTA, and therefore falls squarely within the exception in AS 42.40.285(5). Moreover, subsection AS 42.40.285(5) was not included in AS 42.40.285 until 1999; consequently, this subsection could not have applied to the transfer of the ROW pursuant to ARTA in 1985 by means of interim and permanent conveyances.

E. The Patents Issued by BLM to ARRC for the ARRC ROW are Not Only Proper, They are Required.

Your letter suggests that BLM and ARRC are involved in inappropriate activity with respect to the patents for the ARRC ROW issued by BLM. Respectfully, that assertion is belied by the authorities described above. In fact, in patenting to ARRC at least an exclusive use easement in ROW lands, BLM is doing exactly what Congress required it to do in ARTA. ARTA requires BLM to convey to ARRC not less than an exclusive use easement to all lands located within the ROW and provides that final conveyances be made via patent. Moreover, that obligation exists regardless of the United States' legal interest in the Property, as underscored by the statutory guarantee that the United States will defend ARRC's title against claims that it owns less than an exclusive use easement in the ROW. It would contravene ARTA for BLM to convey to ARRC anything less than a patent for an exclusive use easement in the ROW.

II. The RRUP is a Proper Exercise of ARRC's Authority and Obligation to Preserve the ARRC ROW.

You also assert in your letter that ARRC's adoption of the RRUP was improper. You claim that RRUP asserts an exclusive interest in the ROW that ARRC does not possess, that RRUP is part of a scheme to attack the property rights of ARRC's neighbors and that public sentiment was strongly in opposition to the RRUP.[14] We respectfully disagree with all of those assertions.

[14] You also suggest that ARRC is publically funded, "perhaps too generously." But

ARRC's exclusive interest in the ROW, including the right to exclude other parties from it, is well established above. The balanced residential use permit program provided for in the RRUP is fully in line with both that exclusive interest and ARRC's desire to accommodate its neighbors in a safe and workable manner. Far from being an attack on adjoining property owners' property interests, which stop at the boundary of the ROW, RRUP accommodates existing uses that are compatible with railroad safety and operations. That said, it was incumbent upon ARRC us to develop the RRUP for the safety of our neighbors, customers and employees and to protect the ability of ARRC to use the ROW for the purposes required by Alaska law.

You also assert that ARRC, in enacting RRUP and taking other actions to protect the ROW, has acted "piecemeal so as to avoid stirring up opposition." We completely disagree. The RRUP was developed as the result of probably the most extensive public outreach and participation process ever undertaken in conjunction with the passage of an ARRC Board policy. Starting in 2011, ARRC employees went door-to-door, meeting our neighbors in Anchorage to discuss the prospect of ARRC reducing or eliminating residential use of ARRC ROW. ARRC sent postcards to residential properties that abut ARRC ROW informing them of our program to mark the ROW during the summer of 2011. In 2012, as required by our by-laws, we advertised in three newspapers of record in Anchorage, Seward and Fairbanks the opportunity for public comment on a proposed draft RRUP to be considered by the ARRC Board of Directors (ARRC Board) at a June 2012 board meeting. We also sent mailers to residential properties that abut ARRC ROW inviting residents to comment on the proposed policy at the June 2012 meeting. These mailings are not required by our by-laws and were an attempt to ensure that residents who could be affected by the policy were aware of its development.

Many of our residential neighbors took the opportunity to comment on the draft RRUP at that time, including a large number—including you—who attended and commented at the June 2012 board meeting. After considering those comments, the ARRC Board sent the draft policy back to ARRC staff for substantial changes that addressed many of the issues raised by the public.

After significant revisions to the policy, we again sent mailers to potentially affected residential properties inviting residents to comment on the revised RRUP in writing, by telephone or at public meetings in Anchorage, Wasilla and Fairbanks in November 2012. The Anchorage meeting attracted residents from neighborhoods around Anchorage and many more residents commented in writing or by telephone. Yet more revisions were made to the RRUP in response to those comments. In October 2013, we sent two rounds of postcards to potentially affected residents notifying them that a revised RRUP was again going before the ARRC Board and inviting comments.

ARRC is a public corporation that receives no operating funds from the State of Alaska and is required to turn a profit like private corporations. ARRC's recent financial woes due to the closure of the Flint Hills refinery and other factors are well-documented.

We expanded the comment period at the request of community councils, in addition to providing required public notice of the RRUP in the newspapers.

At the November 12, 2013 ARRC Board meeting, we once again took public comment and made ARRC staff available to answer questions about the proposed policy. Notwithstanding your impression that the public largely opposed the RRUP, many of the comments at the November 12 meeting were positive and applauded ARRC's public outreach efforts and its willingness to modify the RRUP to address public concerns. After the RRUP was approved by the Board at that meeting, we again reached out via postcards to explain to our neighbors when and how the RRUP's permit requirements would take effect.

In conclusion, please be assured that ARRC appreciates that this situation has been and continues to be frustrating to you. We understand that you are sincere in your legal position regarding the respective property interests of ARRC and neighboring landowners, although we disagree with that position. We also are genuinely sorry that you believe that ARRC has acted "wrongfully" and with improper "motives and methods." We respectfully submit, however, that ARRC's acceptance of required ARTA conveyances and its passage of the RRUP have been undertaken aboveboard and fully in line with ARRC's obligation under Alaska law to preserve the integrity of its ROW. At the same time, we have worked very hard to solicit and take into account the public's input into the RRUP process and to accommodate our neighbor's desire to continue to use the ROW where that can be accomplished safely.

I hope that the foregoing adequately responds to the concerns expressed in your letter and 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 and Environmental

cc: Bill O'Leary, President & CEO, ARRC (via email)