Appendix

Table of Contents

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ALASKA RAILROAD CORPORATION, *Plaintiff-Appellee*, v. FLYING CROWN SUBDIVISION ADDITION NO. 1 AND ADDITION NO. 2 PROPERTY OWNERS ASSOCIATION, a non-profit, *Defendant-Appellant*, and MUNICIPALITY OF ANCHORAGE, DEPT OF LAW, *Intervenor-Defendant*.	No. 22-35573 D.C. No. 3:20-cv-00232-JMK ORDER AND OPINION

Appeal from the United States District Court
for the District of Alaska
Joshua M. Kindred, District Judge, Presiding

Argued and Submitted August 15, 2023
Anchorage, Alaska

Filed December 29, 2023

Before: Richard A. Paez, Jacqueline H. Nguyen, and
Bridget S. Bade, Circuit Judges.

Order;
Opinion by Judge Nguyen

SUMMARY*

Property Law

In a case in which Chief Judge Murguia is recused and Judge Bade was drawn as a replacement judge, the panel (1) withdrew the opinion filed on September 18, 2023; (2) filed a new opinion, reflecting Judge Bade's concurrence, affirming the district court's summary judgment in favor of Alaska Railroad Corp. ("ARRC") in its action seeking to quiet title in a railroad right-of-way and to clarify that ARRC's interest in the right-of-way includes an exclusive-use easement; (3) denied a petition for panel rehearing; and (4) denied a petition for rehearing en banc.

ARRC, a state-owned corporation, owns and operates Alaska's railroad system. It possesses a right-of-way on which it operates a section of track next to an air strip owned by Flying Crown Subdivision No. 1 and Addition No. 2 Property Owners Association. ARRC's right-of-way includes one-hundred feet on either side of the track's center line, some of which directly overlaps with Flying Crown's air strip.

The panel held that the Alaska Railroad Act of 1914 authorized the creation of the Alaska Railroad, a federal railroad, and reserved railroad rights-of-way to the United States. The Alaska Railroad Transfer Act of 1982 authorized the federal government to

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

transfer nearly all of the Alaska Railroad property rights to ARRC.

In 1950, the United States issued the "Sperstad Patent" to Flying Crown's predecessor in interest. The Alaska Railroad's track already traversed the land, and the Sperstad Patent reserved a railroad right-of-way. The panel held that the 1914 Act did not reveal the scope of the right-of-way retained by the government. Considering common law principles, the sovereign grantor canon, and the court's interpretation of the general right-of-way statute adopted by Congress in 1875, the panel concluded that, in the Sperstad Patent, the federal government intended to reserve an exclusive-use easement under the 1914 Act. The panel further held that the federal government transferred the exclusive-use easement it retained under the 1914 Act to ARRC under the Alaska Railroad Transfer Act of 1982.

COUNSEL

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Ashley C. Brown and John A. Lehman, Kemppel Huffman and Ellis PC, Anchorage, Alaska, for Amicus Curiae Matanuska Telecom Association, Inc.

ORDER

The Honorable Chief Judge Mary Murguia is recused from this case and Judge Bade was drawn as a replacement judge pursuant to General Order 3.2h (Dkt. No. 45). The opinion filed on September 18, 2023 is hereby withdrawn. A new opinion reflecting Judge Bade's concurrence will be filed contemporaneously with this order.

The panel has voted to deny the petition for panel rehearing. Judge Nguyen and Judge Bade have voted to deny the petition for rehearing en banc, and Judge Paez has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied. No further petitions for panel rehearing or rehearing en banc will be entertained.

OPINION

NGUYEN, Circuit Judge:

This case concerns the property rights of two uniquely Alaskan entities. On one side is Flying Crown Subdivision Addition No. 1 and No. 2 Property Owners Association ("Flying Crown"), a homeowners' association for the eponymous subdivision in Anchorage, Alaska. Flying Crown is one of many subdivisions nestled in South Anchorage. But it is not your average subdivision. The homes in Flying Crown back up to a small air strip. A Flying Crown homeowner can walk out her back door, hop into the plane parked in her backyard, and conveniently taxi her plane directly onto the grassy take-off and landing strip that abuts her backyard. Some of Flying Crown's homeowners selected the subdivision for that very reason.

On the other side is the Alaska Railroad Corporation ("ARRC"), a state-owned corporation that owns and operates Alaska's railroad system. The railroad carries millions of tons of cargo, connects rural communities to population centers in Anchorage and Fairbanks, and allows tourists to travel to remote regions off the state's road system. ARRC also possesses a right-of-way on which it operates a section of track adjacent to Flying Crown's air strip. Its right-of-way includes one-hundred feet on either side of the track's center line, some of which directly overlaps with Flying Crown's air strip.

For decades, Flying Crown and ARRC coexisted peacefully. ARRC operated its railroad, and Flying Crown's homeowners took off and landed on the adjacent air strip. Neither party was legally certain of the exact property right, but it did not seem to matter. As far as we are aware, no significant problems arose because both parties acted in the spirit of mutual accommodation.

In 2019, Flying Crown sent ARRC a letter demanding that ARRC relinquish any claim to exclusive use of the right-of-way. In response, ARRC filed this action seeking to quiet title in the right-of-way and to clarify that ARRC's interest in the right-of-way includes an exclusive-use easement. ARRC's claim raises challenging questions about the proper interpretation of the Alaska Railroad Act of 1914 and the Alaska Railroad Transfer Act of 1982. We will explain the legal issues in more detail below, but suffice it to say that, as a matter of safety, the railroad must possess the right to exclude anyone—including Flying Crown homeowners—from its right-of-way. Accordingly, we hold that ARRC possesses at least an exclusive-use easement in its right-of-way crossing Flying Crown's property. Because the district court properly granted summary judgment to ARRC and denied Flying Crown's cross-motion for summary judgment, we affirm.

I. Factual, Legal, and Procedural Background

The parties rely on railroad statutes from both the contiguous United States and Alaska. We start by reviewing the relevant history of railroad acts in the continental United States and Alaska before turning to the factual and procedural background of this litigation.

A. Railroads in the Continental United States

The continental United States experienced a significant boom in railroad growth in the 1800s. Between 1850 and 1871, "Congress embarked on a policy of subsidizing railroad construction by lavish grants from the public domain." *Great N. Ry. Co. v. United States*, 315 U.S. 262, 273 (1942). Congress granted "rights of way through the public domain, accompanied by outright grants of land along those rights of way," conveyed in "checkerboard blocks." *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 96–97 (2014). This policy enabled railroad companies to "either develop their lots or sell them, to finance construction of rail lines and encourage the settlement of future customers." *Id.* at 97.

The Supreme Court characterized these pre-1871 rights-of-way as "limited fee[s]."[1] N. *Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903). The pre-1871 rights-of-way were unquestionably exclusive. *See New Mexico v. U.S. Tr. Co.*, 172 U.S. 171, 183 (1898) (holding that the railroad's right-of-way is "more than an ordinary easement" because it has the "attributes of the fee, perpetuity and exclusive use and possession"); *W. Union Tel. Co. v. Pa. R.R. Co.*, 195 U.S. 540, 570 (1904) ("A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement [and] . . . 'whatever it may be called, it is, in substance, an interest in the land, special and exclusive in its nature.'" (citation omitted)).

Congress's generous land-grant policy proved unpopular. Western settlers complained that it discouraged settlement because railroads were slow to sell their land. *Brandt*, 572 U.S. at 97. As a result of this and other criticisms, "[a]fter 1871 outright grants of public lands to private railroad companies seem to have been discontinued." *Great N.*, 315 U.S. at 274. Between 1871 and 1875, Congress passed a series of one-off acts granting individual railroads particular

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[1] The Supreme Court initially called the pre-1871 grants "absolute grant[s]," *see St. Joseph & Denver City R.R. Co. v. Baldwin*, 103 U.S. 426, 429–30 (1880), before adopting the "limited fee" designation, *see Barahona v. Union Pac. R.R. Co.*, 881 F.3d 1122, 1127 (9th Cir. 2018) ("[T]he Court apparently endorsed the conclusion that the pre-1871 grants were of a limited fee.").

rights-of-way through public land in the western United States. *Id.* After several years, "[t]he burden of this special legislation moved Congress to adopt [a] general right of way statute" in 1875. *Id.* at 275.

The Supreme Court distinguished 1875 Act right-of-way grants from their pre-1871 predecessors. Unlike pre-1871 acts, the 1875 Act "grants only an easement, and not a fee." *Id.* at 271; *see also Brandt*, 572 U.S. at 104 ("[T]he [*Great Northern*] Court specifically rejected the notion that the right of way conferred even a 'limited fee.'" (citation omitted)).[2] The Supreme Court has not, however, determined whether 1875 Act rights-of-way are exclusive in nature.

B. Railroads in Alaska

Alaska's railroad boom lagged several decades behind the contiguous United States. In the late 1800s and early 1900s, private railroads began investing in Alaska in hopes of capitalizing on the Klondike Gold Rush. But the conditions in Alaska proved challenging and, ultimately, private railroads failed. Recognizing that the developing territory needed a reliable railroad, Congress passed the Alaska Railroad Act of 1914 ("1914 Act"). *See* Act of March 12, 1914, ch. 37, 38 Stat. 305 (formerly codified at 43 U.S.C. § 975, *et*

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[2] The earliest case interpreting an 1875 Act right-of-way called the railroad's interest in its right-of-way a "limited fee." *See Rio Grande W. Ry. Co. v. Stringham*, 239 U.S. 44, 47 (1915) (stating that "[t]he right of way granted by [the 1875 Act] is neither a mere easement, nor a fee simple absolute, but a limited fee [that] carries with it the incidents and remedies usually attending the fee"). Thus, it initially seemed that the Supreme Court would treat 1875 Act easements like their pre-1871 predecessors. But the Supreme Court roundly rejected this position in *Great Northern*, 315 U.S. at 271.

seq.). The 1914 Act authorized the president to "locate, construct and operate railroads in the Territory of Alaska." *Id.* The Alaska Railroad was the first—and only—federally constructed and operated railroad in the United States. *United States v. City of Anchorage*, 437 F.2d 1081, 1082 (9th Cir. 1971).

To make the railroad possible, the 1914 Act required that future land patents by the federal government in Alaska "reserve[] 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." 1914 Act § 1.

In the early 1980s, the federal government decided that Alaska should take over ownership and management of the railroad. S. Rep. No. 97-479, at 5 (1982). Congress enacted the Alaska Railroad Transfer Act of 1982 ("ARTA"), 45 U.S.C. §§ 1201–14, which authorized the federal government to transfer nearly all of its railroad's property rights to the state of Alaska's new state-owned Alaska Railroad Corporation. Today, ARRC continues to own and operate Alaska's full-service freight and passenger railroad.

C. Litigation Background

On February 15, 1950, the United States issued federal patent No. 1128320 to Thomas Sperstad ("Sperstad Patent"), Flying Crown's predecessor in interest. As required by the 1914 Act, the Sperstad Patent "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." The Alaska Railroad's track already traversed the land when the federal government issued the Sperstad Patent.

In 1965, John Graham purchased a piece of the Sperstad Patent to develop the Flying Crown subdivision. *Oceanview Homeowners Ass'n, Inc. v. Quadrant Const. & Eng'g*, 680 P.2d 793, 795 (Alaska 1984). By 1962, an airstrip—which overlapped with the railroad's right-of-way—was built on the Sperstad land. *Id.* Many of Flying Crown's homeowners are pilots and selected the subdivision because of the airstrip.

Following ARTA's enactment in 1983, the federal government transferred the Alaska Railroad's easement over what was originally the Sperstad Patent to ARRC, first by interim conveyance and later pursuant to Patent No. 50-2006-0363. The patent purported to convey "not less than an exclusive-use easement" to ARRC.

ARRC and the Flying Crown homeowners coexisted peacefully for decades. At some point, ARRC began charging Flying Crown an annual $4,500 permitting fee to use the airstrip on the right-of-way. Flying Crown objected to the fee, but the parties seemed to have resolved the issue without litigation—ARRC terminated the fee in 2017. ARRC does not currently charge Flying Crown any permitting fees. Counsel for ARRC represented at oral argument that ARRC has no plans to reinstate the permitting fee.

Nevertheless, in 2019, Flying Crown sent ARRC a letter claiming that the ARTA transfer had "attempted to award property rights no longer owned by the federal government" and demanding that "ARRC immediately proclaim, by means of a legally recordable document, that it relinquishes any and all claim to 'exclusive use' of the right-of-way." In response, ARRC filed this action seeking to quiet title in the right-of-way and to clarify that ARRC's interest in the right-of-way includes an exclusive-use easement.

The district court granted ARRC's motion for summary judgment and denied Flying Crown's cross motion. The court held "that ARRC possesses the interest to at least an exclusive-use easement . . . in its [right-of-way] crossing Flying Crown's property." Flying Crown appealed.

II. Jurisdiction and Standard of Review

We have jurisdiction because this case turns on "substantial questions of federal law." *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005); *see also* 28 U.S.C. § 1331. We review de novo the district court's grant or denial of summary judgment, *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1271 (9th Cir. 2017), and we affirm.

III. Analysis

A. The 1914 Act

The Sperstad Patent "reserved to the United States a right of way for the construction of railroads . . . in accordance with the [Alaska Railroad Act of 1914]." Accordingly, we turn first to the scope of the interest reserved by the federal government under the 1914 Act.

The 1914 Act does not define the scope of a "right-of-way," nor does it include any textual hints as to the right-of-way's exclusivity or lack thereof. Flying Crown contends that the federal government had no exclusive easement under the 1914 Act and therefore cannot transfer such interest to the state; ARRC takes the opposite position. But neither party relies on a purely textual argument. In the absence of textual guidance, we rely on contextual indicators—common law principles, the sovereign-grantor canon, and a contemporaneous railroad act from the contiguous United States—to determine whether the federal government intended to reserve an exclusive-use easement under the 1914 Act. We conclude that it did.

i. Common Law Principles

We begin with "basic common law principles." *Brandt*, 572 U.S. at 106; *accord id.* at 104–06.[3] Flying Crown contends that, under common law, easements are by nature nonexclusive. Not so. "Easements . . . may be exclusive or nonexclusive," and "[t]he degree of exclusivity of the rights conferred by an easement . . . is highly variable." Restatement (Third) of Property: Servitudes § 1.2 cmt. c (2000); *see also id.* § 1.2 cmt. d ("Easements and profits may authorize the exclusive use of portions of the servient estate[.]"). Exclusivity is a spectrum that ranges from "no right to exclude anyone" to "the right to exclude everyone," and nearly everything in between. *Id.* § 1.2 cmt. c.

To determine the degree of exclusivity, "[a] servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." *Id.* § 4.1(1); *see*

[3] We draw the relevant common law principles from the Restatement (Third) of Property: Servitudes, just as the Supreme Court did in *Brandt*.

also Leo Sheep Co. v. United States, 440 U.S. 668, 682 (1979) (holding that a railroad act should "receive such a construction as will carry out the intent of Congress" which can be determined by "the condition of the country when the acts were passed, as well as to the purpose declared on their face" (citation omitted)). Because language in the Sperstad Patent and the underlying 1914 Act provide little guidance, we look instead to the purpose and circumstances of the right-of-way reservation to determine the parties' intent. Both weigh in favor of a finding an exclusive-use easement interest.

The express purpose of right-of-way reservations made pursuant to the 1914 Act was "for the construction of railroads." The intent of the railroad was to

> aid in the development of the agricultural and mineral or other resources of Alaska, and the settlement of the public lands therein, and . . . to provide transportation of coal for the Army and Navy, transportation of troops, arms, munitions of war, the mails, and for other governmental and public uses, and for the transportation of passengers and property.

1914 Act § 1; *see also City of Anchorage*, 437 F.2d at 1082 ("The purpose of this railroad was to aid in the development of the natural resources of the Territory and the settlement of its public lands by providing necessary transportation from the coast to the interior.").

An exclusive-use easement best serves this purpose. Safe and efficient operation requires railroads to have the ability to exclude anyone, including the servient estate owner, at any time. Contrary to Flying Crown's contention, an exclusive-use easement does not impair the statute's settlement purpose. If anything, it facilitates settlement by ensuring that settlers have dependable access to transportation and goods.

Railroad rights-of-way are necessarily different than traditional easements because of the purpose of the easement. Our circuit has recognized as much. *See Barahona*, 881 F.3d at 1134 ("It is beyond dispute that a railroad right of way confers more than a right to simply run trains over the land."). Logically, the scope of an easement intended to facilitate the passage of large, fast-moving machinery differs from, say, an easement to walk across a neighbor's land to access the beach. *See, e.g.*, *New Mexico*, 172 U.S. at 181–82 ("[Right-of-way] may mean one thing in a grant to a natural person for private purposes, and another thing in a grant to a railroad for public purposes, as different as the purposes and uses and necessities, respectively, are."). Thus, the purpose of the 1914 Act—to provide a railroad for the territory of Alaska—is best served by an exclusive-use easement.

The circumstances that led to the creation of the right-of-way also weigh in favor of finding an exclusive-use easement. *See Leo Sheep*, 440 U.S. at 682; Restatement § 4.1(1); *see also United States v. Union Pac. R.R. Co.* ("*Union Pac. I*"), 91 U.S. 72, 79 (1875). Flying Crown contends that the context that led to the 1914 Act is comparable to the contemporaneous 1875 Act in the contiguous United States. But "Alaska is often the exception, not the rule." *Sturgeon v. Frost*, 139 S. Ct. 1066, 1080 (2019) (citation omitted); *Yellen v. Confederated Tribes of the Chehalis Rsrv.*, 141 S. Ct. 2434, 2438 (2021) (highlighting "the unique circumstances of Alaska").

As discussed above, the federal government supported railroads in the contiguous United States through generous land grants until public resentment developed. *Brandt*, 572 U.S. at 97. The 1875 Act resulted from Congress's shift away from such extravagant subsidies. Alaska was different. Unlike the booming railroad industry in the contiguous United States, Alaskan railroad companies struggled and frequently failed. In response, the federal government introduced a radical new policy—the government itself would construct and operate the Alaska Railroad. Consequently, widespread frustration with private railroads' unmerited enrichment at the expense of the public—the very circumstance that led to the 1875 Act—never occurred in Alaska.

If anything, the circumstances that gave rise to the Alaska Railroad were more like the pre-1871, rather than the post-1875, western United States. The western United States was a vast, undeveloped land before the completion of the transcontinental railroad in 1869, *see Union Pac. I*, 91 U.S. at 80; Alaska was a similarly vast, undeveloped territory in the early 1900s, *see* H.R. Rep. No. 92, at 11 (1913). Both territories held the promise of abundant agricultural and mineral resources, as well as the potential for settlement. *See Union Pac. I*, 91 U.S. at 80; 1914 Act § 1. And just as Congress viewed the Alaska Railroad as a critical tool for the impending global unrest in 1914, *see* 51 Cong. Rec. S1896 (1914) ("[O]ne of the prime motive powers behind this bill, or one of the reasons urged for its passage, is that it is a great military necessity."), it similarly viewed a railroad as essential to Civil War-era security when it passed the pre-1871 acts, *see Brandt*, 572 U.S. at 96 ("The Civil War spurred the effort to develop a transcontinental railroad[.]").

In both contexts, serious risks led to substantial government involvement in creation of the railroad. In the pre-1871 western United States, "[t]he risks were great and the costs were staggering," and thus "[p]opular sentiment grew for the Government to play a role in supporting the massive project." *Brandt*, 572 U.S. at 96 ("[T]he Federal Government ought to render immediate and efficient aid in its construction." (citation omitted)). The federal government acquiesced by offering generous land grants for railroad rights-of-way. In 1914 Alaska, where the risks were arguably greater and the costs even more staggering, the government saw the need to play a more active role in developing the railroad. H.R. Rep. No. 92, at 12 (1913) (describing the Alaska Railroad as an "immense undertaking" in light of the "extreme cold" which requires a railroad "aided or built by [the] government[]").

These parallels make sense. The United States acquired the western territories between 1803 and 1853. *Brandt*, 572 U.S. at 95 (beginning with the Louisiana Purchase through the Gadsden Purchase). The United States purchased the Alaska territory in 1867. *Alaska v. United States*, 545 U.S. 75, 83 (2005). Thus, development in Alaska was several decades behind the western United States. It is unsurprising, then, that the circumstances of pre-1871 western United States—where the government granted railroad rights-of-way in exclusive-use limited fee—offer a more apt analogy to 1914 Alaska than the post-1875 western United States. Thus, the circumstances of the 1914 Act weigh in favor of finding at least an exclusive-use easement.

ii. Sovereign-Grantor Canon

The sovereign-grantor canon also militates in favor of exclusivity.[4] Under the canon, "[any] doubts . . . are resolved for the Government, not against it." *United States v. Union Pac. R.R. Co.* ("*Union Pac. II*"), 353 U.S. 112, 116 (1957). Here, the structure of the 1914 Act right-of-way—a reservation to the government instead of a grant to a private company—requires us to apply the sovereign-grantor rule to construe the right-of-way reserved to the government expansively.

Flying Crown emphasizes the Supreme Court's common articulation of the principle—"nothing passes except what is conveyed in clear language"—to argue that we should limit the government's reservation to its explicit language. But Supreme Court cases that cite the principle arise from a governmental *grant* of a right-of-way to a private party. *See Great N.*, 315 U.S. at 272; *Union Pac. II*, 353 U.S. at 116; *Brandt*, 572 U.S. at 110 n.5. In that context, the Court has limited

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[4] Flying Crown contends that the sovereign-grantor rule applies with less vigor to railroad acts. We disagree. *Leo Sheep*'s statement that "this Court long ago declined to apply [the sovereign grantor] canon in its full vigor to grants under the railroad Acts" introduces some confusion when read in isolation. 440 U.S. at 682. But *Leo Sheep* stands for the proposition that the sovereign-grantor rule cannot overcome the legislature's stated or implied intent—not that the sovereign-grantor rule no longer applies. *Id.* ("[P]ublic grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature[.]" (citation omitted)).

the grant to its explicit terms. But, here, the government *reserved* a right-of-way to itself. If we were to limit the reservation to its explicit terms, we would resolve doubts against the government—not for it. We instead follow the animating principle behind the sovereign-grantor canon, that ambiguity in land grants should be resolved in favor of the government, to interpret the reservation expansively. Thus, the sovereign-grantor canon weighs in favor of finding at least an exclusive-use easement.

iii. Contemporaneous Railroad Statute

Finally, reading the 1914 Act in concert with the 1875 Act supports exclusivity. Flying Crown contends that the 1875 Act granted nonexclusive easements and that similar language in the 1914 Act dictates the same conclusion. As noted above, the 1875 Act is an inapt analogy to the 1914 Act. But even assuming the 1875 Act is pertinent, Flying Crown's argument fails because it rests on the faulty premise that the 1875 Act granted nonexclusive easements.

The Supreme Court has opined on several aspects of the interest granted by an 1875 Act right-of-way. For instance, an 1875 Act right-of-way does not include the right to drill for and remove subsurface oil, gas, and minerals. *Great N.*, 315 U.S. at 279. And when the railroad abandons an 1875 Act easement, the easement extinguishes, and the interest goes to the servient landowner (not the government). *Brandt*, 572 U.S. at 105–06.

But the Supreme Court has never addressed whether an 1875 Act easement is exclusive or nonexclusive. *See L.K.L. Assocs., Inc. v. Union Pac. R.R. Co.*, 17 F.4th 1287, 1308 (10th Cir. 2021)

(Briscoe, J., concurring in part and dissenting in part) ("What the Supreme Court did not address in *Brandt*, because it did not need to, is whether an easement granted under the 1875 Act is exclusive or non-exclusive."). The only circuit to answer the question, the Tenth Circuit, held that "[a]n 1875 Act easement allows the grantee to exclude everyone—including the grantor and fee owner." *Id.* at 1295.

We see no reason to depart from our sister circuit's sound reasoning. The 1875 Act stated that a railroad could not exclude its competitors from physically narrow passages like canyons. 43 U.S.C. § 935. The Tenth Circuit held that this language implied that an 1875 Act easement is exclusive, subject to specific exceptions such as in narrow passages. *L.K.L.*, 17 F.4th at 1295–96. In doing so, the Tenth Circuit rejected the plaintiffs' contention that *Brandt* and *Great Northern* foreclosed exclusivity. *Id.* at 1297 (holding that *Brandt* and *Great Northern* turned on the difference between an easement and a possessory interest, which "is not relevant to whether a railroad with an 1875 Act easement has the right to exclude"). We agree. And if the 1875 Act grants exclusive-use easements, then it is only logical that the federal government reserved no less than an exclusive-use easement for itself in Alaska. Indeed, Flying Crown offers no rationale for why the federal government would reserve a lesser property interest for itself in the 1914 Act than it granted to private railroads in the 1875 Act.

* * *

In sum, the language of the 1914 Act does not reveal the scope of the right-of-way retained by the government. But common law principles, the sovereign grantor canon, and our interpretation of the 1875 Act all lead us to hold that the federal government reserved no less than an exclusive-use easement under the 1914 Act.

B. ARTA

We turn now to the scope of the interest transferred from the federal government to ARRC pursuant to ARTA. We hold that the federal government transferred the exclusive-use easement it retained under the 1914 Act to ARRC under ARTA.

ARTA requires the federal government to grant "not less than an exclusive-use easement" to the State under certain circumstances, all of which were met here. 45 U.S.C. § 1205(b)(4)(B). Specifically, as relevant here, ARTA set out the following "procedures applicable" to lands to be transferred:

> [w]here *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, the *conveyance to the State of the Federal interest in such properties pursuant to section 1203(b)(1)(B)* or (2) of this title shall grant not less than an exclusive-use easement in such properties.

Id. (emphasis added).

The Sperstad Patent meets all the conditions of § 1205(b)(4)(B). The Sperstad Patent included land within the railroad right-of-way. The federal government granted the Sperstad Patent in 1950, meaning that the land was "conveyed from Federal ownership prior to January 14, 1983." *Id.* And ARTA authorized transfer of the easement across the Sperstad Patent pursuant to 45 U.S.C. § 1203(b)(1)(B). Under the plain text of § 1205(b)(4)(B), then, "the conveyance to the State of the Federal interest" in this case "shall grant not less than an exclusive-use easement."

Citing to *Encino Motorcars, LLC v. Navarro*, Flying Crown instead contends that we should apply the distributive canon to read § 1205(b)(4)(B) as referring to property interests that have been conveyed and are subject to a claim of valid existing rights or property interests that have not been conveyed and are subject to a claim of valid existing rights. 138 S. Ct. 1134, 1141–42 (2018). But the distributive canon has no role here. The Supreme Court held in Encino that "'or' is 'almost always disjunctive.'" *Id.* at 1141 (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013)). Indeed, the Court eschewed the distributive canon in favor of the ordinary, disjunctive meaning of "or" because it was the "more natural reading." *Id.* at 1142. Likewise, we find that the ordinary, disjunctive reading is the most natural reading of § 1205(b)(4)(B).

IV. Conclusion

We hold that the 1914 Act reserved an exclusive-use easement for the Alaska Railroad and that the federal government transferred that exclusive-use easement to the state under ARTA. Accordingly, the district court properly granted ARRC's motion for summary judgment and denied Flying Crown's cross-motion for summary judgment.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA RAILROAD CORPORATION, *Plaintiff-Appellee*, v. FLYING CROWN SUBDIVISION ADDITION NO. 1 AND ADDITION NO. 2 PROPERTY OWNERS ASSOCIATION, a non-profit, *Defendant-Appellant*, and MUNICIPALITY OF ANCHORAGE, DEPT OF LAW, *Intervenor-Defendant*.	No. 22-35573 D.C. No. 3:20-cv-00232-JMK OPINION

Appeal from the United States District Court
for the District of Alaska
Joshua M. Kindred, District Judge, Presiding

Argued and Submitted August 15, 2023
Anchorage, Alaska

Filed September 18, 2023

Before: Mary H. Murguia, Chief Judge, and
Richard A. Paez and Jacqueline H. Nguyen,
Circuit Judges.

Opinion by Judge Nguyen

SUMMARY*

Property Law

The panel affirmed the district court's summary judgment in favor of Alaska Railroad Corp. ("ARRC") in its action against Flying Crown Subdivision No. 1 and Addition No. 2 Property Owners Association, seeking to quiet title in a railroad right-of-way and to clarify that its interest in the right-of-way includes an exclusive-use easement.

ARRC, a state-owned corporation, owns and operates Alaska's railroad system. It possesses a right-of-way on which it operates a section of track next to an air strip owned by Flying Crown, a homeowners' association. ARRC's right-of-way includes one-hundred feet on either side of the track's center line, some of which directly overlaps with Flying Crown's air strip.

The panel held that the Alaska Railroad Act of 1914 authorized the creation of the Alaska Railroad, a federal railroad, and reserved railroad rights-of-way to the United States. The Alaska Railroad Transfer Act of 1982 authorized the federal government to transfer nearly all of the Alaska Railroad property rights to ARRC.

In 1950, the United States issued the "Sperstad Patent" to Flying Crown's predecessor in interest. The Alaska Railroad's track already traversed the land,

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

and the Sperstad Patent reserved a railroad right-of-way. The panel held that the 1914 Act did not reveal the scope of the right-of-way retained by the government. Considering common law principles, the sovereign grantor canon, and the court's interpretation of the general right-of-way statute adopted by Congress in 1875, the panel concluded that, in the Sperstad Patent, the federal government intended to reserve an exclusive-use easement under the 1914 Act. The panel further held that the federal government transferred the exclusive-use easement it retained under the 1914 Act to ARRC under the Alaska Railroad Transfer Act of 1982.

COUNSEL

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OPINION

NGUYEN, Circuit Judge:

This case concerns the property rights of two uniquely Alaskan entities. On one side is Flying Crown Subdivision Addition No. 1 and No. 2 Property Owners Association ("Flying Crown"), a homeowners' association for the eponymous subdivision in Anchorage, Alaska. Flying Crown is one of many subdivisions nestled in South Anchorage. But it is not your average subdivision. The homes in Flying Crown back up to a small air strip. A Flying Crown homeowner can walk out her back door, hop into the plane parked in her backyard, and conveniently taxi her plane directly onto the grassy take-off and landing strip that abuts her backyard. Some of Flying Crown's homeowners selected the subdivision for that very reason.

On the other side is the Alaska Railroad Corporation ("ARRC"), a state-owned corporation that owns and operates Alaska's railroad system. The railroad carries millions of tons of cargo, connects rural communities to population centers in Anchorage and Fairbanks, and allows tourists to travel to remote regions off the state's road system. ARRC also possesses a right-of-way on which it operates a section of track adjacent to Flying Crown's air strip. Its right-of-way includes one-hundred feet on either side of the track's center line, some of which directly overlaps with Flying Crown's air strip.

For decades, Flying Crown and ARRC coexisted peacefully. ARRC operated its railroad, and Flying Crown's homeowners took off and landed on the adjacent air strip. Neither party was legally certain of the exact property right, but it did not seem to matter. As far as we are aware, no significant problems arose because both parties acted in the spirit of mutual accommodation.

In 2019, Flying Crown sent ARRC a letter demanding that ARRC relinquish any claim to exclusive use of the right-of-way. In response, ARRC filed this action seeking to quiet title in the right-of-way and to clarify that ARRC's interest in the right-of-way includes an exclusive-use easement. ARRC's claim raises challenging questions about the proper interpretation of the Alaska Railroad Act of 1914 and the Alaska Railroad Transfer Act of 1982. We will explain the legal issues in more detail below, but suffice it to say that, as a matter of safety, the railroad must possess the right to exclude anyone—including Flying Crown homeowners—from its right-of-way. Accordingly, we hold that ARRC possesses at least an exclusive-use easement in its right-of-way crossing Flying Crown's property. Because the district court properly granted summary judgment to ARRC and denied Flying Crown's cross-motion for summary judgment, we affirm.

I. Factual, Legal, and Procedural Background

The parties rely on railroad statutes from both the contiguous United States and Alaska. We start by reviewing the relevant history of railroad acts in the continental United States and Alaska before turning to the factual and procedural background of this litigation.

A. Railroads in the Continental United States

The continental United States experienced a significant boom in railroad growth in the 1800s.

Between 1850 and 1871, "Congress embarked on a policy of subsidizing railroad construction by lavish grants from the public domain." *Great N. Ry. Co. v. United States*, 315 U.S. 262, 273 (1942). Congress granted "rights of way through the public domain, accompanied by outright grants of land along those rights of way," conveyed in "checkerboard blocks." *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 96–97 (2014). This policy enabled railroad companies to "either develop their lots or sell them, to finance construction of rail lines and encourage the settlement of future customers." *Id.* at 97.

The Supreme Court characterized these pre-1871 rights-of-way as "limited fee[s]."[1] *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903). The pre-1871 rights-of-way were unquestionably exclusive. *See New Mexico v. U.S. Tr. Co.*, 172 U.S. 171, 183 (1898) (holding that the railroad's right-of-way is "more than an ordinary easement" because it has the "attributes of the fee, perpetuity and exclusive use and possession"); *W. Union Tel. Co. v. Pa. R.R. Co.*, 195 U.S. 540, 570 (1904) ("A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement [and] . . . 'whatever it may be called, it is, in substance, an interest in the land, special and exclusive in its nature.'" (citation omitted)).

[1] The Supreme Court initially called the pre-1871 grants "absolute grant[s]," *see St. Joseph & Denver City R.R. Co. v. Baldwin*, 103 U.S. 426, 429–30 (1880), before adopting the "limited fee" designation, *see Barahona v. Union Pac. R.R. Co.*, 881 F.3d 1122, 1127 (9th Cir. 2018) ("[T]he Court apparently endorsed the conclusion that the pre-1871 grants were of a limited fee.").

Congress's generous land-grant policy proved unpopular. Western settlers complained that it discouraged settlement because railroads were slow to sell their land. *Brandt*, 572 U.S. at 97. As a result of this and other criticisms, "[a]fter 1871 outright grants of public lands to private railroad companies seem to have been discontinued." *Great N.*, 315 U.S. at 274. Between 1871 and 1875, Congress passed a series of one-off acts granting individual railroads particular rights-of-way through public land in the western United States. *Id.* After several years, "[t]he burden of this special legislation moved Congress to adopt [a] general right of way statute" in 1875. *Id.* at 275.

The Supreme Court distinguished 1875 Act right-of-way grants from their pre-1871 predecessors. Unlike pre-1871 acts, the 1875 Act "grants only an easement, and not a fee." *Id.* at 271; *see also Brandt*, 572 U.S. at 104 ("[T]he [*Great Northern*] Court specifically rejected the notion that the right of way conferred even a 'limited fee.'" (citation omitted)).[2] The Supreme Court has not, however, determined whether 1875 Act rights-of-way are exclusive in nature.

[2] The earliest case interpreting an 1875 Act right-of-way called the railroad's interest in its right-of-way a "limited fee." *See Rio Grande W. Ry. Co. v. Stringham*, 239 U.S. 44, 47 (1915) (stating that "[t]he right of way granted by [the 1875 Act] is neither a mere easement, nor a fee simple absolute, but a limited fee [that] carries with it the incidents and remedies usually attending the fee"). Thus, it initially seemed that the Supreme Court would treat 1875 Act easements like their pre-1871 predecessors. But the Supreme Court roundly rejected this position in *Great Northern*, 315 U.S. at 271.

B. Railroads in Alaska

Alaska's railroad boom lagged several decades behind the contiguous United States. In the late 1800s and early 1900s, private railroads began investing in Alaska in hopes of capitalizing on the Klondike Gold Rush. But the conditions in Alaska proved challenging and, ultimately, private railroads failed. Recognizing that the developing territory needed a reliable railroad, Congress passed the Alaska Railroad Act of 1914 ("1914 Act"). *See* Act of March 12, 1914, ch. 37, 38 Stat. 305 (formerly codified at 43 U.S.C. § 975, *et seq*.). The 1914 Act authorized the president to "locate, construct and operate railroads in the Territory of Alaska." *Id.* The Alaska Railroad was the first—and only—federally constructed and operated railroad in the United States. *United States v. City of Anchorage*, 437 F.2d 1081, 1082 (9th Cir. 1971).

To make the railroad possible, the 1914 Act required that future land patents by the federal government in Alaska "reserve[] 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." 1914 Act § 1.

In the early 1980s, the federal government decided that Alaska should take over ownership and management of the railroad. S. Rep. No. 97-479, at 5 (1982). Congress enacted the Alaska Railroad Transfer Act of 1982 ("ARTA"), 45 U.S.C. §§ 1201–14, which authorized the federal government to transfer nearly all of its railroad's property rights to the state of Alaska's new state-owned Alaska Railroad Corporation. Today, ARRC continues to own and operate Alaska's full-service freight and passenger railroad.

C. Litigation Background

On February 15, 1950, the United States issued federal patent No. 1128320 to Thomas Sperstad ("Sperstad Patent"), Flying Crown's predecessor in interest. As required by the 1914 Act, the Sperstad Patent "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." The Alaska Railroad's track already traversed the land when the federal government issued the Sperstad Patent.

In 1965, John Graham purchased a piece of the Sperstad Patent to develop the Flying Crown subdivision. *Oceanview Homeowners Ass'n, Inc. v. Quadrant Const. & Eng'g*, 680 P.2d 793, 795 (Alaska 1984). By 1962, an airstrip—which overlapped with the railroad's right-of-way—was built on the Sperstad land. *Id.* Many of Flying Crown's homeowners are pilots and selected the subdivision because of the airstrip.

Following ARTA's enactment in 1983, the federal government transferred the Alaska Railroad's easement over what was originally the Sperstad Patent to ARRC, first by interim conveyance and later pursuant to Patent No. 50-2006-0363. The patent purported to convey "not less than an exclusive-use easement" to ARRC.

ARRC and the Flying Crown homeowners coexisted peacefully for decades. At some point, ARRC began charging Flying Crown an annual $4,500 permitting fee to use the airstrip on the right-of-way.

Flying Crown objected to the fee, but the parties seemed to have resolved the issue without litigation—ARRC terminated the fee in 2017. ARRC does not currently charge Flying Crown any permitting fees. Counsel for ARRC represented at oral argument that ARRC has no plans to reinstate the permitting fee.

Nevertheless, in 2019, Flying Crown sent ARRC a letter claiming that the ARTA transfer had "attempted to award property rights no longer owned by the federal government" and demanding that "ARRC immediately proclaim, by means of a legally recordable document, that it relinquishes any and all claim to 'exclusive use' of the right-of-way." In response, ARRC filed this action seeking to quiet title in the right-of-way and to clarify that ARRC's interest in the right-of-way includes an exclusive-use easement.

The district court granted ARRC's motion for summary judgment and denied Flying Crown's cross motion. The court held "that ARRC possesses the interest to at least an exclusive-use easement . . . in its [right-of-way] crossing Flying Crown's property." Flying Crown appealed.

II. Jurisdiction and Standard of Review

We have jurisdiction because this case turns on "substantial questions of federal law." *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005); *see also* 28 U.S.C. § 1331. We review de novo the district court's grant or denial of summary judgment, *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1271 (9th Cir. 2017), and we affirm.

III. Analysis

A. The 1914 Act

The Sperstad Patent "reserved to the United States a right of way for the construction of railroads . . . in accordance with the [Alaska Railroad Act of 1914]." Accordingly, we turn first to the scope of the interest reserved by the federal government under the 1914 Act.

The 1914 Act does not define the scope of a "right-of-way," nor does it include any textual hints as to the right-of-way's exclusivity or lack thereof. Flying Crown contends that the federal government had no exclusive easement under the 1914 Act and therefore cannot transfer such interest to the state; ARRC takes the opposite position. But neither party relies on a purely textual argument. In the absence of textual guidance, we rely on contextual indicators—common law principles, the sovereign-grantor canon, and a contemporaneous railroad act from the contiguous United States—to determine whether the federal government intended to reserve an exclusive-use easement under the 1914 Act. We conclude that it did.

i. Common Law Principles

We begin with "basic common law principles." *Brandt*, 572 U.S. at 106; *accord id.* at 104–06.[3] Flying Crown contends that, under common law, easements are by nature nonexclusive. Not so. "Easements . . . may be exclusive or nonexclusive," and "[t]he degree of exclusivity of the rights conferred by an easement

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[3] We draw the relevant common law principles from the Restatement (Third) of Property: Servitudes, just as the Supreme Court did in *Brandt*.

. . . is highly variable." Restatement (Third) of Property: Servitudes § 1.2 cmt. c (2000); *see also id.* § 1.2 cmt. d ("Easements and profits may authorize the exclusive use of portions of the servient estate[.]"). Exclusivity is a spectrum that ranges from "no right to exclude anyone" to "the right to exclude everyone," and nearly everything in between. *Id.* § 1.2 cmt. c.

To determine the degree of exclusivity, "[a] servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." *Id.* § 4.1(1); *see also Leo Sheep Co. v. United States*, 440 U.S. 668, 682 (1979) (holding that a railroad act should "receive such a construction as will carry out the intent of Congress" which can be determined by "the condition of the country when the acts were passed, as well as to the purpose declared on their face" (citation omitted)). Because language in the Sperstad Patent and the underlying 1914 Act provide little guidance, we look instead to the purpose and circumstances of the right-of-way reservation to determine the parties' intent. Both weigh in favor of a finding an exclusive-use easement interest.

The express purpose of right-of-way reservations made pursuant to the 1914 Act was "for the construction of railroads." The intent of the railroad was to

> aid in the development of the agricultural and mineral or other resources of Alaska, and the settlement of the public lands therein, and . . . to provide transportation of coal for the Army and Navy, transportation

> of troops, arms, munitions of war, the mails, and for other governmental and public uses, and for the transportation of passengers and property.

1914 Act § 1; *see also City of Anchorage*, 437 F.2d at 1082 ("The purpose of this railroad was to aid in the development of the natural resources of the Territory and the settlement of its public lands by providing necessary transportation from the coast to the interior.").

An exclusive-use easement best serves this purpose. Safe and efficient operation requires railroads to have the ability to exclude anyone, including the servient estate owner, at any time. Contrary to Flying Crown's contention, an exclusive-use easement does not impair the statute's settlement purpose. If anything, it facilitates settlement by ensuring that settlers have dependable access to transportation and goods.

Railroad rights-of-way are necessarily different than traditional easements because of the purpose of the easement. Our circuit has recognized as much. *See Barahona*, 881 F.3d at 1134 ("It is beyond dispute that a railroad right of way confers more than a right to simply run trains over the land."). Logically, the scope of an easement intended to facilitate the passage of large, fast-moving machinery differs from, say, an easement to walk across a neighbor's land to access the beach. *See, e.g.*, *New Mexico*, 172 U.S. at 181–82 ("[Right-of-way] may mean one thing in a grant to a natural person for private purposes, and another thing in a grant to a railroad for public purposes, as different as the purposes and uses and necessities, respectively, are."). Thus, the purpose of the 1914

Act—to provide a railroad for the territory of Alaska—is best served by an exclusive-use easement.

The circumstances that led to the creation of the right-of-way also weigh in favor of finding an exclusive-use easement. *See Leo Sheep*, 440 U.S. at 682; Restatement § 4.1(1); *see also United States v. Union Pac. R.R. Co.* ("*Union Pac. I*"), 91 U.S. 72, 79 (1875). Flying Crown contends that the context that led to the 1914 Act is comparable to the contemporaneous 1875 Act in the contiguous United States. But "Alaska is often the exception, not the rule." *Sturgeon v. Frost*, 139 S. Ct. 1066, 1080 (2019) (citation omitted); *Yellen v. Confederated Tribes of the Chehalis Rsrv.*, 141 S. Ct. 2434, 2438 (2021) (highlighting "the unique circumstances of Alaska").

As discussed above, the federal government supported railroads in the contiguous United States through generous land grants until public resentment developed. *Brandt*, 572 U.S. at 97. The 1875 Act resulted from Congress's shift away from such extravagant subsidies. Alaska was different. Unlike the booming railroad industry in the contiguous United States, Alaskan railroad companies struggled and frequently failed. In response, the federal government introduced a radical new policy—the government itself would construct and operate the Alaska Railroad. Consequently, widespread frustration with private railroads' unmerited enrichment at the expense of the public—the very circumstance that led to the 1875 Act—never occurred in Alaska.

If anything, the circumstances that gave rise to the Alaska Railroad were more like the pre-1871, rather than the post-1875, western United States. The western United States was a vast, undeveloped land before the completion of the transcontinental railroad in 1869, *see Union Pac. I*, 91 U.S. at 80; Alaska was a similarly vast, undeveloped territory in the early 1900s, *see* H.R. Rep. No. 92, at 11 (1913). Both territories held the promise of abundant agricultural and mineral resources, as well as the potential for settlement. *See Union Pac. I*, 91 U.S. at 80; 1914 Act § 1. And just as Congress viewed the Alaska Railroad as a critical tool for the impending global unrest in 1914, *see* 51 Cong. Rec. S1896 (1914) ("[O]ne of the prime motive powers behind this bill, or one of the reasons urged for its passage, is that it is a great military necessity."), it similarly viewed a railroad as essential to Civil War-era security when it passed the pre-1871 acts, *see Brandt*, 572 U.S. at 96 ("The Civil War spurred the effort to develop a transcontinental railroad[.]").

In both contexts, serious risks led to substantial government involvement in creation of the railroad. In the pre-1871 western United States, "[t]he risks were great and the costs were staggering," and thus "[p]opular sentiment grew for the Government to play a role in supporting the massive project." *Brandt*, 572 U.S. at 96 ("[T]he Federal Government ought to render immediate and efficient aid in its construction." (citation omitted)). The federal government acquiesced by offering generous land grants for railroad rights-of-way. In 1914 Alaska, where the risks were arguably greater and the costs even more staggering, the government saw the need to play a more active role in developing the railroad. H.R. Rep. No. 92, at 12 (1913) (describing the Alaska Railroad as an "immense undertaking" in light of the "extreme cold" which requires a railroad "aided or built by [the] government[]").

These parallels make sense. The United States acquired the western territories between 1803 and 1853. *Brandt*, 572 U.S. at 95 (beginning with the Louisiana Purchase through the Gadsden Purchase). The United States purchased the Alaska territory in 1867. *Alaska v. United States*, 545 U.S. 75, 83 (2005). Thus, development in Alaska was several decades behind the western United States. It is unsurprising, then, that the circumstances of pre-1871 western United States—where the government granted railroad rights-of-way in exclusive-use limited fee—offer a more apt analogy to 1914 Alaska than the post-1875 western United States. Thus, the circumstances of the 1914 Act weigh in favor of finding at least an exclusive-use easement.

ii. Sovereign-Grantor Canon

The sovereign-grantor canon also militates in favor of exclusivity.[4] Under the canon, "[any] doubts . . . are resolved for the Government, not against it." *United States v. Union Pac. R.R. Co.* ("*Union Pac. II*"), 353 U.S. 112, 116 (1957). Here, the structure of the 1914 Act right-of-way—a reservation to the government

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[4] Flying Crown contends that the sovereign-grantor rule applies with less vigor to railroad acts. We disagree. *Leo Sheep*'s statement that "this Court long ago declined to apply [the sovereign grantor] canon in its full vigor to grants under the railroad Acts" introduces some confusion when read in isolation. 440 U.S. at 682. But *Leo Sheep* stands for the proposition that the sovereign-grantor rule cannot overcome the legislature's stated or implied intent—not that the sovereign-grantor rule no longer applies. *Id.* ("[P]ublic grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature[.]" (citation omitted)).

instead of a grant to a private company—requires us to apply the sovereign-grantor rule to construe the right-of-way reserved to the government expansively.

Flying Crown emphasizes the Supreme Court's common articulation of the principle—"nothing passes except what is conveyed in clear language"—to argue that we should limit the government's reservation to its explicit language. But Supreme Court cases that cite the principle arise from a governmental *grant* of a right-of-way to a private party. *See Great N.*, 315 U.S. at 272; *Union Pac. II*, 353 U.S. at 116; *Brandt*, 572 U.S. at 110 n.5. In that context, the Court has limited the grant to its explicit terms. But, here, the government *reserved* a right-of-way to itself. If we were to limit the reservation to its explicit terms, we would resolve doubts against the government—not for it. We instead follow the animating principle behind the sovereign-grantor canon, that ambiguity in land grants should be resolved in favor of the government, to interpret the reservation expansively. Thus, the sovereign-grantor canon weighs in favor of finding at least an exclusive-use easement.

iii. Contemporaneous Railroad Statute

Finally, reading the 1914 Act in concert with the 1875 Act supports exclusivity. Flying Crown contends that the 1875 Act granted nonexclusive easements and that similar language in the 1914 Act dictates the same conclusion. As noted above, the 1875 Act is an inapt analogy to the 1914 Act. But even assuming the 1875 Act is pertinent, Flying Crown's argument fails because it rests on the faulty premise that the 1875 Act granted nonexclusive easements.

The Supreme Court has opined on several aspects of the interest granted by an 1875 Act right-of-way. For instance, an 1875 Act right-of-way does not include the right to drill for and remove subsurface oil, gas, and minerals. *Great N.*, 315 U.S. at 279. And when the railroad abandons an 1875 Act easement, the easement extinguishes, and the interest goes to the servient landowner (not the government). *Brandt*, 572 U.S. at 105–06.

But the Supreme Court has never addressed whether an 1875 Act easement is exclusive or nonexclusive. *See L.K.L. Assocs., Inc. v. Union Pac. R.R. Co.*, 17 F.4th 1287, 1308 (10th Cir. 2021) (Briscoe, J., concurring in part and dissenting in part) ("What the Supreme Court did not address in *Brandt*, because it did not need to, is whether an easement granted under the 1875 Act is exclusive or non-exclusive."). The only circuit to answer the question, the Tenth Circuit, held that "[a]n 1875 Act easement allows the grantee to exclude everyone—including the grantor and fee owner." *Id.* at 1295.

We see no reason to depart from our sister circuit's sound reasoning. The 1875 Act stated that a railroad could not exclude its competitors from physically narrow passages like canyons. 43 U.S.C. § 935. The Tenth Circuit held that this language implied that an 1875 Act easement is exclusive, subject to specific exceptions such as in narrow passages. *L.K.L.*, 17 F.4th at 1295–96. In doing so, the Tenth Circuit rejected the plaintiffs' contention that *Brandt* and *Great Northern* foreclosed exclusivity. *Id.* at 1297 (holding that *Brandt* and *Great Northern* turned on the difference between an easement and a possessory interest, which "is not relevant to whether a railroad with an 1875 Act easement has the right to exclude"). We agree. And if the 1875 Act grants exclusive-use easements, then it is only logical that the federal government reserved no less than an exclusive-use easement for itself in Alaska. Indeed, Flying Crown offers no rationale for why the federal government would reserve a *lesser* property interest for itself in the 1914 Act than it granted to private railroads in the 1875 Act.

* * *

In sum, the language of the 1914 Act does not reveal the scope of the right-of-way retained by the government. But common law principles, the sovereign grantor canon, and our interpretation of the 1875 Act all lead us to hold that the federal government reserved no less than an exclusive-use easement under the 1914 Act.

B. ARTA

We turn now to the scope of the interest transferred from the federal government to ARRC pursuant to ARTA. We hold that the federal government transferred the exclusive-use easement it retained under the 1914 Act to ARRC under ARTA.

ARTA requires the federal government to grant "not less than an exclusive-use easement" to the State under certain circumstances, all of which were met here. 45 U.S.C. § 1205(b)(4)(B). Specifically, as relevant here, ARTA set out the following "procedures applicable" to lands to be transferred:

> [w]here *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, the *conveyance to the State of the Federal interest in such properties pursuant to section 1203(b)(1)(B)* or (2) of this title shall grant not less than an exclusiveuse easement in such properties.

Id. (emphasis added).

The Sperstad Patent meets all the conditions of § 1205(b)(4)(B). The Sperstad Patent included land within the railroad right-of-way. The federal government granted the Sperstad Patent in 1950, meaning that the land was "conveyed from Federal ownership prior to January 14, 1983." *Id.* And ARTA authorized transfer of the easement across the Sperstad Patent pursuant to 45 U.S.C. § 1203(b)(1)(B). Under the plain text of § 1205(b)(4)(B), then, "the conveyance to the State of the Federal interest" in this case "shall grant not less than an exclusive-use easement."

Citing to *Encino Motorcars, LLC v. Navarro*, Flying Crown instead contends that we should apply the distributive canon to read § 1205(b)(4)(B) as referring to property interests that have been conveyed and are subject to a claim of valid existing rights *or* property interests that have not been conveyed and are subject to a claim of valid existing rights. 138 S. Ct. 1134, 1141–42 (2018). But the distributive canon has no role here. The Supreme Court held in *Encino* that "'or' is 'almost always disjunctive.'" *Id.* at 1141 (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013)). Indeed, the Court eschewed the distributive canon in favor of the ordinary, disjunctive meaning of "or" because it was the "more natural reading." *Id.* at 1142. Likewise, we find that the ordinary, disjunctive reading is the most natural reading of § 1205(b)(4)(B).

IV. Conclusion

We hold that the 1914 Act reserved an exclusive-use easement for the Alaska Railroad and that the federal government transferred that exclusive-use easement to the state under ARTA. Accordingly, the district court properly granted ARRC's motion for summary judgment and denied Flying Crown's cross-motion for summary judgment.

AFFIRMED.

Filed November 21, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA RAILROAD CORPORATION, Plaintiff-Appellee, v. FLYING CROWN SUBDIVISION ADDITION NO. 1 AND ADDITION NO. 2 PROPERTY OWNERS ASSOCIATION, a non-profit, Defendant-Appellant, and MUNICIPALITY OF ANCHORAGE, DEPT OF LAW, Intervenor-Defendant.	No. 22-35573 D.C. No. 3:20-cv-00232-JMK District of Alaska, Anchorage ORDER

Pursuant to G.O. § 3.2.i, Judge Bade has been randomly drawn by lot as the replacement for Judge Murguia. The panel for this case will now consist of: Judges PAEZ, NGUYEN, and BADE.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

Filed June 30, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALASKA RAILROAD CORPORATION, Plaintiff, v. FLYING CROWN SUBDIVISION ADDITION NO. 1 AND ADDITION NO. 2 PROPERTY OWNERS ASSOCIATION, Defendant.	Case No. 3:20-cv-00232-JMK **ORDER DENYING MOTION TO RECONSIDER**

Before the Court at Docket 123 is Defendant Flying Crown Subdivision Addition No. 1 and Addition No. 2 Property Owners Association's ("Flying Crown") Motion for Reconsideration (the "Motion"). Flying Crown requests that this Court "vacate and reconsider its April 6, 2022 entry of judgment in this case under Local Rule 7.3(h)(5) and Federal Rules of Civil Procedure 59(e) and 60(b)," but primarily relies on Rule 59(e).[1] Defendant Alaska Railroad Corporation ("ARRC") filed a response in opposition at Docket 124.

At the outset, the Court notes that Defendant's Motion does not comply with the procedures set forth in the local rules for this district. Local Civil Rule 7.3(h)(2) provides that "[a] motion for reconsideration

[1] Docket 123 at 1–2.

is limited to 5 pages." At 13 pages, Flying Crown's Motion is overlength. Further, ARRC did not request leave of Court to file a response, as required by Local Civil Rule 7.3(h)(3), and its response similarly is overlength.[2] Despite these procedural deficiencies, the Court accepts both parties' pleadings as filed, and addresses the merits of Flying Crown's Motion.

Under Local Rule 7.3(h)(1), "[a] court will ordinarily deny a motion for reconsideration absent a showing of one of the following: (A) a manifest error of the law or fact; (B) discovery of new material facts not previously available; or (C) intervening change in the law." Further, "[a] motion for reconsideration of an order granting a dispositive motion must be filed pursuant to Federal Rule of Civil Procedure 59 or 60."[3] Flying Crown brought its motion 28 days after the Court's Order, and thus it is properly analyzed as a Rule 59(e) motion.[4]

Reconsideration under Rule 59(e) is "an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources."[5] "Indeed, 'a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented

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[2] D. Alaska Loc. Civ. R. 7.3(h)(3) ("No response to a motion for reconsideration may be filed unless requested by the court. Unless otherwise ordered, a response must be filed within 7 days of entry of the order requesting a response and is limited to 5 pages.").

[3] *Id.* at 7.3(h)(5).

[4] *See Schroeder v. McDonald*, 55 F.3d 454, 459 (9th Cir. 1995).

[5] *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.'"[6] Generally,

> there are four basic grounds upon which a Rule 59(e) motion may be granted: (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law."[7]

A motion to reconsider may not be used as a vehicle to relitigate legal issues and facts previously considered and rejected by the Court, or to assert new arguments.[8]

Substantively, Flying Crown's Motion fails to make the requisite showing under the local and federal rules for reconsideration of the Court's judgment. Flying Crown advances three separate arguments for why reconsideration is warranted. First, Flying Crown argues the Court committed manifest errors of fact when it "incorrectly assumed that ARRC is actually using the full right-of-way for a 'railroad purpose,'" and mischaracterized Flying

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[6] *Plumley v. Energy*, No. 3:16-cv-00512-BEN-AGS, 2018 WL 11350622, *1 (S. D. Cal. Dec. 28, 2018) (quoting *Kona Enterprises*, 229 F.3d at 890).

[7] *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011).

[8] *See, e.g.*, *Estate of Nunez by and through Nunez v. County of San Diego*, 381 F. Supp. 3d 1251, 1255 (S. D. Cal. 2019).

Crown's position on that issue.[9] The Court made no such finding, and explicitly declined to make any findings as to whether ARRC's right-of-way on Flying Crown's property was being used for a "railroad purpose," a legally significant term and not relevant to the narrow legal issues presented in this case.[10] This determination was not necessary to the Court's finding that ARRC possessed at least an exclusive-use easement in the contested right-of-way and had no impact on the ultimate resolution of the case. Further, Flying Crown offers no support for its assertion that it ever contested the purposes for which the right-of-way was utilized.[11] It may not bring these claims for the first time in a motion to reconsider.[12] The Court therefore finds that Flying Crown has failed to show a manifest error of fact.

Second, Flying Crown asserts that the Court committed an error of law by disregarding the precedent set forth in *Marvin M. Brandt Revocable Trust v. United States*.[13] The Court analyzed the decision in *Brandt* at length throughout multiple sections in its Order and distinguished the majority's holding from the circumstances in this case.[14] Flying Crown misunderstands the purpose of a motion to

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[9] Docket 123 at 2 (emphasis added).

[10] Docket 121 at 12 n.51.

[11] Docket 85 at 12–13 (Flying Crown's statement of issues).

[12] *See Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) ("A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.").

[13] 572 U.S. 93 (2014).

[14] *See* Docket 121 at 15–22.

reconsider to be a forum to voice its disagreement with the Court's decision. This is quintessentially the type of argument this Court is prohibited from considering under Rule 59(e).[15] While the Court certainly can appreciate zealous advocacy, it will not tolerate requests to "expend its resources on considering, yet again, an issue it has already considered and decided," in this case, the applicability of *Brandt*.[16] This is not a manifest error of the law.

Finally, Flying Crown asserts that the Court "erroneously relied on subsequent legislation and legislative history to interpret the 1914 Act" and rehashes congressional testimony leading to the enactment of ARTA over the course of seven pages in its Motion.[17] Specifically, Flying Crown objects to the Court's finding that a subsequent Congress's remarks interpreting the 1914 Act were a persuasive tool of statutory construction.[18] As described in its Order, the Court finds support from the Supreme Court and Ninth Circuit in giving weight to the remarks of a subsequent Congress in interpreting an earlier

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[15] *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, n.5 (2008) ("Rule 59(e) permits a court to alter or amend a judgment, but it 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.").

[16] *Alliance for Wild Rockies, et al. v. United States Forest Serv., et al.*, No. 1:19-cv-00445-BLW, 2020 WL 7086287, *2 (Dec. 3, 2020).

[17] Docket 123 at 7–13.

[18] Docket 121 at 20–21.

enacted statute on the same subject.[19] Flying Crown cannot show that the Court has committed a manifest error of law simply by reiterating the arguments the Court already has considered and rejected. The Appellate Court is well equipped to consider Flying Crown's arguments insomuch as it is dissatisfied with the District Court's interpretation of the controlling case law and weight afforded to the evidence before it.

Accordingly, the Court finds Flying Crown has failed to show clear error was committed and declines to exercise its discretion in reconsidering the final judgment.[20]

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[19] *See Branch v. Smith*, 538 U.S. 254, 281 (2003) ("[I]t is of course, the most rudimentary rule of statutory construction . . . that courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes[.]"); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 380–81 (1969) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) ("while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, . . . such views are entitled to significant weight, . . . and particularly so when the precise intent of the enacting Congress is obscure."); *Montana Wilderness Ass'n, Nine Quarter Circle Ranch v. U.S. Forest Serv.*, 655 F.2d 951, 957 (9th Cir. 1981) ("Although a subsequent conference report is not entitled to the great weight given subsequent legislation . . . it is still entitled to significant weight . . . particularly where it is clear that the conferees had carefully considered the issue.").

[20] *See McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) ("the district court enjoys considerable discretion in granting or denying the motion [for reconsideration]").

CONCLUSION

Therefore, IT IS ORDERED that Flying Crown's Motion for Reconsideration at Docket 123 is DENIED.

DATED this 30th day of June, 2022, at Anchorage, Alaska.

/s/ Joshua M. Kindred
JOSHUA M. KINDRED
United States District Judge

Filed April 5, 2022

UNITED STATES DISTRICT COURT
for the
District of Alaska

ALAKSA RAILROAD CORPORATION, *Plaintiff*, v. FLYING CROWN SUDIVISION ADDITION NO. 1 AND ADDITION NO. 2 PROPERTY OWNERS ASSOCIATION, *Defendant*, MUNICIPALITY OF ANCHORAGE, DEPARTMENT OF LAW, *Intervenor-Defendant*.	)	Civil Action No. 3:20-cv-00232-JMK

JUDGMENT IN A CIVIL ACTION

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **DECISION BY COURT.** This action came to trial or decision before the Court. The issues have been tried or determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

THAT the defendant recover nothing, the action be dismissed on the merits, and the plaintiff Alaska Railroad Corporation recover costs in the amount of $___ and attorney's fees in the amount of $___ with post-judgment interest thereon at the rate of __% as provided by law from the defendant Flying Crown Subdivision Addition No. 1 and Addition No. 2 Property Owners Association.

APPROVED:

s/ Joshua M. Kindred
Joshua M. Kindred
United States District Judge

Date: April 5, 2022

Brian D. Karth
Brian D. Karth
Clerk of Court

Note: Award of prejudgment interest, costs, and attorney's fees are governed by D.Ak. LR 54.1, 54.2, and 58.1.

Filed March 10, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALASKA RAILROAD CORPORATION, Plaintiff, vs. FLYING CROWN SUBDIVISION ADDITION NO. 1 AND ADDITION NO. 2 PROPERTY OWNERS ASSOCIATION, Defendant, MUNICIPALITY OF ANCHORAGE, DEPARTMENT OF LAW, Intervenor-Defendant.	Case No. 3:20-cv-00232-JMK **ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Before the Court at Docket 13 is Plaintiff Alaska Railroad Corporation's ("ARRC") Motion for Summary Judgment. Defendant Flying Crown Subdivision Addition No. 1 and Addition No. 2 Property Owners Association ("Flying Crown") filed an abbreviated Response in Opposition at Docket 81. ARRC filed a consolidated Reply in support of its Motion for

Summary Judgment and Response in Opposition to Flying Crown's cross motion at Docket 91.[1]

Additionally, before the Court at Docket 84 is Defendant Flying Crown's Cross Motion for Summary Judgment. Flying Crown supports its Cross Motion for Summary Judgment with a "Consolidated Memorandum In Opposition to Plaintiff's Motion for Summary Judgment and In Support of Flying Crown's Cross-Motion for Summary Judgment" at Docket 85. ARRC's consolidated Response is filed at Docket 91. Flying Crown filed its Reply at Docket 94.

Intervenor-Defendant Municipality of Anchorage ("the Municipality") filed a Response in Opposition to ARRC's Motion for Summary Judgment, entitled "Municipality of Anchorage's Memo in Support of Opposition to Plaintiff's Motion for Summary Judgment" at Docket 86.

Amici curiae ENSTAR Natural Gas Company and Alaska Pipeline Company (collectively, "ENSTAR") filed an amicus brief at Docket 88 in support of Flying Crown's Opposition to ARRC's Motion for Summary Judgment. Amicus curiae Matanuska Telecom Association, Inc. ("MTA") filed an amicus brief at Docket 97 in support of Flying Crown's Motion for Summary Judgment. With the Court's permission, ARRC filed a sur-reply to MTA's amicus brief at Docket 111.

The Parties presented oral arguments on November 30, 2021, and December 15, 2021, before

[1] ARRC's original consolidated Reply/Response appears at Docket 89, but was incorrectly filed. Docket 91, therefore, appears as an Errata but contains the complete, correctly filed version.

this Court.[2] Per the discussion below, ARRC's Motion for Summary Judgment at Docket 13 is **GRANTED**. Flying Crown's Cross Motion for Summary Judgement at Docket 84 is **DENIED** without prejudice.

II. BACKGROUND

The Court's analysis requires an understanding of complicated legislative and factual context dating back to the turn of the 20th century. During the early 1900s, in the wake of the Klondike Gold Rush, as many as fifty private companies were formed for the purpose of constructing railroads in the Territory of Alaska.[3] Observing the failures and financial ruin of these private companies, while recognizing the importance of reliable rail travel to the commercial development of the Territory, Congress passed the Alaska Railroad Act of 1914 ("1914 Act").[4] The 1914 Act authorized the President to locate, construct, and operate a federal railroad in Alaska and to "acquire rights of way, terminal grounds, and all other rights" necessary for its construction.[5] The Act also directed

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[2] Due to inclement weather, the Court was forced to continue the November 30, 2021, oral argument to December 15, 2021. *See* Docket 120.

[3] Docket 1 at 3.

[4] Act of March 12, 1914, 38 Stat. 305 (formerly codified at 43 U.S.C. § 975, *et seq.*) ("1914 Act"), *repealed by* Alaska Railroad Transfer Act, Pub. L. 97-468, Title VI, § 615(a)(1), 96 Stat. 2556, 2577–78 (1983).

[5] 1914 Act, § 1 ("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

the federal government to reserve a right-of-way in patents issued for all lands conveyed out of federal ownership.[6]

On February 15, 1950, the United States issued federal patent No. 1128320 to Thomas Sperstad ("1950 Sperstad Patent"), Flying Crown's predecessor-in-interest, granting a parcel of land known as the Sperstad Homestead.[7] The Sperstad Patent explicitly "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)."[8] An airstrip was later developed on the Sperstad Homestead, along the federal government's right-of-way ("ROW"), and coexisted peacefully with the operations of the railroad.[9] According to Flying Crown, when it developed the subdivision, a portion of this airstrip was included and it is now used by the homeowners.[10] The Municipality has at least three properties passed to it by federal patents that contain the same language as the Sperstad Patent, *i.e.*, reserving the federal

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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. . . .").

[6] *Id.*

[7] Docket 85 at 7.

[8] *Id.* (quoting Docket 13-1).

[9] According to Flying Crown, "[a] portion of the airstrip overlaps with the outer edges of Plaintiff Alaska Railroad Corporation's [] easement." Docket 85 at 4.

[10] *Id.* at 8.

government's interest in its ROW pursuant to the 1914 Act.[11]

In 1981, Senator Ted Stevens introduced "on behalf of himself and Senator [Frank] Murkowski S.1500, a bill to provide for the transfer of the Alaska Railroad to the State of Alaska."[12] Later, in 1983, Congress enacted the Alaska Railroad Transfer Act of 1982 ("ARTA"), which authorized the transfer of nearly all the federal Alaska Railroad's property rights to the State of Alaska's new Alaska Railroad Corporation ("ARRC").[13] The Secretary of Transportation was directed to transfer "all rail properties of the Alaska Railroad" to ARRC, which received all interests that were held at that time by the United States.[14] Relevant to this case, Section 1203 of ARTA describes the procedures that the Secretary was directed to follow in making such

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[11] Docket 86 at 4.

[12] S. Rep. No. 97-479, at 5 (1982).

[13] *See* 45 U.S.C. § 1203(a) ("Subject to the provisions of this chapter, the United States, through the Secretary, shall transfer all rail properties of the Alaska Railroad to the State.").

[14] ARTA defines all "rail properties of the Alaska Railroad" to mean "all right, title, and interest of the United States to lands, buildings, facilities, machinery, equipment, supplies, records, rolling stock, trade names, accounts receivable, goodwill, and other real and personal property, both tangible and intangible, 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, but excluding any such properties acquired, in the ordinary course of business after that date but before the date of transfer. . . ." 45 U.S.C. § 1202(10). The definition goes on to include several exclusions irrelevant to this case.

transfers.[15] The federal Alaska Railroad's ROW contained in the Sperstad Patent was transferred to ARRC via interim conveyance which "vest[ed] in the State exactly the same right, title, and interest in and to the rail properties identified therein as the State would have received had it been issued a patent by the United States."[16] The Secretary then was directed to survey the land conveyed by interim conveyance and issue a patent.[17]

In 2006, the United States apparently perfected this interim conveyance and transferred its full interest to the state of Alaska in Patent No. 50-2006-0363 ("2006 Patent"), which conveyed an exclusive-use easement across the property subject to the 1950 Sperstad Patent.[18] The 2006 Patent states: "[p]ursuant to [ARTA], the right, title, and interest granted by the United States in the above-described real property that is located within the right-of-way of the Alaska Railroad shall be not less than an exclusive-use easement as defined in Sec. 603(6) of ARTA."[19] Flying Crown alleges it was not notified of the issuance of the 2006 Patent.[20] Although Flying Crown currently accesses the portion of the runway underlying the ROW free of charge, ARRC previously

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[15] *See id.* at § 1203(b)(1)(A)–(D).

[16] *Id.* at § 1203(b)(3).

[17] *Id.*

[18] Docket 13 at 10.

[19] Docket 13-2 at 2.

[20] Docket 85 at 10.

has charged $4,500 per year for a permit to use the property.[21]

In 2019, Flying Crown sent a letter to ARRC claiming that the transfer of the federal Alaska Railroad's ROW had "attempted to award property rights no longer owned by the federal government."[22] Flying Crown demanded that "ARRC immediately proclaim, by means of a legally recordable document, that it relinquishes any and all claim to 'exclusive use' of the right-of-way[.]"[23] This ongoing dispute appears to be at least partially born out of Flying Crown's displeasure with ARRC's insistence that the subdivision obtain a permit to access lands (*i.e.*, the airstrip) encumbered by the ROW.[24] According to Flying Crown, many homeowners have purchased homes and made significant alterations to their properties within the Flying Crown subdivision to gain access to the airstrip, and are concerned about future access.[25]

On September 21, 2020, in response to Flying Crown's demand letter, ARRC filed this action seeking a "judgment quieting title in the ROW crossing defendant's property and a finding that ARRC's interest in that ROW includes the entire interest previously held by the United States federal government, and all rights contained within the definition of an 'exclusive use easement' under 45

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[21] *Id.* at 12.

[22] Docket 13 at 10.

[23] *Id.* at 11.

[24] Docket 85 at 11–12.

[25] *Id.*

U.S.C. § 1202(6)."[26] ARRC maintains that it cannot continue to operate the railroad safely or efficiently without clarifying the rights to and retaining authority over its ROW on Flying Crown's property.[27]

III. LEGAL STANDARD

Federal Rule of Civil Procedure 56(a) directs a court to grant summary judgment if the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law."[28] When considering a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."[29] To present a genuine dispute, the evidence must be such "that a reasonable jury could return a verdict for the nonmoving party."[30] "A fact is material if it could affect the outcome of the suit under the governing substantive law."[31] If the evidence provided by the nonmoving party is "merely colorable" or "not significantly probative," summary judgment is appropriate.[32] Once the moving party has met its initial burden, the nonmoving party "may not rest upon the mere allegations or denials of the

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[26] Docket 1 at 10.

[27] *Id.* at 8.

[28] Fed. R. Civ. P. 56(a).

[29] *Moldex-Metric, Inc. v. McKeon Prods., Inc.*, 891 F.3d 878, 881 (9th Cir. 2018) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

[30] *Anderson*, 477 U.S. at 248.

[31] *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006) (citing *Anderson*, 477 U.S. at 248).

[32] *Anderson*, 477 U.S. at 249–50.

adverse party's pleading," but must provide evidence that "set[s] forth specific facts showing that there is a genuine issue for trial."[33] Conclusory allegations will not suffice.[34]

As a threshold matter, the Court finds that summary judgment is appropriate in this case. In determining whether to grant or deny summary judgment, a court need not "scour the record in search of a genuine issue of triable fact."[35] A court is entitled to "rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment."[36] The Parties agree that the record presents no disputed issues of material fact.[37]

IV. DISCUSSION

Set to this storied background, the matter before the Court boils down to one relatively straightforward question: what property interest does ARRC possess in its ROW that crosses Flying Crown's property? ARRC posits that it possesses at least an "exclusive-use interest" in the ROW.[38] ARRC requests that this Court grant summary judgment in its favor, quieting title to the ROW, and finding that "ARRC's interest in that ROW includes the entire interest previously held by the United States federal government, and all

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[33] *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (internal citations omitted).

[34] *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

[35] *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (internal quotation and citation omitted).

[36] *Id.* (internal quotation and citation omitted).

[37] *See* Dockets 13 at 12; 85 at 5; 86 at 3.

[38] Docket 13 at 1.

rights contained within the definition of an 'exclusive use easement' under 45 U.S.C. § 1202(6)."[39]

Flying Crown answers that ARRC can possess no more than a "common-law simple easement" for the purpose of railroad construction and operation.[40] Flying Crown does not dispute that the federal government's interest in the ROW passed to ARRC under ARTA.[41] It does, however, dispute the nature of the interest that was transferred. The crux of Flying Crown's contention is that the federal government reserved a simple easement in the ROW at the time the 1950 Sperstad Patent was issued, and, therefore, that is the greatest interest that could be conveyed to ARRC under ARTA. In other words, the United States could not "lawfully convey a property interest greater than what it actually possessed."[42] Flying Crown requests that this Court grant summary judgment in its favor and find that: (1) "[t]he 1914 Act right of way reserved across federal lands, as reflected in the Sperstad Patent, is a common-law simple easement for the purpose of railroad construction and operation, not an 'exclusive-use' or other 'near-fee' land interest"; (2) "United States lacked the legal authority to convey to ARRC, under ARTA, any rights in the Sperstad Homestead beyond its 1914 Act easement rights, because the United States did not actually possess broader rights in 1983"; (3) "ARTA did not newly create and grant ARRC an 'exclusive-use easement' across the Sperstad Homestead because previously

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[39] Docket 1 at 10.

[40] Docket 85 at 12.

[41] *Id.* at 13.

[42] *Id.*

patented lands do not contain 'unresolved claims of valid existing rights,' and thus were not subject to the new 'exclusive-use easement' created for other land categories in ARTA"; and (4) "[i]f the Court determines that ARTA did convey to ARRC a greater interest than the common-law easement that the United States possessed in the Sperstad Homestead, this will constitute an unconstitutional taking of Flying Crown's property without just compensation and due process of law."[43] The Municipality supports Flying Crown's position, but describes ARRC's interest in the ROW as an "easement for railroad purposes."[44]

Resolution to the overarching question of what interest ARRC possesses in its ROW hinges on two distinct legal issues. First, what was the nature of the interest reserved by the federal government in the ROW when it issued the 1950 Sperstad Patent? Second, what is the nature of the interest conveyed to ARRC in the ROW pursuant to ARTA? Each of these questions relies entirely on what property interest Congress intended to convey in the 1914 Act.

A. The Federal Government Reserved at Least an "Exclusive-Use Easement" in the 1950 Sperstad Patent Pursuant to the 1914 Act.

ARRC asserts that the railway ROW reserved in the 1950 Sperstad patent, issued pursuant to the 1914 Act, "included rights to exclusive possession and control of all areas within the ROW."[45] Because the

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[43] Docket 84 at 2.

[44] Docket 86 at 6.

[45] Docket 13 at 12–13.

legal scope of a railway ROW is not defined in the 1914 Act, ARRC urges this Court to "(1) look to the meaning of a railroad 'right-of-way' as that term was understood at the time of the 1914 Act; and (2) resolve any ambiguities in favor of the United States as sovereign grantor."[46]

Defendants agree with ARRC that the Court must look to case law to determine the commonly understood scope of a railroad's right-of-way. However, Flying Crown alleges that only cases decided after 1871 are relevant due to a Congressional shift in policy concerning land grants to railroads after that year.[47] Flying Crown maintains that a railway easement is no different from an easement as understood under the common law, meaning that it is a nonpossessory interest and entitles the railroad to less than full control.[48]

(1) Right-of-way as defined in the 1914 Act

At the outset, the Court notes that resolution of this first issue does not require the Court to precisely define the contours of the interest the federal government reserved to itself in the 1950 Sperstad Patent. Ultimately, ARRC asks this Court to declare that its current ROW takes the form of at least an exclusive-use easement as defined in Section 1202(6) of ARTA.[49] That definition specifies that an "exclusive-use easement" affords the easement holder:

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[46] *Id.* at 14.

[47] Docket 85 at 16.

[48] *Id.* at 15–16.

[49] Docket 1 at 10.

> (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[.][50]

Therefore, the Court need only to determine whether ARRC's interest in the ROW crossing Flying Crown's property gives it the exclusive right to use, possess, and enjoy the *surface* estate of the land for the defined purposes and supportive functions.[51]

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[50] 45 U.S.C. § 1202(6).

[51] The Municipality of Anchorage spends nearly the entirety of its brief asserting that ARRC's interest in the ROW is an "Easement for Railroad Purposes." *See* Docket 86 at 6–30. The phrase "railroad purpose" is derived from "the Supreme Court's description in *Union Pacific* of the nature of the rights acquired under" the pre-1871 Acts and the 1875 Act. *Barahona v. Union*

Article IV, Section 3, Clause 2 of the United States Constitution gives Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[.]" Therefore, when Congress grants an interest in property, it may specify terms or elements different from those that would otherwise apply by virtue of common law. Congress enacted both the 1914 Act and ARTA pursuant to this constitutional authority.

Turning to the plain language of the 1914 Act, Congress declared that:

> 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 and twenty-five

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Pac. R.R. Co., 881 F.3d 1122, 1131 (9th Cir. 2018) (citing to *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 114 (1957)). However, the Parties' cross motions for summary judgment do not contest the purpose and use of ARRC's ROW across Flying Crown's property, or ARRC's ability to require a lease incident to its use of the ROW for railroad purposes. It appears that ARRC is utilizing its ROW to operate a functioning railway, a universally recognized use under the pre-1871 Acts and the 1875 Act. The Court specifically declined to analyze this aspect of ARRC's interest in the ROW when it denied ENSTAR's and MTA's Motions to Intervene. *See* Dockets 59; 60.

> feet on either side of the center line of any such telegraph or telephone lines.[52]

Central to this case is the meaning Congress intended to attach to the phrase "right of way" at the time the statute was enacted. This Court is unaware of any case law squarely defining the contours of the federal government's right-of-way under that Act, and therefore looks to case law interpreting other acts for guidance. Case law distinguishes a railroad right-of-way, although often characterized as an easement, from a traditional private easement and recognizes that the term carries an elevated and particularized meaning in this context.[53] A "simple easement" generally has been used to describe an interest only in the right to use another's land, or an area above or below it, for a particular purpose (such as a right-of-way);[54] while a complete conveyance in all rights associated with the property generally is described as "fee simple."[55] However, there exists a wide range of

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[52] Act of March 12, 1914, 38 Stat. 305 (formerly codified at 43 U.S.C. § 975, *et seq.*) ("1914 Act"), *repealed by* Alaska Railroad Transfer Act, Pub. L. 97-468, Title VI, § 615(a)(1), 96 Stat. 2556, 2577–78 (1983) (emphasis added).

[53] *See e.g.*, *Western Union Telegraph Co. v. Pennsylvania R.R. Co.*, 195 U.S. 540, 570 (1904).

[54] Under RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2(1) (Am. Law Inst. 2000), an easement is a "nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." *See also* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining an easement as "[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose.").

[55] *See* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining fee simple as "the broadest property interest allowed by law").

interests between the two terms depending on the exclusivity of the possession, the duration of the interest, and the completeness of the rights granted. As articulated recently by the Tenth Circuit:

> the degree of exclusivity of the rights conferred by an easement or profit is highly variable. At one extreme, the holder of the easement or profit has no right to exclude anyone from making any use that does not unreasonably interfere with the uses authorized by the servitude. On the other end of the spectrum, the holder of the easement or profit has the right to exclude everyone, including the servient owner, from making any use of the land within the easement boundaries.[56]

A railroad's right-of-way historically has leaned closer to the latter. In *Western Union Telegraph Company v. Pennsylvania Railroad Company*, the Supreme Court held that

> [a] railroad right of way is a very substantial thing. It is more than a mere right of passage. It 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. . . . A railroad's right of way has, therefore, the substantiality of the fee, and it is private property, even to the public, in

[56] *LKL Assocs., Inc. v. Union Pac. R.R. Co.*, 17 F.4th 1287, 1295 (10th Cir. 2021) (quoting RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2 cmt. c (Am. Law Inst. 2000)) (internal quotations omitted).

> all else but an interest and benefit in its uses.[57]

The Supreme Court also has been careful to note that the terminology used between courts is less important than the actual property rights and interests described.[58]

Flying Crown agrees that "[w]hen the United States first began supporting railroads with land dedications, it legislatively granted public land in fee to the railroads."[59] However, citing to *Great Northern Railway Company v. United States*,[60] it argues that this practice ended in 1871 and railroads thereafter were granted simple common law easements. In *Great Northern*, the Supreme Court was asked to rule on the narrow question of whether the Great Northern Railway Company possessed oil and mineral rights underlying its right-of-way acquired pursuant to the Act of March 3, 1875, also known as the General

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[57] *Western Union*, 195 U.S. 540, 570 (1904) (internal quotation and citation omitted).

[58] *See New Mexico v. U.S. Trust Co. of New York*, 172 U.S. 171, 183 (1898) ("the right acquired by the railroad company, though technically an easement, yet requires for its enjoyment a use of the land permanent in its nature and practically exclusive.") (internal quotation omitted); *see also Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93, 114 (2014) ("federal and state decisions in this area have not historically depended on 'basic common law principles.' To the contrary, this Court and others have long recognized that in the context of railroad rights of way, traditional property terms like 'fee' and 'easement' do not neatly track common-law definitions.") (Sotomayor, J., dissenting).

[59] Docket 85 at 16.

[60] 315 U.S. 262, 271 (1942).

Railroad Right-of-Way Act ("1875 Act").[61] The 1875 Act provided that "[t]he right of way through the public lands of the United States is granted to any railroad company" meeting certain requirements.[62] To claim its right-of-way, a railway company was expected to file a proposed map of its rail corridor with a local Department of Interior office, and, upon approval, "all such lands over which such right of way shall pass shall be disposed of subject to the right of way."[63] Analyzing the "language of the Act, its legislative history, its early administrative interpretation, and the construction placed upon it by Congress in subsequent enactments[,]" the Supreme Court ruled that the 1875 Act "clearly grant[ed] only an easement, and not a fee" to the Great Northern Railway Company.[64] Reconciling Congress's clear intent to grant land in fee simple to the railroads prior to 1871, the Court observed that "[a]fter 1871 outright grants of public lands to private railroad companies seem to have been discontinued."[65] The Supreme Court also noted that any ambiguity in a grant should be resolved favorably to the sovereign grantor and went on to find that there was nothing in the statute which clearly and explicitly conveyed mineral rights to the railway companies.[66] The United States

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[61] *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 270 (1942).

[62] 43 U.S.C. § 934.

[63] *Id.* at § 937.

[64] *Great Northern*, 315 U.S. at 277, 271.

[65] *Id.* at 274.

[66] *Id.* at 272, 276–77.

therefore retained control of subsurface mineral rights.

The Supreme Court had chance again to interpret the scope of a railroad's right-of-way under the 1875 Act in *Marvin M. Brandt Revocable Trust v. United States*.[67] This time, the Supreme Court grappled with the question of who possesses the rights to underlying minerals when a railroad abandons its right-of-way: the federal government, or the landowner?[68] The federal government argued that the abandoned railway right-of-way at issue was "tantamount to a limited fee with an implied reversionary interest,"[69] and therefore "vested in the United States when the right of way was relinquished."[70] Relying heavily on its decision in *Great Northern*, the Court rejected the government's characterization and found that the right-of-way was an easement which terminated upon the railroad's abandonment, leaving the landowner's property unburdened.[71] The Supreme Court again explicitly found that cases describing rights-of-way granted prior to 1871 were not controlling due to a major shift in Congressional policy concerning land grants to railroads after that year.[72] This interpretation entitled landowners to the mineral rights upon abandonment of the right-of-way.

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[67] 572 U.S. 93 (2014).

[68] *Id.* at 102–03.

[69] *Id.* at 110.

[70] *Id.* at 102.

[71] *Id.* at 110.

[72] *Id.* at 107.

Flying Crown asks this Court to adopt a simplistic view of the case law and find that, based on the Supreme Court's ruling in *Brandt*, the United States cannot reserve more than a common law simple easement in a railroad right-of-way under *any* statute enacted after 1871. But *Brandt* does not demand this result. While it is true that the 1875 Act unquestionably granted an easement to a qualifying railroad in its right-of-way, rather than an interest in fee simple, the Supreme Court in *Brandt* left unresolved the degree of exclusivity the easement grants the railroad in its right-of-way.[73]

Although not binding on this Court, the Tenth Circuit's decision in *LKL Associates., Inc., v. Union Pacific Railroad Co.*[74] is illustrative to the question of easement exclusivity left open in *Brandt*.[75] In *LKL*, plaintiff Union Pacific Railroad Company ("Union Pacific") charged the defendants rent under a lease that allowed the defendants to continue operating a business on land owned in fee simple, but encumbered by the railroad's right-of-way pursuant to the 1875

[73] *See LKL Assocs., Inc. v. Union Pac. R.R. Co.*, 17 F.4th 1287, 1295 (10th Cir. 2021) ("The Court in *Brandt* also used common law principles to define the essential features of an easement—mainly, that it is a 'nonpossessory right to enter and use and in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.' But the Court left unresolved the degree of exclusivity this right of way affords the grantee.") (internal citations omitted).

[74] 17 F.4th 1287, 1295 (10th Cir. 2021).

[75] The Parties agree that *LKL* is factually akin to the dispute between ARRC and Flying Crown. *See* Dockets 85 at 18; 115 at 1.

Act.[76] After the Supreme Court declared in *Brandt* that a railroad's right-of-way under the 1875 Act is a "nonpossessory" easement, the defendants filed suit to have their leases rescinded and restitution for past rents paid, among other declaratory relief.[77] Recognizing that this case dealt primarily with surface level rights, rather than mineral rights, the Tenth Circuit first analyzed "whether a railroad's 1875 Act right of way includes the right to exclude others."[78] After affirming the undisputed fact that the 1875 Act "grants only an easement and not a fee interest," the court then found that this did not preclude a nonpossessory easement from providing a grantee with exclusivity.[79] In other words, "[a]s long as the grantor has not 'clearly and unequivocally relinquished all interest in the subject area,' courts can certainly find that an exclusive easement is not a fee."[80] The court ultimately determined that Union Pacific had the right to exclude defendants from its property pursuant to its right-of-way under the 1875 Act, in congruence with *Great Northern* and *Brandt*,

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[76] *See LKL*, 17 F.4th at 1291.

[77] *Id.* Flying Crown similarly argues that because an easement is by nature "nonpossessory," it cannot be "exclusive-use," because exclusive-use implies "full control." Docket 85 at 15–16. However, ARRC agrees that its interest is nonpossessory. *See* Docket 91-1 at 5. Nonpossessory is an irrelevant characterization in this context because a nonpossessory interest such as a right-of-way can certainly include the right to exclude even the servient owner from using the land. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2(1) (Am. Law Inst. 2000).

[78] *LKL*, 17 F.4th at 1294.

[79] *Id.* at 1295.

[80] *Id.* at 1296–97 (citing Jon W. Bruce & James W. Ely, Jr., THE LAW OF EASEMENTS & LICENSES IN LAND § 1:28 (2019)).

because "[a] railroad easement is exclusive in character."[81]

This Court agrees with the Tenth Circuit's observation that *Brandt* is not particularly illustrative to determining the surface level exclusivity of a railroad's right-of-way.[82] Where it was principally concerned with the rights to the underlying minerals, the Supreme Court in *Brandt* had no occasion to determine whether the federal government could exclude all parties from the surface. It is hard to imagine that an operational railroad would not possess this stick in the bundle, especially in a residential area such as the Flying Crown Subdivision where residents actively use the land burdened by the ROW and safety is of the utmost concern. As described *supra*, ARRC does not ask this Court to determine who possesses the rights to underlying mineral resources or the disposition of its interests upon abandonment. Nor does ARRC request that this Court declare its current interest in the ROW is held in fee simple.[83] Although the Court finds that

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[81] *Id.* at 1297.

[82] *See id.* at 1295.

[83] *See* Docket 1 at 10. ARRC's position is that the federal government reserved "a ROW equivalent to the type of 'limited fee' described in *N. Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903)," in the 1950 Sperstad Patent. Docket 13 at 14. Indeed, the Court notes that subsequent legislative history, Congressional remarks, and the historical underpinnings of the Alaska railroad, discussed *infra*, support a finding that the federal government intended to reserve its ROW in fee simple, pursuant to the 1914 Act. However, the Court need only determine that ARRC's current interest in the ROW is at least paramount to an "exclusive-use easement," as defined by ARTA,

Brandt is not necessarily inapposite to this case, it does find that *Brandt* is of limited import in determining whether the federal government's interest in the ROW was at least an exclusive-use easement pursuant to the 1914 Act.

This Court also must recognize the stark differences between the 1875 Act and the 1914 Act, including the circumstances leading to their enactments. First, the 1875 Act reserved a right-of-way to qualifying private railroad companies, while the 1914 Act specifically reserved the ROW to the federal government.[84] Indeed, the Ninth Circuit noted in 1971 that the federal Alaska Railroad was the only railroad in the United States wholly owned and operated by the federal government.[85] Other courts have recognized this disparity and refused to find the two statutes comparable on this basis alone.[86]

Second, the development of a railway in the Alaska Territory was unlike any other infrastructure

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which only specifies exclusive rights to the surface and subsurface rights as necessary to support surface uses. The Court therefore declines to consider whether the federal government's interest in the 1950 Sperstad Patent was reserved in fee simple.

84 *Compare* 43 U.S.C. § 934 *with* 1914 Act § 1.

85 *United States v. City of Anchorage, State of Alaska*, 437 F.2d 1081, 1082 (9th Cir. 1971).

86 *See, e.g.*, *King Cnty. v. Abernathy*, No. C20-0060-RAJ-SKV, 2021 WL 3472379, *6 n.6 (W.D. Wash. July 26, 2021) ("The [1914 Act] likewise authorized the President to 'perform any and all acts in addition to those specifically set out in the statutory language which were necessary to accomplish the purposes and declared objects of the Act.' . . . No such language exists in the 1875 Act.").

endeavor in the continental United States. At its inception, many private railroad companies attempted and failed to establish a functional railway system in the Territory of Alaska. The Ninth Circuit has recognized that "[a]t the time of the passage of the [1914] Act . . . the interior of Alaska was, for most purposes, completely isolated from the outside world. The construction of a railroad was absolutely essential to the development of the interior."[87] The Ninth Circuit even went as far as to describe the establishment of the federal Alaska Railroad as a "public exigency" and found that the 1914 Act unquestionably reserved lands under navigable waters in fee to the United States.[88] Given the importance of the federal Alaska Railroad to the development of the Territory, and its unique nature as a railway owned exclusively by a sovereign, the Court can only rely on case law interpreting the contours of the 1875 Act so much.

In this case, the Court finds that Congress's interpretation of the 1914 Act in subsequent enactments is more persuasive than case law exclusively interpreting the 1875 Act. In *Great Northern*, on which *Brandt* heavily relies, the Supreme Court found "it is settled that 'subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.'"[89] As discussed *infra* in Section IV.B. of this Order, the Senate Committee on Commerce, Science,

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[87] *City of Anchorage*, 437 F.2d at 1084.

[88] *Id.* at 1085.

[89] *Great Northern*, 315 U.S. at 277 (citing to *Tiger v. W. Inv. Co.*, 221 U.S. 286, 309 (1911)).

and Transportation concluded that the subsequently enacted ARTA

> 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.[90]

The Committee further explained that "[t]he reported bill . . . ensures conveyance of the track right-of-way in fee so that the State can continue to operate the railroad."[91] Congress in 1982 thus interpreted the 1914 Act as reserving the federal government's ROW in fee simple. Although the Supreme Court in *Brandt* cautioned against relying on the views of a subsequent Congress in interpreting the intent of an earlier one, that remark referred to statutes that did not speak directly to the issue at hand.[92] It is difficult for this Court to simply ignore the statements of Congress directly relating to its intent in enacting ARTA and *in pari materia* with the 1914 Act.[93]

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[90] S. Rep. No. 97-479, at 8 (1982) (emphasis added).

[91] *Id.*

[92] *Brandt*, 572 U.S. at 109.

[93] *See United States v. Freeman*, 44 U.S. 556, 564–65 (1845) ("If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute; if it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration

(2) Resolution of ambiguities

Where land grants are ambiguous, such ambiguity must be resolved in favor of the sovereign grantor.[94] Further, "nothing passes but what is conveyed in clear and explicit language."[95] Flying Crown argues that there is no ambiguity in the 1914 Act or the ROW reservation pursuant to that Act, and therefore this canon of construction is irrelevant.[96] The Court disagrees. A "right-of-way," especially in the context of a railway, without further delineation of rights, is an inherently ambiguous term in property law. The Parties and this Court have gone to great lengths to parse legislative history and case law to decipher the meaning Congress intended to attach to the phrase "right-of-way" in the 1914 Act, as that phrase is not defined within the statute. Further, the federal government did not clearly or explicitly give away its interest in the exclusive occupancy and use of the ROW in the 1950 Sperstad Patent. Therefore, even if Flying Crown could argue that the *Brandt* decision is persuasive, this Court still would find that the latent

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of its meaning, and will govern the construction of the first statute.") (internal citations omitted).

[94] *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 272 (1942) ("[t]he Act is also subject to the general rule of construction that any ambiguity in a grant is to be resolved favorably to a sovereign grantor"); *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116 (1957) ("[L]and grants are construed favorably to the Government . . . if there are doubts they are resolved for the Government, not against it.").

[95] *Great Northern*, 315 U.S. at 272 (quoting *Caldwell v. United States*, 250 U.S. 14, 20 (1919)).

[96] Docket 85 at 23. The Municipality also argues that ARTA is unambiguous, but agrees that all ambiguity must be resolved in favor of the sovereign grantor. Docket 86 at 7.

ambiguity in the 1950 Sperstad Patent must be resolved in favor of the federal government.

In summary, based on the unique circumstances facing railroad companies in constructing the Alaskan railroad, the interpretation of Congress in subsequent enactments, and the well-settled principle that uncertainty in a land grant from a sovereign grantor must be resolved in favor of that grantor, this Court finds that the federal government reserved at least an exclusive-use easement, as defined by ARTA, in its ROW in the 1950 Sperstad Patent pursuant to the 1914 Act.

(B) ARRC Received at Least an "Exclusive-Use" Easement in the ROW Pursuant to ARTA

Finding that the federal government reserved *at least* an exclusive-use easement in the 1950 Sperstad Patent pursuant to the 1914 Act, the Court now must determine what interest was transferred to ARRC pursuant to ARTA, first via interim conveyance, and later via the 2006 Patent. The Court engages in the same analysis to determine the scope of that interest and looks to the plain language and legislative history of ARTA.

In unanimously reporting S. 1500, the Senate Committee on Commerce, Science, and Transportation declared that the bill, as amended, would "facilitate the transfer of the railroad lands [to the State] by providing for the conveyance of the track right-of-way in fee and an expedited process for adjudicating Native and other third party claims of valid existing rights to other railroad lands."[97] Taking

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[97] S. Rep. No. 97-479, at 1 (1982).

into account the variety of claims that might arise, Congress identified four categories of conveyances in section 1203(b)(1) of ARTA: (A) "all rail properties of the Alaska Railroad except any interest in real property" to be delivered by bill of sale to the State; (B) "all rail properties of the Alaska Railroad that are not conveyed pursuant to subparagraph (A) of this paragraph and are not subject to unresolved claims of valid existing rights" to be delivered to the State via interim conveyance; (C) "all rail properties of the Alaska Railroad not conveyed pursuant to subparagraphs (A) or (B) of this paragraph pending conveyances in accordance with the review and settlement or final administrative adjudication of claims of valid existing rights" to be delivered to the State via an exclusive license; and (D) "an exclusive-use easement for that portion of the right-of-way of the Alaska Railroad within the Denali National Park and Preserve" to be conveyed to the State via deed.[98]

The Parties appear to agree that the 1950 Sperstad Patent was transferred to the State pursuant to section 1203(b)(1)(B) because it was transferred via interim conveyance and not subject to any unresolved claims.[99] Referring specifically to that subsection in section 1205(b)(4)(B), ARTA states

> [w]here 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, the conveyance to the

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98 45 U.S.C. § 1203(b)(1)(A)–(D).

99 *See* Dockets 85 at 29–30; 13 at 10; 86 at 21.

> State of the Federal interest in such properties pursuant to **section 1203(b)(1)(B)** or (2) of this title shall grant not less than an exclusive-use easement in such properties.[100]

Mr. Sperstad was granted the patent to the Sperstad Homestead in 1950, well before January 1983. A simple reading of ARTA plainly indicates that Congress authorized the transfer of its interest in the ROW, as reserved in the 1950 Sperstad Patent, from federal ownership to ARRC. ARTA is clear that such interest shall not be less an exclusive-use easement. ARRC therefore maintains an exclusive-use easement in the ROW crossing Flying Crown's property.

The Court's reading is bolstered by subsequent administrative interpretations of ARTA. Though not binding, the Court finds the Interior Board of Land Appeals' ("IBLA") interpretation of ARTA in *Peter Slaiby & Rejani Slaiby* ("*Slaiby*") to be persuasive.[101] In *Slaiby*, two landowners appealed the Bureau of Land Management's decision allowing the Secretary of Transportation to grant a patent to ARRC for an exclusive-use easement over their property adjacent

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[100] 45 U.S.C. § 1205(b)(4)(B) (emphasis added). Flying Crown argues that ARRC interprets this section to mean that "for all properties transferred under ARTA, regardless of which category they are in or what their title history includes, ARRC received a near-fee interest in an exclusive-use easement, or the full fee interest." Docket 85 at 37. But the Court focuses this Order only on those interim conveyances made pursuant to section 1203(b)(1)(B), which includes the 1950 Sperstad Patent. It makes no observation concerning the remaining transfer mechanisms.

[101] 186 IBLA 143 (2015).

to a portion of ARRC's ROW.[102] The original landowner was granted a patent for 150 acres of land in 1950.[103] However, after the Good Friday 1964 earthquake, railway trackage needed revision and realignment.[104] Pursuant to that process, in 1965, the federal Alaska Railroad purchased several parcels of land from the original landowner as well as a "perpetual right of way and easement [ROW] to construct, reconstruct, operate and maintain a railroad line and appurtenances."[105] The Slaibys later acquired a home on the parcels encumbered by the federal Alaska Railroad's ROW. Counsel for ARRC represented that the ROW had not yet been conveyed pursuant to ARTA and was still owned by the federal government.[106] The Slaibys claimed that the interest acquired by the federal government in 1965 was a "limited easement" and urged the Bureau of Land Management not to grant an exclusive-use easement.[107] Finding the language of ARTA clear, the IBLA determined that where the landowners' property was "conveyed out of Federal ownership prior to January 14, 1983, the U.S. Secretary of Transportation 'shall not grant less than an exclusive-use easement in such properties [to ARRC].'"[108] In

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[102] *Id.* at 146.

[103] *Id.*

[104] *Id.*

[105] *Id.* (alterations in original).

[106] *Id.*

[107] *Id.*

[108] 186 IBLA at 148 (quoting 45 U.S.C. § 1205(b)(4)(B)) (alteration in original).

ruling for ARRC, the IBLA interpreted ARTA in the same way the Court does in this case.

Flying Crown's interpretation of ARTA requires this Court to find that "the exclusive-use easement requirement" contained in section 1205(b)(4)(B) does not apply to the ROW reserved in the 1950 Sperstad Patent.[109] This is difficult where the text of section 1205(b)(4)(B) specifically cites its applicability to interim conveyances made pursuant to section 1203(b)(1)(B), under which Flying Crown states the 1950 Sperstad Patent was transferred. Flying Crown acknowledges this, but it argues that section 1205(b)(4)(B) of ARTA only applies to "such claims to *federally-owned land* that *remained unresolved* at ARTA's enactment" because section 1205(b) broadly specifies adjudicatory procedures and, significantly, includes the phrase "unresolved claims of valid existing rights."[110] Because the federal government's ROW was contained in a patent, it was resolved, and therefore section 1205(b)(4)(B) does not apply.[111]

For this reading to make sense, Flying Crown requires us to find that "as to patented lands . . . all provisions in ARTA that involve the procedures and the requirements for the Secretary to resolve 'claims of valid existing rights' simply have no applicability" because "there are no remaining 'unresolved claims' to patented lands."[112] In other words, the Court must

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[109] Docket 85 at 33.

[110] *Id.* at 34 (emphasis in original).

[111] *Id.* at 36.

[112] *Id.* Flying Crown appears to base its argument, in part, on the fact that section 1205(b)(4)(B) is found under the subtitle

determine that Congress committed a massive drafting error. First, ARTA specifically defines a "claim of valid existing rights" as "any claim to the rail properties of the Alaska Railroad on record in the Department of the Interior as of January 13, 1983."[113] If Congress intended for this definition to apply only to unresolved claims, it would have said so, as it does in other places in the statute.[114] Further, Flying Crown cherry-picks its conclusion that section 1205(b)(4)(B) only applies to "claim[s] of valid existing rights," by ignoring the first half of that subsection, which states that the exclusive-use easement also applies to "lands within the right-of-way, or any interest in such lands, [that has] been conveyed from Federal ownership prior to January 14, 1983, ***or*** is subject to a claim of valid existing rights[.]"[115] The Court declines to divine a contrary Congressional intent from the statute where the plain language suggests a clear application.

"Review and settlement of claims; administrative adjudication process; management of lands; procedures applicable." 45 U.S.C. § 1205(b). However, section 1205 is broadly entitled "Lands to be Transferred." A "review and settlement process" is specifically identified in subsection (1)(A); however, subsection (B) stands apart. *See* 45 U.S.C. § 1205(b)(2) ("Upon completion of the review and settlement process required by paragraph (1)(A) of this subsection . . . .). Section 1205(4), which states the purposes of subsections (1)(A) and (B), clarifies that in addition to providing adjudicatory procedures, these subsections are meant to "avoid potential impairment of railroad operations resulting from joint or divided ownership in substantial segments of right-of-way." *Id.* at § 1205(4).

[113] 45 U.S.C. § 1202(3).

[114] *See, e.g.*, 45 U.S.C. § 1203(b)(1)(B).

[115] 45 U.S.C. § 1205(b)(4)(B) (emphasis added).

Even assuming, *arguendo*, Flying Crown is correct that the exclusive-use easement mandate contained in section 1205(b)(4)(B) does not apply to the 1950 Sperstad Patent, it is irrelevant to ARRC's interests in the ROW at issue in this case. This is because regardless of the Court's interpretation of ARTA, both Parties still agree that ARTA conveyed precisely the interest that was reserved by the federal government pursuant to the 1914 Act.[116] This Court already has determined that the federal government reserved at least an exclusive-use easement in the ROW pursuant to that Act. It therefore follows that its entire interest was transferred to ARRC under ARTA.[117]

The Court's determinations that (1) the United States reserved at least an exclusive-use easement in its right-of-way in the 1950 Sperstad Patent, and (2) this entire interest was transferred to ARRC pursuant to ARTA and perfected in the 2006 Patent, and forecloses the remainder the of Flying Crown's assertions in its Cross Motion for Summary Judgment. Premised on its claim that the United States reserved a common law simple easement in the ROW and therefore could not convey the full panoply of rights articulated under ARTA to ARRC, Flying

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[116] *See* Dockets 91-1 at 14–15; 85 at 30.

[117] Flying Crown also asserts that ARRC's interpretation of ARTA is barred by the canon of constitutional avoidance because "it would require the Court to find that ARTA effectuated an unconstitutional taking by giving ARRC greater rights over Flying Crown's property than the federal government actually possessed." Docket 85 at 27. This argument is circular. To determine there was an unconstitutional taking, the Court first would need to adopt Flying Crown's interpretation of ARTA. The Court expressly rejects that interpretation and therefore does not address this argument any further.

Crown argues that it is entitled to compensation under the Fifth Amendment of the United States Constitution.[118] The Court has determined that the United States did not transfer an expanded interest to ARRC upon enactment of ARTA. Accordingly, there is no taking, and Flying Crown's constitutional claim fails.

V. CONCLUSION

The Court finds that ARRC possesses the interest to at least an exclusive-use easement, as defined by ARTA, in its ROW crossing Flying Crown's property, reserved in Federal Patent 50-2006-0363. Based on the foregoing, ARRC's Motion for Summary Judgment at Docket 13 is **GRANTED**. Flying Crown's Cross Motion for Summary Judgment at Docket 84 is **DENIED** without prejudice.

IT IS SO ORDERED this 10th day of March, 2022, at Anchorage, Alaska.

/s/ Joshua M. Kindred
JOSHUA M. KINDRED
United States District Judge

[118] Docket 85 at 44–45.

An Act To authorize the President of the United States to locate, construct, and operate railroads in the Territory of Alaska, and for other purposes, 38 Stat. 305 (March 12, 1914)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States is hereby empowered, authorized, and directed to adopt and use a name by which to designate the railroad or railroads and properties to be located, owned, acquired, or operated under the authority of this Act; to employ such officers, agents, or agencies, in his discretion, as may be necessary to enable him to carry out the purposes of this Act; to authorize and require such officers, agents, or agencies to perform any or all of the duties imposed upon him by the terms of this Act; to detail and require any officer or officers in the Engineer Corps in the Army or Navy to perform service under this Act; to fix the compensation of all officers, agents, or employees appointed or designated by him; to designate and cause to be located a route or routes for a line or lines of railroad in the Territory of Alaska not to exceed in the aggregate one thousand miles, to be so located as to connect one or more of the open Pacific Ocean harbors on the southern coast of Alaska with the navigable waters in the interior of Alaska, and with a coal field or fields so as best to aid in the development of the agricultural and mineral or other resources of Alaska, and the settlement of the public lands therein, and so as to provide transportation of coal for the Army and Navy, transportation of troops, arms, munitions of war, the mails, and for other governmental and public uses, and for the transportation of passengers and property; to construct and build a railroad or railroads along such route or routes as he may so designate and locate, with the necessary branch lines, feeders, sidings, switches, and spurs; to purchase or otherwise acquire all real and personal property necessary to carry out the purposes of this Act; to exercise the power of eminent domain to acquire property for such use, which use is hereby declared to be a public use by condemnation in the courts of Alaska in accordance with the laws now or hereafter in force there; to acquire rights of way, terminal grounds, and all other rights; to purchase or otherwise acquire all necessary equipment for the construction and operation of such railroad or railroads; to build or otherwise acquire docks, wharves, terminal facilities, and all structures needed for the equipment and operation of such railroad or railroads; to fix, change, or modify rates for the transportation of passengers and property, which rates shall be equal and uniform, but no free transportation or passes shall be permitted except, that the provisions of the interstate commerce laws relating to the transportation of employees and their families shall be in force as to the lines constructed under this Act; to receive compensation for the transportation of passengers and property, and to perform generally all the usual duties of a common carrier by railroad; to make and establish rules and regulations for the control and operation of said railroad or railroads; in his discretion, to lease the said railroad or railroads, or any portion thereof, including telegraph and telephone lines, after completion under such terms as he may deem proper, but no lease shall be for a longer period than twenty years, or in the event of failure to lease, to operate the same until the further action of Congress: *Provided,* That if said railroad or railroads, including telegraph and telephone lines, are leased under the authority herein given, then and in that event they shall be operated under the jurisdiction and control of the provisions of the interstate commerce laws; to purchase, condemn, or otherwise acquire upon such terms as he may deem proper any other line or lines of railroad in Alaska which may be necessary to complete the construction of the line or lines of railroad designated or located by him: *Provided*, That the price to be paid in case of purchase shall in no case exceed the actual physical value of the railroad; to make contracts or agreements with any railroad or steamship company or vessel owner for joint transportation of passengers or property over the road or roads herein provided for, and such railroad or steamship line or by such vessel, and to make such other contracts as may be necessary to carry out any of the purposes of this Act; to utilize in carrying on the work herein provided for any and all machinery, equipment, instruments, material, and other property of any sort whatsoever used or acquired in connection with the construction of the Panama Canal, so far and as rapidly as the same is no longer needed at Panama, and the Isthmian Canal Commission is hereby authorized to deliver said property to such officers or persons as the President may designate, and to take credit therefor at such percentage of its original cost as the President may approve, but this amount shall not be charged against the fund provided for in this Act.

The authority herein granted shall include the power to construct, maintain, and operate telegraph and telephone lines so far as they may be necessary or convenient in the construction and operation of the railroad or railroads as herein authorized and they shall perform generally all the usual duties of telegraph and telephone lines for hire.

That it is the intent and purpose of Congress through this Act to authorize and empower the President of the United States, and he is hereby fully authorized and empowered, through such officers, agents, or agencies he may appoint or employ, to do all necessary acts and things in addition to those specifically authorized in this Act to enable him to accomplish the purposes and objects of this Act.

The President is hereby authorized to withdraw, locate, and dispose of, under such rules and regulations as he may proscribe, such area or areas of the public domain along the line or lines of such proposed railroad or railroads for town-site purposes as he may from time to time designate.

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 and twenty-five feet on either side of the center line of any such telegraph or telephone lines, and the President may, in such manner as he deems advisable, make reservation of such lands as are or may be useful for furnishing materials for construction and for stations, terminals, docks, and for such other purposes in connection with the construction and operation of such railroad lines as he may deem necessary and desirable.

SEC. 2. That the cost of the work authorized by this Act shall not exceed $35,000,000, and in executing the authority granted by this Act the President shall not expend nor obligate the United States to expend more than the said sum; and there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $1,000,000 to be used for carrying out the provisions of this Act, to continue available until expended

SEC. 3. That all moneys derived from the lease, sale, or disposal of any of the public lands, including townsites, in Alaska, or the coal or mineral therein contained, or the timber thereon, and the earnings of said railroad or railroads, together with the earnings of the telegraph and telephone lines constructed under this Act, above maintenance charges and operating expenses, shall be paid into the Treasury of the United States as other miscellaneous receipts are paid, and a separate account thereof shall be kept and annually reported to Congress.

SEC. 4. That the officers, agents, or agencies placed in charge of the work by the President shall make to the President annually, and at such other periods as may be required by the President or by either House of Congress, full and complete reports of all their acts and doings and of all moneys received and expended in the construction of said work and in the operation of said work or works and in the performance of their duties in connection therewith. The annual reports herein provided for shall be by the President transmitted to Congress.

Approved, March 12, 1914.

Alaska Railroad Transfer Act, 45 U.S.C. §§ 1201–1214

§ 1201. Findings

The Congress finds that—

(1) the Alaska Railroad, which was built by the Federal Government to serve the transportation and development needs of the Territory of Alaska, presently is providing freight and passenger services that primarily benefit residents and businesses in the State of Alaska;

(2) many communities and individuals in Alaska are wholly or substantially dependent on the Alaska Railroad for freight and passenger service and provision of such service is an essential governmental function;

(3) continuation of services of the Alaska Railroad and the opportunity for future expansion of those services are necessary to achieve Federal, State, and private objectives; however, continued Federal control and financial support are no longer necessary to accomplish these objectives;

(4) the transfer of the Alaska Railroad and provision for its operation by the State in the manner contemplated by this chapter is made pursuant to the Federal goal and ongoing program of transferring appropriate activities to the States;

(5) the State's continued operation of the Alaska Railroad following the transfer contemplated by this chapter, together with such expansion of the railroad as may be necessary or convenient in the future, will constitute an appropriate public use of the rail system and associated properties, will provide an essential governmental service, and will promote the general welfare of Alaska's residents and visitors; and

(6) in order to give the State government the ability to determine the Alaska Railroad's role in serving the State's transportation needs in the future, including the opportunity to extend rail service, and to provide a savings to the Federal Government, the Federal Government should offer to transfer the railroad to the State, in accordance with the provisions of this chapter, in the same manner in which other Federal transportation functions (including highways and airports) have been transferred since Alaska became a State in 1959.

§ 1202. Definitions

As used in this chapter, the term—

(1) "Alaska Railroad" means the agency of the United States Government that is operated by the Department of Transportation as a rail carrier in Alaska under authority of the Act of March 12, 1914 (43 U.S.C. 975 et seq.) (popularly referred to as the "Alaska Railroad Act") and section 6(i) of the Department of Transportation Act, or, as the context requires, the railroad operated by that agency;

(2) "Alaska Railroad Revolving Fund" means the public enterprise fund maintained by the Department of the Treasury into which revenues of the Alaska Railroad and appropriations for the Alaska Railroad are deposited, and from which funds are expended for Alaska Railroad operation, maintenance and construction work authorized by law;

(3) "claim of valid existing rights" means any claim to the rail properties of the Alaska Railroad on record in the Department of the Interior as of January 13, 1983;

(4) "date of transfer" means the date on which the Secretary delivers to the State the four documents referred to in section 1203(b)(1) of this title;

(5) "employees" means all permanent personnel employed by the Alaska Railroad on the date of transfer, including the officers of the Alaska Railroad, unless otherwise indicated in this chapter;

(6) "exclusive-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;

(7) "Native Corporation" has the same meaning as such term has under section 102(6) of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3102(6));

(8) "officers of the Alaska Railroad" means the employees occupying the following positions at the Alaska Railroad as of the day before the date of transfer: General Manager; Assistant General Manager; Assistant to the General Manager; Chief of Administration; and Chief Counsel;

(9) "public lands" has the same meaning as such term has under section 3(e) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(e));

(10) "rail properties of the Alaska Railroad" means all right, title, and interest of the United States to lands, buildings, facilities, machinery, equipment, supplies, records, rolling stock, trade names, accounts receivable, goodwill, and other real and personal property, both tangible and intangible, 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, but excluding any such properties disposed of, and including any such properties acquired, in the ordinary course of business after that date but before the date of transfer, and also including the exclusive-use easement within the Denali National Park and Preserve conveyed to the State pursuant to this chapter and also excluding the following:

(A) the unexercised reservation to the United States for future rights-of-way required in all patents for land taken up, entered, or located in Alaska, as provided by the Act of March 12, 1914 (43 U.S.C. 975 et seq.);

(B) the right of the United States to exercise the power of eminent domain;

(C) any moneys in the Alaska Railroad Revolving Fund which the Secretary demonstrates, in consultation with the State, are unobligated funds appropriated from general tax revenues or are needed to satisfy obligations incurred by the United States in connection with the operation of the Alaska Railroad which would have been paid from such Fund but for this chapter and which are not assumed by the State pursuant to this chapter;

(D) any personal property which the Secretary demonstrates, in consultation with the State, prior to the date of transfer under section 1203 of this title, to be necessary to carry out functions of the United States after the date of transfer; and

(E) any lands or interest therein (except as specified in this chapter) within the boundaries of the Denali National Park and Preserve;

(11) "right-of-way" means, except as used in section 1208 of this title—

(A) an area extending not less than one hundred feet on both sides of the center line of any main line or branch line of the Alaska Railroad; or

(B) an area extending on both sides of the center line of any main line or branch line of the Alaska Railroad appropriated or retained by or for the Alaska Railroad that, as a result of military jurisdiction over, or non-Federal ownership of, lands abutting the main line or branch line, is of a width less than that described in subparagraph (A) of this paragraph;

(12) "Secretary" means the Secretary of Transportation;

(13) "State" means the State of Alaska or the State-owned railroad, as the context requires;

(14) "State-owned railroad" means the authority, agency, corporation or other entity which the State of Alaska designates or contracts with to own, operate or manage the rail properties of the Alaska Railroad or, as the context requires, the railroad owned, operated, or managed by such authority, agency, corporation, or other entity; and

(15) "Village Corporation" has the same meaning as such term has under section 3(j) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(j)).

§ 1203. Transfer authorization

(a) Authority of Secretary; time, manner, etc., of transfer

Subject to the provisions of this chapter, the United States, through the Secretary, shall transfer all rail properties of the Alaska Railroad to the State. Such transfer shall occur as soon as practicable after the Secretary has made the certifications required by subsection (d) of this section and shall be accomplished in the manner specified in subsection (b) of this section.

(b) Simultaneous and interim transfers, conveyances, etc.

(1) On the date of transfer, the Secretary shall simultaneously:

(A) deliver to the State a bill of sale conveying title to all rail properties of the Alaska Railroad except any interest in real property;

(B) deliver to the State an interim conveyance of the rail properties of the Alaska Railroad that are not conveyed pursuant to subparagraph (A) of this paragraph and are not subject to unresolved claims of valid existing rights;

(C) deliver to the State an exclusive license granting the State the right to use all rail properties of the Alaska Railroad not conveyed pursuant to subparagraphs (A) or (B) of this paragraph pending conveyances in accordance with the review and settlement or final administrative adjudication of claims of valid existing rights;

(D) convey to the State a deed granting the State (i) an exclusive-use easement for that portion of the right-of-way of the Alaska Railroad within the Denali National Park and Preserve extending not less than one hundred feet on either side of the main or branch line tracks, and eight feet on either side of the centerline of the "Y" track connecting the main line of the railroad to the power station at McKinley Park Station and (ii) title to railroad-related improvements within such right-of-way.

Prior to taking the action specified in subparagraphs (A) through (D) of this paragraph, the Secretary shall consult with the Secretary of the Interior. The exclusive-use easement granted pursuant to subparagraph (D) of this paragraph and all rights afforded by such easement shall be exercised only for railroad purposes, and for such other transportation, transmission, or communication purposes for which lands subject to such easement were utilized as of January 14, 1983.

(2) The Secretary shall deliver to the State an interim conveyance of rail properties of the Alaska Railroad described in paragraph (1)(C) of this subsection that become available for conveyance to the State after the date of transfer as a result of settlement, relinquishment, or final administrative adjudication pursuant to section 1205 of this title. Where the rail properties to be conveyed pursuant to this paragraph are surveyed at the time they become available for conveyance to the State, the Secretary shall deliver a patent therefor in lieu of an interim conveyance.

(3) The force and effect of an interim conveyance made pursuant to paragraphs (1)(B) or (2) of this subsection shall be to convey to and vest in the State exactly the same right, title, and interest in and to the rail properties identified therein as the State would have received had it been issued a patent by the United States. The Secretary of the Interior shall survey the land conveyed by an interim conveyance to the State pursuant to paragraphs (1)(B) or (2) of this subsection and, upon completion of the survey, the Secretary shall issue a patent therefor.

(4) The license granted pursuant to paragraph (1)(C) of this subsection shall authorize the State to use, occupy, and directly receive all benefits of the rail properties described in the license for the operation of the State-owned railroad in conformity with the Memorandum of Understanding referred to in section 1205(b)(3) of this title. The license shall be exclusive, subject only to valid leases, permits, and other instruments issued before the date of transfer and easements reserved pursuant to subsection (c)(2) of this section. With respect to any parcel conveyed pursuant to this chapter, the license shall terminate upon conveyance of such parcel.

(c) Reservations to United States in interim conveyances and patents

(1) Interim conveyances and patents issued to the State pursuant to subsection (b) of this section shall confirm, convey and vest in the State all reservations to the United States (whether or not expressed in a particular patent or document of title), except the unexercised reservations to the United States for future rights-of-way made or required by the first section of the Act of March 12, 1914 (43 U.S.C. 975d). The conveyance to the State of such reservations shall not be affected by the repeal of such Act under section 615 of this title.

(2) In the license granted under subsection (b)(1)(C) of this section and in all conveyances made to the State under this chapter, there shall be reserved to the Secretary of the Interior, the Secretary of Defense and the Secretary of Agriculture, as appropriate, existing easements for administration (including agency transportation and utility purposes) that are identified in the report required by section 1204(a) of this title. The appropriate Secretary may obtain, only after consent of the State, such future easements as are necessary for administration. Existing and future easements and use of such easements shall not interfere with operations and support functions of the State-owned railroad.

(3) There shall be reserved to the Secretary of the Interior the right to use and occupy, without compensation, five thousand square feet of land at Talkeetna, Alaska, as described in ARR lease numbered 69-25-0003-5165 for National Park Service administrative activities, so long as the use or occupation does not interfere with the operation of the State-owned railroad. This reservation shall be effective on the date of transfer under this section or the expiration date of such lease, whichever is later.

(d) Certifications by Secretary; scope, subject matter, etc.

(1) Prior to the date of transfer, the Secretary shall certify that the State has agreed to operate the railroad as a rail carrier in intrastate and interstate commerce.

(2)

(A) Prior to the date of transfer, the Secretary shall also certify that the State has agreed to assume all rights, liabilities, and obligations of the Alaska Railroad on the date of transfer, including leases, permits, licenses, contracts, agreements, claims, tariffs, accounts receivable, and accounts payable, except as otherwise provided by this chapter.

(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, the United States shall be solely responsible for—

> **(i)** all claims and causes of action against the Alaska Railroad that accrue on or before the date of transfer, regardless of the date on which legal proceedings asserting such claims were or may be filed, except that the United States shall, in the case of any tort claim, only be responsible for any such claim against the United States that accrues before the date of transfer and results in an award, compromise, or settlement of more than $2,500, and the United States shall not compromise or settle any claim resulting in State liability without the consent of the State, which consent shall not be unreasonably withheld; and
>
> **(ii)** all claims that resulted in a judgment or award against the Alaska Railroad before the date of transfer.

(C) For purposes of subparagraph (B) of this paragraph, the term "accrue" shall have the meaning contained in section 2401 of Title 28.

(D) Any hazardous substance, petroleum or other contaminant release at or from the State-owned rail properties that began prior to January 5, 1985, shall be and remain the liability of the United States for damages and for the costs of investigation and cleanup. Such liability shall be enforceable under 42 U.S.C. 9601 et seq. for any release described in the preceding sentence.

(3)

(A) Prior to the date of transfer, the Secretary shall also certify that the State-owned railroad has established arrangements pursuant to section 1206 of this title to protect the employment interests of employees of the Alaska Railroad during the two-year period commencing on the date of transfer. These arrangements shall include provisions—

(i) which ensure that the State-owned railroad will adopt collective bargaining agreements in accordance with the provisions of subparagraph (B) of this paragraph;

(ii) for the retention of all employees, other than officers of the Alaska Railroad, who elect to transfer to the State-owned railroad in their same positions for the two-year period commencing on the date of transfer, except in cases of reassignment, separation for cause, resignation, retirement, or lack of work;

(iii) for the payment of compensation to transferred employees (other than employees provided for in subparagraph (E) of this paragraph), except in cases of separation for cause, resignation, retirement, or lack of work, for two years commencing on the date of transfer at or above the base salary levels in effect for such employees on the date of transfer, unless the parties otherwise agree during that two-year period;

(iv) for priority of reemployment at the State-owned railroad during the two-year period commencing on the date of transfer for transferred employees who are separated for lack of work, in accordance with subparagraph (C) of this paragraph (except for officers of the Alaska Railroad, who shall receive such priority for one year following the date of transfer);

(v) for credit during the two-year period commencing on the date of transfer for accrued annual and sick leave, seniority rights, and relocation and turnaround travel allowances which have been accrued during their period of Federal employment by transferred employees retained by the State-owned railroad (except for officers of the Alaska Railroad, who shall receive such credit for one year following the date of transfer);

(vi) for payment to transferred employees retained by the State-owned railroad during the two-year period commencing on the date of transfer, including for one year officers retained or separated under subparagraph (E) of this paragraph, of an amount equivalent to the cost-of-living allowance to which they are entitled as Federal employees on the day before the date of transfer, in accordance with the provisions of subparagraph (D) of this paragraph; and

(vii) for health and life insurance programs for transferred employees retained by the State-owned railroad during the two-year period commencing on the date of transfer, substantially equivalent to the Federal health and life insurance programs available to employees on the day before the date of transfer (except for officers of the Alaska Railroad, who shall receive such credit for one year following the date of transfer).

(B) The State-owned railroad shall adopt all collective bargaining agreements which are in effect on the date of transfer. Such agreements shall continue in effect for the two-year period commencing on the date of transfer, unless the parties agree to the contrary before the expiration of that two-year period. Such agreements shall be renegotiated during the two-year period, unless the parties agree to the contrary. Any labor-management negotiation impasse declared before the date of transfer shall be settled in accordance with chapter 71 of Title 5. Any impasse declared after the date of transfer shall be subject to applicable State law.

(C) Federal service shall be included in the computation of seniority for transferred employees with priority for reemployment, as provided in subparagraph (A)(iv) of this paragraph.

(D) Payment to transferred employees pursuant to subparagraph (A)(vi) of this paragraph shall not exceed the percentage of any transferred employee's base salary level provided by the United States as a cost-of-living allowance on the day before the date of transfer, unless the parties agree to the contrary.

(E) Prior to the date of transfer, the Secretary shall also certify that the State-owned railroad has agreed to the retention, for at least one year from the date of transfer, of the offices of the Alaska Railroad, except in cases of separation for cause, resignation, retirement, or lack of work, at or above their base salaries in effect on the date of transfer, in such positions as the State-owned railroad may determine; or to the payment of lump-sum severance pay in an amount equal to such base salary for one year to officers not retained by the State-owned railroad upon transfer or, for officers separated within one year on or after the date of transfer, of a portion of such lump-sum severance payment (diminished pro rata for employment by the State-owned railroad within one year of the date of transfer prior to separation).

(4) Prior to the date of transfer, the Secretary shall also certify that the State has agreed to allow representatives of the Secretary adequate access to employees and records of the Alaska Railroad when needed for the performance of functions related to the period of Federal ownership.

(5) Prior to the date of transfer, the Secretary shall also certify that the State has agreed to compensate the United States at the value, if any, determined pursuant to section 1204(d) of this title.

§ 1204. Transition period

(a) Joint report by Secretary and Governor of Alaska; contents, preparation, etc.

Within 6 months after January 14, 1983, the Secretary and the Governor of Alaska shall jointly prepare and deliver to the Congress of the United States and the legislature of the State a report that describes to the extent possible the rail properties of the Alaska Railroad, the liabilities and obligations to be assumed by the State, the sum of money, if any, in the Alaska Railroad Revolving Fund to be withheld from the State pursuant to section 1202(10)(C) of this title, and any personal property to be withheld pursuant to section 1202(10)(D) of this title. The report shall separately identify by the best available descriptions (1) the rail properties of the Alaska Railroad to be transferred pursuant to section 1203(b)(1)(A), (B), and (D) of this title; (2) the rail properties to be subject to the license granted pursuant to section 1203(b)(1)(C) of this title; and (3) the easements to be reserved pursuant to section 1203(c)(2) of this title. The Secretaries of Agriculture, Defense, and the Interior and the Administrator of the General Services Administration shall provide the Secretary with all information and assistance necessary to allow the Secretary to complete the report within the time required.

(b) Inspection, etc., of rail properties and records; terms and conditions; restrictions

During the period from January 14, 1983, until the date of transfer, the State shall have the right to inspect, analyze, photograph, photocopy and otherwise evaluate all of the rail properties of the Alaska Railroad and all records related to the rail properties of the Alaska Railroad maintained by any agency of the United States under conditions established by the Secretary to protect the confidentiality of proprietary business data, personnel records, and other information, the public disclosure of which is prohibited by law. During that period, the Secretary and the Alaska Railroad shall not, without the consent of the State and only in conformity with applicable law and the Memorandum of Understanding referred to in section 1205(b)(3) of this title—

(1) make or incur any obligation to make any individual capital expenditure of money from the Alaska Railroad Revolving Fund in excess of $300,000;

(2) (except as required by law) sell, exchange, give, or otherwise transfer any real property included in the rail properties of the Alaska Railroad; or

(3) lease any rail property of the Alaska Railroad for a term in excess of five years.

(c) Format for accounting practices and systems

Prior to transfer of the rail properties of the Alaska Railroad to the State, the Alaska Railroad's accounting practices and systems shall be capable of reporting data to the Interstate Commerce Commission in formats required of comparable rail carriers subject to the jurisdiction of the Interstate Commerce Commission.

(d) Fair market value; determination, terms and conditions, etc.

(1) Within nine months after January 14, 1983, the United States Railway Association (hereinafter in this section referred to as the "Association") shall determine the fair market value of the Alaska Railroad under the terms and conditions of this chapter, applying such procedures, methods and standards as are generally accepted as normal and common practice. Such determination shall include an appraisal of the real and personal property to be transferred to the State pursuant to this chapter. Such appraisal by the Association shall be conducted in the usual manner in accordance with generally accepted industry standards, and shall consider the current fair market value and potential future value if used in whole or in part for other purposes. The Association shall take into account all obligations imposed by this chapter and other applicable law upon operation and ownership of the State-owned railroad. In making such determination, the Association shall use to the maximum extent practicable all relevant data and information, including, if relevant, that contained in the report prepared pursuant to subsection (a) of this section.

(2) The determination made pursuant to paragraph (1) of this subsection shall not be construed to affect, enlarge, modify, or diminish any inventory, valuation, or classification required by the Interstate Commerce

Commission pursuant to subchapter V of chapter 107 of Title 49.

§ 1205. Lands to be transferred

(a) Availability of lands among rail properties

Lands among the rail properties of the Alaska Railroad shall not be—

(1) available for selection under section 12 of the Act of January 2, 1976, as amended (43 U.S.C. 1611, note), subject to the exception contained in section 12(b)(8)(i)(D) of such Act, as amended by subsection (d)(5) of this section;

(2) available for conveyance under section 1425 of the Alaska National Interest Lands Conservation Act (Public Law 96-487; 94 Stat. 2515);

(3) available for conveyance to Chugach Natives, Inc., under sections 1429 or 1430 of the Alaska National Interest Lands Conservation Act (Public Law 96-487; 94 Stat. 2531) or under sections 12(c) or 14(h)(8) of the Alaska Native Claims Settlement Act (43 U.S.C. 1611(c) and 1613(h)(8), respectively); or

(4) available under any law or regulation for entry, location, or for exchange by the United States, or for the initiation of a claim or selection by any party other than the State or other transferee under this chapter, except that this paragraph shall not prevent a conveyance pursuant to section 12(b)(8)(i)(D) of the Act of January 2, 1976 (43 U.S.C. 1611, note), as amended by subsection (d)(5) of this section.

(b) Review and settlement of claims; administrative adjudication; management of lands; procedures applicable

(1)

(A) During the ten months following January 14, 1983, so far as practicable consistent with the priority of preparing the report required pursuant to section 1204(a) of this title, the Secretary of the Interior, Village Corporations with claims of valid existing rights, and the State shall review and make a good faith effort to settle as many of the claims as possible. Any agreement to settle such claims shall take effect and bind the United States, the State, and the Village Corporation only as of the date of transfer of the railroad.

(B) At the conclusion of the review and settlement process provided in subparagraph (A) of this paragraph, the Secretary of the Interior shall prepare a report identifying lands to be conveyed in accordance with settlement agreements under this chapter or applicable law. Such settlement shall not give rise to a presumption as to whether a parcel of land subject to such agreement is or is not public land.

(2) The Secretary of the Interior shall have the continuing jurisdiction and duty to adjudicate unresolved claims of valid existing rights pursuant to applicable law and this chapter.

The Secretary of the Interior shall complete the final administrative adjudication required under this subsection not later than three years after January 14, 1983, and shall complete the survey of all lands to be conveyed under this chapter not later than five years after January 14, 1983, and after consulting with the Governor of the State of Alaska to determine priority of survey with regard to other lands being processed for patent to the State. The Secretary of the Interior shall give priority to the adjudication of Village Corporation claims as required in this section. Upon completion of the review and settlement process required by paragraph (1)(A) of this subsection, with respect to lands not subject to an agreement under such paragraph, the Secretary of the Interior shall adjudicate which lands subject to claims of valid existing rights filed by Village Corporations, if any, are public lands and shall complete such final administrative adjudication within two years after January 14, 1983.

(3) Pending settlement or final administrative adjudication of claims of valid existing rights filed by Village Corporations prior to the date of transfer or while subject to the license granted to the State pursuant to section 1203(b)(1)(C) of this title, lands subject to such claims shall be managed in accordance with the Memorandum of Understanding among the Federal Railroad Administration, the State, Eklutna, Incorporated, Cook Inlet Region, Incorporated (as that term is used in section 12 of the Act of January 2, 1976 (Public Law 94-204; 89 Stat. 1150)), and Toghotthele Corporation, executed by authorized officers or representatives of each of these entities. Duplicate originals of the Memorandum of Understanding shall be maintained and made available for public inspection and copying in the Office of the Secretary, at Washington, District of Columbia, and in the Office of the Governor of the State of Alaska, at Juneau, Alaska.

(4) The following procedures and requirements are established to promote finality of administrative adjudication of claims of valid existing rights filed by Village Corporations, to clarify and simplify the title status of lands subject to such claims, and to avoid potential impairment of railroad operations resulting from joint or divided ownership in substantial segments of right-of-way:

(A)

(i) Prior to final administrative adjudication of Village Corporation claims of valid existing rights in land subject to the license granted under section 1203(b)(1)(C) of this title, the Secretary of the Interior may, notwithstanding any other provision of law, accept relinquishment of so much of such claims as involved lands within the right-of-way through execution of an agreement with the appropriate Village Corporation effective on or after the date of transfer. Upon such relinquishment, the interest of the United States in the right-of-way shall be conveyed to the State pursuant to section 1203(b)(1)(B) or (2) of this title.

(ii) With respect to a claim described in clause (i) of this subparagraph that is not settled or relinquished prior to final administrative adjudication, 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. Upon failure of the interested Village Corporation to relinquish so much of its claims as involve lands within the right-of-way prior to final adjudication of valid existing rights, the Secretary shall convey to the State pursuant to section 1203(b)(1)(B) or (2) of this title all right, title and interest of the United States in and to the right-of-way free and clear of such Village Corporation's claim to and interest in lands within such right-of-way.

(B) 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, the conveyance to the State of the Federal interest in such properties pursuant to section 1203(b)(1)(B) or (2) of this title shall grant not less than an exclusive-use easement in such properties. The foregoing requirements shall not be construed to permit the conveyance to the State of less than the entire Federal interest in the rail properties of the Alaska Railroad required to be conveyed by section 1203(b) of this title. If an action is commenced against the State or the United States contesting the validity or existence of a reservation of right-of-way for the use or benefit of the Alaska Railroad made prior to January 14, 1983, the Secretary of the Interior, through the Attorney General, shall appear in and defend such action.

(c) Judicial review; remedies available; standing of State

(1) The final administrative adjudication pursuant to subsection (b) of this section shall be final agency action and subject to judicial review only by an action brought in the United States District Court for the District of Alaska.

(2) No administrative or judicial action under this chapter shall enjoin or otherwise delay the transfer of the Alaska Railroad pursuant to this chapter, or substantially impair or impede the operations of the Alaska Railroad or the State-owned railroad.

(3) Before the date of transfer, the State shall have standing to participate in any administrative determination or judicial review pursuant to this chapter. If transfer to the State does not occur pursuant to section 1203 of this title, the State shall not thereafter have standing to participate in any such determination or review.

(d) Omitted

(e) Liability of State for damage to land while used under license

The State shall be liable to a party receiving a conveyance of land among the rail properties of the Alaska Railroad subject to the license granted pursuant to section 1203(b)(1)(C) of this title for damage resulting from use by the State of the land under such license in a manner not authorized by such license.

§ 1206. Employees of Alaska Railroad

(a) Coverage under Federal civil service retirement laws; election, funding, nature of benefits, etc., for employees transferring to State-owned railroad; voluntary separation incentives

(1) Any employees who elect to transfer to the State-owned railroad and who on the day before the date of transfer are subject to the civil service retirement law (subchapter III of chapter 83 of Title 5) shall, so long as continually employed by the State-owned railroad without a break in service, continue to be subject to such law, except that the State-owned railroad shall have the option of providing benefits in accordance with the provisions of paragraph (2) of this subsection. Employment by the State-owned railroad without a break in continuity of service shall be considered to be employment by the United States Government for purposes of subchapter III of chapter 83 of Title 5. The State-owned railroad shall be the employing agency for purposes of section 8334(a) of Title 5 and shall contribute to the Civil Service Retirement and Disability Fund a sum as provided by such section, except that such sum shall be determined by applying to the total basic pay (as defined in section 8331(3) of Title 5) paid to the employees of the State-owned railroad who are covered by the civil service retirement law, the per centum rate determined annually by the Director of the Office of Personnel Management to be the excess of the total normal cost per centum rate of the civil service retirement system over the employee deduction rate specified in section 8334(a) of Title 5. The State-owned railroad shall pay into the Federal Civil Service Retirement and Disability Fund that portion of the cost of administration of such Fund which is demonstrated by the Director of the Office of Personnel Management to be attributable to its employees.

(2) At any time during the two-year period commencing on the date of transfer, the State-owned railroad shall have the option of providing to transferred employees retirement benefits, reflecting prior Federal service, in or substantially equivalent to benefits under the retirement program maintained by the State for State employees. If the State decides to provide benefits under this paragraph, the State shall provide such benefits to all transferred employees, except those employees who will meet the age and service requirements for retirement under section 8336(a), (b), (c) or (f) of Title 5 within five years after the date of transfer and who elect to remain participants in the Federal retirement program.

(3) If the State provides benefits under paragraph (2) of this subsection—

> **(A)** the provisions of paragraph (1) of this subsection regarding payments into the Civil Service Retirement and Disability Fund for those employees who are transferred to the State program shall have no further force and effect (other than for employees who will meet the age and service requirements for retirement under section 8336(a), (b), (c) or (f) of Title 5 within five years after the date of transfer and who elect to remain participants in the Federal retirement program); and
>
> **(B)** all of the accrued employee and employer contributions and accrued interest on such contributions made by and on behalf of the transferred employees during their prior Federal service (other than amounts for employees who will meet the age and service requirements for retirement under section 8336(a), (b), (c) or (f) of Title 5 within five years after the date of

transfer and who elect to remain participants in the Federal retirement program) shall be withdrawn from the Federal Civil Service Retirement and Disability Fund and shall be paid into the retirement fund utilized by the State-owned railroad for the transferred employees, in accordance with the provisions of paragraph (2) of this subsection. Upon such payment, credit for prior Federal service under the Federal civil service retirement system shall be forever barred, notwithstanding the provisions of section 8334 of Title 5.

(4)

(A) The State-owned railroad shall be included in the definition of "agency" for purposes of section 3(a), (b), (c), and (e) of the Federal Workforce Restructuring Act of 1994 and may elect to participate in the voluntary separation incentive program established under such Act. Any employee of the State-owned railroad who meets the qualifications as described under the first sentence of paragraph (1) shall be deemed an employee under such Act.

(B) An employee who has received a voluntary separation incentive payment under this paragraph and accepts employment with the State-owned railroad within 5 years after the date of separation on which payment of the incentive is based shall be required to repay the entire amount of the incentive payment unless the head of the State-owned railroad determines that the individual involved possesses unique abilities and is the only qualified applicant available for the position.

(b) Coverage for employees not transferring to State-owned railroad

Employees of the Alaska Railroad who do not transfer to the State-owned railroad shall be entitled to all of the rights and benefits available to them under Federal law for discontinued employees.

(c) Rights and benefits of transferred employees whose employment with State-owned railroad is terminated

Transferred employees whose employment with the State-owned railroad is terminated during the two-year period commencing on the date of transfer shall be entitled to all of the rights and benefits of discontinued employees that such employees would have had under Federal law if their termination had occurred immediately before the date of the transfer, except that financial compensation paid to officers of the Alaska Railroad shall be limited to that compensation provided pursuant to section 1203(d)(3)(E) of this title. Such employees shall also be entitled to seniority and other benefits accrued under Federal law while they were employed by the State-owned railroad on the same basis as if such employment had been Federal service.

(d) Lump-sum payment for unused annual leave for employees transferring to State-owned railroad

Any employee who transfers to the State-owned railroad under this chapter shall not be entitled to lump-sum payment for unused annual leave under section 5551 of Title 5, but shall be credited by the State with the unused annual leave balance at the time of transfer.

(e) Continued coverage for certain employees and annuitants in Federal health benefits plans and life insurance plans

(1) Any person described under the provisions of paragraph (2) may elect life insurance coverage under chapter 87 of Title 5 and enroll in a health benefits plan under chapter 89 of Title 5 in accordance with the provisions of this subsection.

(2) The provisions of paragraph (1) shall apply to any person who—

(A) on March 30, 1994, is an employee of the State-owned railroad;

(B) has 20 years or more of service (in the civil service as a Federal employee or as an employee of the State-owned railroad, combined) on the date of retirement from the State-owned railroad; and

(C)

(i) was covered under a life insurance policy pursuant to chapter 87 of Title 5 on January 4, 1985, for the purpose of electing life insurance coverage under the provisions of paragraph (1); or

(ii) was enrolled in a health benefits plan pursuant to chapter 89 of Title 5 on January 4, 1985, for the purpose of enrolling in a health benefits plan under the provisions of paragraph (1).

(3) For purposes of this section, any person described under the provisions of paragraph (2) shall be deemed to have been covered under a life insurance policy under chapter 87 of Title 5 and to have been enrolled in a health benefits plan under chapter 89 of Title 5 during the period beginning on January 5, 1985, through the date of retirement of any such person.

(4) The provisions of paragraph (1) shall not apply to any person described under paragraph (2) until the date such person retires from the State-owned railroad.

§ 1207. State operation

(a) Laws, authorities, etc., applicable to State-owned railroad with status as rail carrier engaged in interstate and foreign commerce

(1) After the date of transfer to the State pursuant to section 1203 of this title, the State-owned railroad shall be a rail carrier engaged in interstate and foreign commerce subject to part A of subtitle IV of Title 49 and all other Acts applicable to rail carriers subject to that chapter, including the antitrust laws of the United States, except, so long as it is an instrumentality of the State of Alaska, the Railroad Retirement Act of 1974 (45 U.S.C. 231 et seq.), the Railroad Retirement Tax Act (26 U.S.C. 3201 et seq.), the Railway Labor Act (45 U.S.C. 151 et seq.), the Act of April 22, 1908 (45 U.S.C. 51 et seq.) (popularly referred to as the "Federal Employers' Liability Act"), and the Railroad Unemployment Insurance Act (45 U.S.C. 351 et seq.). Nothing in this chapter shall preclude the State from explicitly invoking by law any exemption from the antitrust laws as may otherwise be available.

(2) The transfer to the State authorized by section 1203 of this title and the conferral of jurisdiction to the Interstate Commerce Commission pursuant to paragraph (1) of this subsection are intended to confer upon the State-owned railroad all business opportunities available to comparable railroads, including contract rate agreements meeting the requirements of section 10713 of Title 49, notwithstanding any participation in such agreements by connecting water carriers.

(3) All memoranda which sanction non-compliance with Federal railroad safety regulations contained in 49 CFR Parts 209–236, and which are in effect on the date of transfer, shall continue in effect according to their terms as "waivers of compliance" (as that term is used in section 20103(d) of Title 49).

(4) The operation of trains by the State-owned railroad shall not be subject to the requirement of any State or local law which specifies the minimum number of crew members which must be employed in connection with the operation of such trains.

(5) Revenues generated by the State-owned railroad, including any amount appropriated or otherwise made available to the State-owned railroad, shall be retained and managed by the State-owned railroad for railroad and related purposes.

(6)

> **(A)** After the date of transfer, continued operation of the Alaska Railroad by a public corporation, authority or other agency of the State shall be deemed to be an exercise of an essential governmental function, and revenue derived from such operation shall be deemed to accrue to the State for the purposes of section 115(a)(1) of Title 26. Obligations issued by such entity shall also be deemed obligations of the State for the purposes of section 103(a)(1) of Title 26, but not obligations within the meaning of section 103(b)(2) of Title 26.
>
> **(B)** Nothing in this chapter shall be deemed or construed to affect customary tax treatment of private investment in the equipment or other assets that are used or owned by the State-owned railroad.

(b) Procedures for issuance of certificate of public convenience and necessity; inventory, valuation, or classification of property; additional laws, authorities, etc., applicable

As soon as practicable after January 14, 1983, the Interstate Commerce Commission shall promulgate an expedited, modified procedure for providing on the date of transfer a certificate of public convenience and necessity to the State-owned railroad. No inventory, valuation, or classification of property owned or used by the State-owned railroad pursuant to subchapter V of chapter 107 of Title 49 shall be required during the two-year period after the date of transfer. The provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and section 382(b) of the Energy Policy and Conservation Act (42 U.S.C. 6362(b)) shall not apply to actions of the Commission under this subsection.

(c) Eligibility for participation in Federal railroad assistance programs

The State-owned railroad shall be eligible to participate in all Federal railroad assistance programs on a basis equal to that of other rail carriers subject to part A of subtitle IV of Title 49.

(d) Laws and regulations applicable to National Forest and Park lands; limitations on Federal actions

After the date of transfer to the State pursuant to section 1203 of this title, the portion of the rail properties within the boundaries of the Chugach National Forest and the exclusive-use easement within the boundaries of the Denali National Park and Preserve shall be subject to laws and regulations for the protection of forest and park values. The right to fence the exclusive-use easement within Denali National Park and Preserve shall be subject to the concurrence of the Secretary of the Interior. The Secretary of the Interior, or the Secretary of Agriculture where appropriate, shall not act pursuant to this subsection without consulting with the Governor of the State of Alaska or in such a manner as to unreasonably interfere with continued or expanded operations and support functions authorized under this chapter.

(e) Preservation and protection of rail properties

The State-owned railroad may take any necessary or appropriate action, consistent with Federal railroad safety laws, to preserve and protect its rail properties in the interests of safety.

§ 1208. Future rights-of-way

(a) Access across Federal lands; application approval

After January 14, 1983, the State or State-owned railroad may request the Secretary of the Interior or the Secretary of Agriculture, as appropriate under law, to expeditiously approve an application for a right-of-way in order that the Alaska Railroad or State-owned railroad may have access across Federal lands for transportation and related purposes. The State or State-owned railroad may also apply for a lease, permit, or conveyance of any necessary or convenient terminal and station grounds and material sites in the vicinity of the right-of-way for which an application has been submitted.

(b) Consultative requirements prior to approval of application; conformance of rights-of-way, etc.

Before approving a right-of-way application described in subsection (a) of this section, the Secretary of the Interior or the Secretary of Agriculture, as appropriate, shall consult with the Secretary. Approval of an application for a right-of-way, permit, lease, or conveyance described in subsection (a) of this section shall be pursuant to applicable law. Rights-of-way, grounds, and sites granted pursuant to this section and other applicable law shall conform, to the extent possible, to the standards provided in the Act of March 12, 1914 (43 U.S.C. 975 et seq.) and section 1202(6) of this title. Such conformance shall not be affected by the repeal of such Act under section 615 of this title.

(c) *Reversion to the United States* (Repealed. Pub.L. 108-7, Div. I, Title III, § 345(5), 117 Stat. 418 (Feb. 20, 2003)).

Reversion to the United States of any portion of any right-of-way or exclusive-use easement granted to the State or State-owned railroad shall occur only as provided in section 1209 of this title. For purposes of such section, the date of the approval of any such right-of-way shall be deemed the "date of transfer."

§ 1209 Reversion

(Repealed. Pub.L. 108-7, Div. I, Title III, § 345(5), 117 Stat. 418 (Feb. 20, 2003))

(a) Reversion or payment to Federal Government for conversion to use preventing State-owned railroad from continuing to operate

If, within ten years after the date of transfer to the State authorized by section 1203 of this title, the Secretary finds that all or part of the real property transferred to the State under this chapter, except that portion of real property which lies within the boundaries of the Denali National Park and Preserve, is converted to a use that would prevent the State-owned railroad from continuing to operate, that real property (including permanent improvements to the property) shall revert to the United States Government, or (at the option of the State) the State shall pay to the United States Government an amount determined to be the fair market value of that property at the time its conversion prevents continued operation of the railroad.

(b) Reversion upon discontinuance by State of use of any land within right-of-way; criteria for discontinuance

If, after the date of transfer pursuant to section 1203 of this title, the State discontinues use of any land within the right-of-way, the State's interest in such land shall revert to the United States. The State shall be considered to have discontinued use within the meaning of this subsection and subsection (d) of this section when:

(1) the Governor of the State of Alaska delivers to the Secretary of the Interior a notice of such discontinuance, including a legal description of the property subject to the notice, and a quitclaim deed thereto; or

(2) the State has made no use of the land for a continuous period of eighteen years for transportation, communication, or transmission purposes. Notice of such discontinuance shall promptly be published in the Federal Register by the Secretary, the Secretary of the Interior, or the Secretary of Agriculture, and reversion shall be effected one year after such notice, unless within such one-year period the State brings an appropriate action in the United States District Court for the District of Alaska to establish that the use has been continuing without an eighteen-year lapse. Any such action shall have the effect of staying reversion until exhaustion of appellate review from the final judgment in that action or termination of the right to seek such review, whichever first occurs.

(c) Conveyances by United States subsequent to reversion

Upon such reversion pursuant to subsection (b) of this section, the Secretary of the Interior shall immediately convey by patent to abutting landowners all right, title and interest of the United States. Where land abutting the reverted right-of-way is owned by different persons or entities, the conveyance made pursuant to this subsection shall extend the property of each abutting owner to the centerline of the right-of-way.

(d) Discontinuance by State of use of national park or forest lands; jurisdiction upon reversion

If use is discontinued (as that term is used in subsection (b) of this section) of all or part of those properties of the Alaska Railroad transferred to the State pursuant to this chapter which lie within the boundaries of the Denali National Park and Preserve or the Chugach National Forest, such properties or part thereof (including permanent improvements to the property) shall revert to the United States and shall not be subject to subsection (c) of this section. Upon such reversion, jurisdiction over that property shall be transferred to the Secretary of the Interior or the Secretary of Agriculture, as appropriate, for administration as part of the Denali National Park and Preserve or the Chugach National Forest.

(e) Payment into Treasury of United States of excess proceeds from sale or transfer of all or substantially all of State-owned railroad; limitations

Except as provided in subsections (a) through (d) of this section, if, within five years after the date of transfer to the State pursuant to section 1203 of this title, the State sells or transfers all or substantially all of the State-owned railroad to an entity other than an instrumentality of the State, the proceeds from the sale or transfer that exceed the cost of any rehabilitation and improvement made by the State for the State-owned railroad and any net liabilities incurred by the State for the State-owned railroad shall be paid into the general fund of the Treasury of the United States.

(f) Enforcement by Attorney General

The Attorney General, upon the request of the Secretary, the Secretary of the Interior, or the Secretary of Agriculture, shall institute appropriate proceedings to enforce this section in the United States District Court for the District of Alaska

§ 1210. Other disposition

If the Secretary has not certified that the State has satisfied the conditions under section 1203 of this title within one year after the date of delivery of the report referred to in section 1204(a) of this title, the Secretary may dispose of the rail properties of the Alaska Railroad. Any disposal under this section shall give preference to a buyer or transferee who will continue to operate rail service, except that—

> **(1)** such preference shall not diminish or modify the rights of the Cook Inlet Region, Incorporated (as that term is used in section 12 of the Act of January 2, 1976 (Public Law 94-204; 89 Stat. 1150)), pursuant to such section, as amended by section 606(d) of this title; and
>
> **(2)** this section shall not be construed to diminish or modify the powers of consent of the Secretary or the State under section 12(b)(8) of such Act, as amended by section 606(d)(5) of this title.

Any disposal under this section shall be subject to valid existing rights.

§ 1211. Denali National Park and Preserve lands

On the date of transfer to the State (pursuant to section 1203 of this title) or other disposition (pursuant to section 1210 of this title), that portion of rail properties of the Alaska Railroad within the Denali National Park and Preserve shall, subject to the exclusive-use easement granted pursuant to section 1203(b)(1)(D) of this title, be transferred to the Secretary of the Interior for administration as part of the Denali National Park and Preserve, except that a transferee under section 1210 of this title shall receive the same interest as the State under section 1203(b)(1)(D) of this title.

§ 1212. Applicability of other laws

(a) Actions subject to other laws

The provisions of chapter 5 of Title 5 (popularly known as the Administrative Procedure Act, and including provisions popularly known as the Government in the Sunshine Act), chapter 10 of Title 5, division A of subtitle III of Title 54, section 303 of Title 49, and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall not apply to actions taken pursuant to this chapter, except to the extent that such laws may be applicable to granting of rights-of-way under section 1208 of this title.

(b) Federal surplus property disposal; withdrawal or reservation of land for use of Alaska Railroad

The enactment of this chapter, actions taken during the transition period as provided in section 1204 of this title, and transfer of the rail properties of the Alaska Railroad under authority of this chapter shall be deemed not to be the disposal of Federal surplus property under sections 541 to 555 of Title 40 or the Act of October 3, 1944, popularly referred to as the "Surplus Property Act of 1944" (50 U.S.C.App. 1622). Such events shall not constitute or cause the revocation of any prior withdrawal or reservation of land for the use of the Alaska Railroad under the Act of March 12, 1914 (43 U.S.C. 975 et seq.), the Alaska Statehood Act (note preceding 48 U.S.C. 21), the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), the Act of January 2, 1976 (Public Law 94-204; 89 Stat. 1145), the Alaska National Interest Lands Conservation Act (Public Law 96-487; 94 Stat. 2371), and the general land and land management laws of the United States.

(c) Ceiling on Government contributions for Federal employees health benefits insurance premiums

Beginning on January 14, 1983, the ceiling on Government contributions for Federal employees health benefits insurance premiums under section 8906(b)(2) of Title 5 shall not apply to the Alaska Railroad.

(d) Acreage entitlement of State or Native Corporation

Nothing in this chapter is intended to enlarge or diminish the acreage entitlement of the State or any Native Corporation pursuant to existing law.

(e) Judgments involving interests, etc., of Native Corporations

With respect to interests of Native Corporations under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) and the Alaska National Interest Lands

Conservation Act (16 U.S.C. 3101 et seq.), except as provided in this chapter, nothing contained in this chapter shall be construed to deny, enlarge, grant, impair, or otherwise affect any judgment heretofore entered in a court of competent jurisdiction, or valid existing right or claim of valid existing right.

§ 1213. Conflict with other laws

The provisions of this chapter shall govern if there is any conflict between this chapter and any other law.

§ 1214. Separability

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

Anchorage 012525

4–1040
(October 1948)

The United States of America

To all to whom these presents shall come, Greeting:

WHEREAS, a Certificate of the District Land Office at Anchorage, Alaska, is now deposited in the Bureau of Land Management, whereby it appears that pursuant to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of Thomas W. Sperstad has been established and duly consummated, in conformity to law for the following described land:

Seaward Meridian, Alaska

T. 12 N., R. 3 W.
Sec. 29, W½NW¼;
Sec. 30, SE¼NE¼.

The area described contains 120 acres, according to the Official Plat of the Survey of the said Land, on file in the Bureau of Land Management:

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said claimant the tract of Land above described; TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued 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; and there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States. 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). Excepting and reserving, however, 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). Excepting and reserving, however, to the United States, pursuant to the provisions of the Act of August 1, 1946 (60 Stat. 755) all uranium, thorium or any other material which is or may be determined to be peculiarly essential to the production of fissionable materials, whether or not of commercial value, together with the right of the United States through its authorized agents or representatives at any time to enter upon the land and prospect for, mine, and remove the same. And there is reserved from the lands hereby granted, a right of way thereon for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under authority of the United States or of any State created out of the Territory of Alaska, in accordance with the Act of July 24, 1947 (61 Stat., 418)

IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat., 476), has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.

[SEAL]

GIVEN under my hand, in the District of Columbia, the FIFTEENTH day of FEBRUARY in the year of our Lord one thousand nine hundred and FIFTY and of the Independence of the United States the one hundred and SEVENTY-FOURTH.

For the Director, Bureau of Land Management.

Patent No. 1128320

By /s/ Jas. F. Homer
Chief, Patents Section