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Please review & comment through Lynn Hurnisch.

| NORTHERN REGION           |    |
|---------------------------|----|
| Regional Director         |    |
| DCC Director              | cc |
| Planning & Research Chief |    |
| Adm. Serv. Officer        | cc |
| MPO Director              |    |
| Legat                     |    |
| Sci                       |    |
| Western Dir. Norms        |    |
| REGION                    |    |

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THESE MATERIALS 7/23 WERE PROVIDED BY MIKE PEN FOLD ON 7/21. WE ASKED & RECEIVED AN OK TO REVIEW & COMMENT ON POLICY DOCUMENT. EMPHASIS SHOULD BE ON CLARITY IN LANGUAGE ON POINTS WE AGREE ON - THERE'S NOT A LOT OF MANEUVERING ROOM IN ALASKA ON POINTS OF DIS-AGREEMENTS. PLS. REVIEW & PROVIDE COMMENTS TO ME BY 7/27. WE'LL BE SITTING DOWN WITH BLM ON TUES. OR WED. FOR A LAST SHOT. IN ADDITION, I WOULD LIKE COMMENTS ON PROPOSED MOU/PROCESS BY 8/3. THANKS.

MARK HICKEY

DRAFT

Revised July 16, 1987

## ALASKA FEDERAL AGENCY RS 2477 POLICY

Bureau of Land Management, National Park Service,  
Fish and Wildlife Service, and Forest Service

Since the passage of the Alaska National Interest Lands Conservation Act (ANILCA), RS 2477 rights-of-way have become a major issue in the State of Alaska. These rights-of-way provide proscribed legal access across Federal lands. A uniform understanding of the rights granted by this law, as it pertains to federal lands, is the goal of this policy paper. This paper is intended to assist both the Federal land managers and the public with access related questions.

RS 2477 was only one of many authorities which provided for access across Federal lands. Some authorities are available to all the agencies, i.e., Title XI of ANILCA, while others apply to only one or two agencies, i.e., both the Bureau of Land Management (BLM) and Forest Service may use Title V of the Federal Land Policy and Management Act. All agencies also have permitting authorities relating to access.

The RS 2477 grant was unique among these access authorities. It was a congressional grant which did not require any action on the part of a Federal agency. While the grant was "offered" by Congress, a right could not come into existence until there was an "acceptance" of the offer and thereby a contract was completed. The scope of the congressional offer is defined by Federal law. The acceptance was by a State, instrumentality of the State, or public user(s) and is defined by State law only to the degree the acceptance is within the scope of the Federal offer, i.e., the rights accepted could not

exceed those offered. These unique features of RS 2477 have led to varying interpretations of both the grant and acceptance and the relationship of the Federal land manager to RS 2477 right-of-way claims. Only limited Federal case law is available for guidance to Federal land managers. Most judicial opinions have been from State courts where the Federal government was not a party to the lawsuit and which are not binding on the Federal government. The following policy statements are intended to eliminate some key areas of confusion.

Revised Statute 2477

The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted. (Section 8 of the Act of July 26, 1866; RS 2477, 43 U.S.C. 932; repealed October 21, 1976, 90 Stat. 2793.)

1. An RS 2477 right could only have been created on unreserved public lands; withdrawn, appropriated, or reserved lands were not available. December 14, 1968, the date withdrawal application for Public Land Order 4582 was posted to the Miscellaneous Documents Index of the BLM Master Title Plats, is the date all lands became reserved in Alaska. Generally, no RS 2477 grants could have been accepted after this date. Many areas were withdrawn from "unreserved public lands" status prior to December 14, 1968, for example, National Forest lands were withdrawn between 1906 and 1923, Clarence Rhode National Wildlife Refuge was withdrawn in 1960, Mt. McKinley National Park was withdrawn in 1917, and other lands were segregated by settlement entries. When researching an RS 2477

right-of-way claim, the BLM Master Title Plats and the managing agency's land status records must be examined to determine the exact date(s) lands crossed by the claimed RS 2477 right-of-way were unreserved public lands.

2. Federal agencies may administratively recognize RS 2477 claims for management purposes; however, only a Federal court can ultimately determine the validity of an RS 2477 which crosses Federal land.
3. A potential RS 2477 must meet the following criteria:
  - A. The highway was located over unreserved public lands, and
  - B. There was actual construction which created a highway.
    - (1) Construction, including sufficient actual use to amount to construction, must have taken place while the lands were unreserved public lands.
    - (2) As a minimum, there must have been sufficient "construction" to allow passage of persons, animals or vehicles for which the highway was established.
    - (3) The passage of a Territorial or State law does not constitute construction. Therefore, a section line designation that had not been constructed or used while the lands were unreserved public lands is not valid under RS 2477.

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C. The constructed highway must have been a public highway. A public highway is:

a travel or transportation route typical of that locale at the time the grant was accepted;

(2) freely open to everyone; and

accepted by either a positive act on the part of the appropriate public authorities of the State clearly manifesting their intention to designate the highway as a public highway or there must have been public use for such period or time and under such conditions as to constitute a public highway.

4. An RS 2477 grant is:

A. an easement over the land;

B. for vehicular, animal, or pedestrian travel; not for pipelines, powerlines, telephone or other communication facilities, and

C. a specific width. It is not a transportation corridor

5. The width of an RS 2477 right-of-way is that width necessary to accommodate the uses common to that right-of-way, variously defined as the area actually used, ditch to ditch, or the constructed area. The Federal Government's position is that the State's April 6, 1963, law (AS

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19.10.015) does not apply to Federal lands, because a State law cannot define the Federal offer.

6. Public Land Order (PLO) 601 and other similar PLOs, Executive Orders and Secretarial Orders apply to roads established or maintained under the jurisdiction of the Secretary of the Interior. RS 2477 rights were not established or maintained under the authority of the Secretary and, therefore, the widths mentioned in these orders do not apply to RS 2477 rights-of-way.
7. Abandonment of an RS 2477 right-of-way that has been determined valid in Federal court requires formal vacation by the governmental entity possessing the authority to take that action, usually the State or borough. Non-use by itself is not sufficient grounds for abandonment of a valid right-of-way.
8. Although RS 2477 was repealed on October 21, 1976, there is no time limit to come forward with a claim to an RS 2477 right-of-way so long as the action(s) constituting the acceptance of the grant took place prior to repeal of the law and prior to withdrawal, appropriation or reservation of the land.
9. All Federal agencies have legal authority to regulate uses on RS 2477 rights-of-way. The extent of that authority is governed by the regulations of the individual agency whose lands the rights-of-way crosses.

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State Director  
Bureau of Land Management

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Regional Director  
U.S. Fish and Wildlife Service

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Regional Forester  
Forest Service, USDA

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Regional Director  
National Park Service

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POTENTIAL NEXT STEPS IN STATE-FEDERAL COOPERATIVE PROJECT ON RS2477

Convene RS-2477 work group to consider Memorandum of Understanding (MOU) on process as soon as possible. (Hopefully 1 or 2 meetings at the most).

Finalize MOU and get signed.

Each agency must, of course, develop their own internal procedures.

Discuss if we have significant enough legal issues on RS2477 to find a test case

Work together to develop a comprehensive handbook for citizens on access. This could possibly be an Alaska Land Use Council activity.

Public meetings and/or work shops might be appropriate

Identify an area to conduct comprehensive transportation planning.

Could be State or Federal lead depending on the area but it would be a cooperative effort between Federal, State and local governments in any case

Develop an affordable State-Federal road construction program based on good transportation planning.

- Bodlen  
 - Hankins  
 - Roberts  
 - DOT/PF

} Work Group?



DRAFT - FROM BLM  
PROPOSED MOU

WHEREAS: The Bureau of Land Management (BLM), National Park Service (NPS), Fish and Wildlife Service (FWS) and the Forest Service (FS), Federal land managing agencies in Alaska, have developed an Alaska Federal Agency RS 2477 Policy paper to provide a uniform understanding of the rights granted by RS 2477 as it pertains to federal land; and

WHEREAS: The Alaska Department of Natural Resources (DNR) and the Alaska Department of Transportation and Public Facilities (DOT/PP) has developed a RS 2477 Rights-of-Way Policy and Procedures paper to implement coordinated statewide procedures that better define and establish state goals and responsibilities pertaining to the identification and validation of previously established rights-of-way for historic roads and trails in Alaska under RS 2477; and

WHEREAS: The Federal and State agencies desire to establish the procedures for the assertion of RS 2477 rights-of-way by DNR and DOT/PP for acceptance and recognition by BLM, FWS, NPS AND FS.

THEREFORE: This Memorandum of Understanding (MOU) will establish the procedures by which the DNR and DOT/PP will assert claims of RS 2477 rights-of-way and BLM, NPS, FWS and FS will accept and place the recognized claim on their respective status plats.

Policies and Procedures

DNR and DOT/PP each have specific statewide public access responsibilities, which include RS 2477 ROW's.

For purpose of state RS 2477 ROW decisions, DNR shall be responsible for those claims not part of the designated state or federal-aid highway system and DOT/PF shall be responsible for all existing and proposed state or federal-aid highway system ROW's and claims associated with future state transportation system needs.

When DNR or DOT/PF have made a determination that an assertion of an RS 2477 should be made to a Federal agency signatory to this MOU, the following shall be submitted:

1. Identification and description of the land involved;
2. Periods of time when the land was "unreserved public land";
3. Identification of any positive acts on the part of the public authorities clearly manifesting an intention to accept the grant;
4. Evidence of public use for such time and under such conditions to prove that the grant was accepted; and
5. As a minimum, a 1:63360 scale USGS map showing the location of the RS 2477 right-of-way.

Assertions shall be filed with the Federal agency and office which manages the land over which the RS 2477 is claimed. The agency addresses are attached as Appendix I.

Upon receipt of an assertion the Federal agency will:

1. Determine that the assertion has been filed in the proper office. If not, the assertion will be forwarded to the proper agency office for review;
2. Assign a serial or control number and establish a case file for tracking and notation purposes;
3. Review the information and documents submitted, including the maps, applying the criteria contained, in the Alaska Federal Agency RS 2477 Policy;
4. If the assertion meets the criteria and contains sufficient description for plotting, the Federal agency will acknowledge the assertion by letter stating that the claim has been administratively recognized; and
5. Plot each recognized RS 2477 right-of-way on their respective status plats.

If the assertion does not meet the established Federal criteria, the appropriate Federal agency shall prepare a letter to the asserting State agency stating that the assertion will not be administratively recognized, giving the reasons for deficiency in meeting the criteria

Nothing in this MOU shall obligate any party to the expenditure of funds, or for future payments of money, in excess of appropriations authorized by law.

Nothing herein is intended to conflict with Federal, State or local law or regulation. If there are conflicts, this agreement will be amended as soon as practical to bring it into conformance with conflicting law or regulation.

This MOU is effective on the date signed by the last authorized representative of the agencies and shall continue in force and effect until terminated by mutual consent.

Federal Agencies

State Agencies

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Regional Director, National Park  
Service

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Commissioner, Department of  
Natural Resources

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Regional Director, US Fish and  
Wildlife Service

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Commissioner, Department of  
Transportation & Public Facilities

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State Director, Bureau of Land  
Management