

2.18
DEC 13 1985

BILL SHEFFIELD, GOVERNOR

Chief R/W Agent	SD
Administration	
Airports	
Appraisals	
✓ Engineering	
Materials	
Negotiations	
Pre-Audit	
Rein. & Prop. Mgt.	
Title	
Return to:	
File	

November 6, 1985

Dear Reviewer:

Attached for your review and comment is a draft RS 2477 Rights-Of-Way (ROW) Policy and Procedures document cooperatively prepared by the Department of Natural Resources (DNR) and the Department of Transportation and Public Facilities (DOT/PF).

The purpose of this document is to provide comprehensive and uniform policy and procedures for addressing potential RS 2477 historical roads and trails in Alaska by the two state agencies primarily responsible for this issue. Included in this document is a brief discussion of the general background and history of RS 2477 roads and trails, followed by procedures for state decisions related to assertion, validation, disclaimer of interest, vacation and arrangements for ensuring adequate agency and public notice and review. The document also identifies the roles and responsibilities of DNR and DOT/PF during the process and outlines management responsibilities, legal considerations and other related issues.

In addition to review by the general public, we are submitting this document to numerous affected parties and interest groups for comment, including the Alaska Land Use Council, the Alaska Land Use Advisors Committee, the Alaska Miners Association, the Senate and House Transportation and Resources Committees, the Alaska Federation of Natives, the Alaska Native Land Managers Association, the Resource Development Council, the Citizens Advisory Commission on Federal Lands, and environmental groups. DNR and DOT/PF will sponsor informal meetings in Anchorage and Fairbanks to discuss this document. The Anchorage meeting is scheduled for 10:00 AM on Tuesday, December 3rd in the DNR Commissioner's Conference Room, 12th Floor, Frontier Building at 36th and C Streets. The Fairbanks meeting is scheduled for 10:00 AM, Wednesday, December 4th in the DOT/PF Conference Room, Suite D, 600 University Plaza.

The formal comment period will close on January 6, 1986. Thereafter, we expect to adopt policies and procedures and begin implementation. It may be necessary to follow this effort with formal regulations implementing portions of this proposal. If that proves necessary, every effort will be made to do so as expeditiously as possible.

Reviewer
November 6, 1985
Page 2

If there are any questions regarding this material, please contact Mark Hickey at DOT/PF in Juneau (465-3900), or Gary Gustafson at DNR in Anchorage (762-4347). Written comments should be forwarded to Mr. Gustafson, Chief, Land Management, Division of Land and Water Management, Pouch 7-005, Anchorage, Alaska 99510.

Sincerely



R. J. Krapp, Commissioner
Department of Transportation
and Public Facilities



Esther C. Wunnicke, Commissioner
Department of Natural Resources

DRAFT

NOVEMBER 6, 1985 DRAFT

ALASKA DEPARTMENT OF NATURAL RESOURCES
ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

RS 2477 RIGHTS-OF-WAY POLICY AND PROCEDURES

I. Policy

The State of Alaska, acting through the Department of Natural Resources (DNR) and Department of Transportation and Public Facilities (DOT/PF), recognizes a need to develop and implement coordinated statewide procedures that better define and establish state goals and responsibilities pertaining to the identification and establishment of historical roads and trails in Alaska under federal Revised Statute RS) 2477.

Therefore, it is the policy of the state, as implemented by the procedures contained herein, to help promote public access opportunities, provide guidance to public and private officials with land resource and transportation management and planning decisions, ensure adequate public and agency participation in the state decision making process, respect private property rights and help resolve uncertainty over possible valid existing RS 2477 rights-of-way (ROW's) on public and private lands.

II. Background

Revised Statute 2477 (43 U.S.C. 932) was a federal law in effect from 1866 to October 21, 1976. It provided that

"The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

Alaska Supreme Court held in Hamerly v. Denton, 359 P. 2d 123 (1961) that before a RS 2477 ROW can be accepted as valid, there must be: a) proof that the route was located on unreserved public land; and b) either a positive act on the part of the appropriate public authorities (of the state or territory) clearly manifesting an intention to accept the grant, or public for such period of time and under such conditions as to prove that the grant was accepted.

In Girves v. Kenai Peninsula Borough, 536 P. 2d 1221 (1975) the Alaska Supreme Court held that enactment of AS 19.10.010 by the territorial legislature was a positive act manifesting the legislature's intent to accept the federal grant of right-of-way for the construction and use of highways over unreserved public lands on section ines

In April of 1974, the Alaska Department of Highways submitted the 1974 Existing Trail System Inventory to the Bureau of Land Management (BLM). This submission was a further documentation by the state of its intent to accept the grant for approximately 1400 possible RS 2477 ROW's statewide. However, this inventory was not intended to represent a comprehensive listing of all possible statewide RS 2477's. There may be other historical roads and trails in Alaska which qualify under the grant and which may eventually be identified and asserted by the state or another party

On September 28, 1984, DNR, DOT/PF and the BLM entered into a Memorandum of Understanding (MOU) which specified how the federal land status plats would be noted to identify the approximate location of possible RS 2477 ROW's in the Northern Region of Alaska. The MOU outlined a process whereby BLM would plot each possible RS 2477 ROW on federal master title plats, if in accord with specific criteria included in the BLM Manual (2801.24.B.1, Rel. 2-152). However, on November 28, 1984, BLM issued an Instructional Memorandum (No. 85-72) which stated that BLM would note RS 2477 assertions on its official land records only if it

administered the affected land. This decision significantly altered the original intent of the parties with respect to this MOU.

III. Responsibilities

DNR and DOT/PF each have specific statewide public access responsibilities, which include RS 2477 ROW's. However, DNR and DOT/PF recognize a need to more precisely articulate respective responsibilities for RS 2477 ROW identification, recognition and management.

A. Department of Natural Resources

DNR has broad public access responsibilities for state land and water pursuant to AS 38.04.050, 38.04.055, 38.05.035, 38.05.850 and 38.35.020. In addition, DNR is the designated state agency responsible for recommending public easement reservations to BLM in land conveyances to Native corporations, pursuant to Section 17(b) of ANCSA. DNR is also responsible for the reservation of public access easements on state and conveyed to boroughs and

municipalities under AS 29.18 and to private individuals under various state land disposal and lease programs.

For purposes of state RS 2477 ROW decisions, DNR shall be responsible for those claims not part of the designated state or federal-aid highway system (including trails where state management is considered likely or where alternative third-party management has been arranged through mutual agreement) or claims proposed as additions to the system. All proposed RS 2477 ROW decisions by DNR shall be reviewed in advance by DOT/PF.

B. Department of Transportation and Public Facilities

DOT/PF has broad statutory responsibilities to plan, design, construct and maintain modes of transportation and transportation facilities pursuant to AS 19.05.010, 19.05.030, 19.010.010-040, 44.42.020, and 44.42.050. This includes the specific responsibility to protect and preserve the rights-of-way and land holdings for the state's existing transportation systems includes federal-aid highways and to plan for and acquire rights-of-way for future state transportation needs. In addition, DOT/PF is the designated state agency responsible for rep-

resenting state interests under the transportation and utility system application and approval process in Title XI of the Alaska National Interest Lands Conservation Act (ANILCA).

For purposes of state RS 2477 ROW decisions, 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, including realignment of existing state facilities. All proposed RS 2477 ROW decisions by DOT/PF shall be reviewed in advance by DNR

C. Regional Offices

and DOT/PF each maintain departmental regional offices located in Anchorage, Fairbanks and Juneau. Although the geographical responsibilities of these offices are not identical, they generally correspond to the Central/Southcentral, Northern and Southeast portions of the state.

purposes of state RS 2477 ROW decisions, it is agreed by DNR and DOT/PF that their respective regional offices shall be responsible for receiving RS 2477 ROW claims and processing such claims in accord with the process specified in Section IV.

An RS 2477 ROW claim may be accepted by any DNR or DOT/PF regional office, which in accord with this section, will be responsible for processing a claim or forwarding such claim to the regional office having jurisdictional responsibility for the geographic area encompassing the potential RS 2477 ROW. If a claim should cross regional office jurisdictional boundaries, regional office responsible for the area traversed by the majority of the route shall assume the lead role for purposes of sequent state decisions.

Representatives from each DNR and DOT/PF regional office agree to meet as necessary with their counterparts to review all new RS 2477 ROW claims and clarify responsibilities for further processing in accord with this section and Section IV (below).

IV Procedures

The State of Alaska, acting through DNR or DOT/PF, will use the following procedures to guide future state assertion, disclaimer of interest or vacation decisions relative to possible RS 2477

ROW's. The state may also decide to delay or postpone a final decision if it is determined that insufficient information or evidence exists to fully document what otherwise appears to be a valid claim. The procedure involves preliminary review, written state best interest finding, public notice, comment, and final decision. Nothing in this policy statement shall affect the right of private citizens or other parties from independently asserting ROW's under RS 2477. A decision by the state to under-
an RS 2477 claim review is contingent upon the availability of sufficient funds and resources.

RS 2477 ROW assertion process is generally depicted on the chart attached as Figure 1 (page 9).

A. Preliminary Review

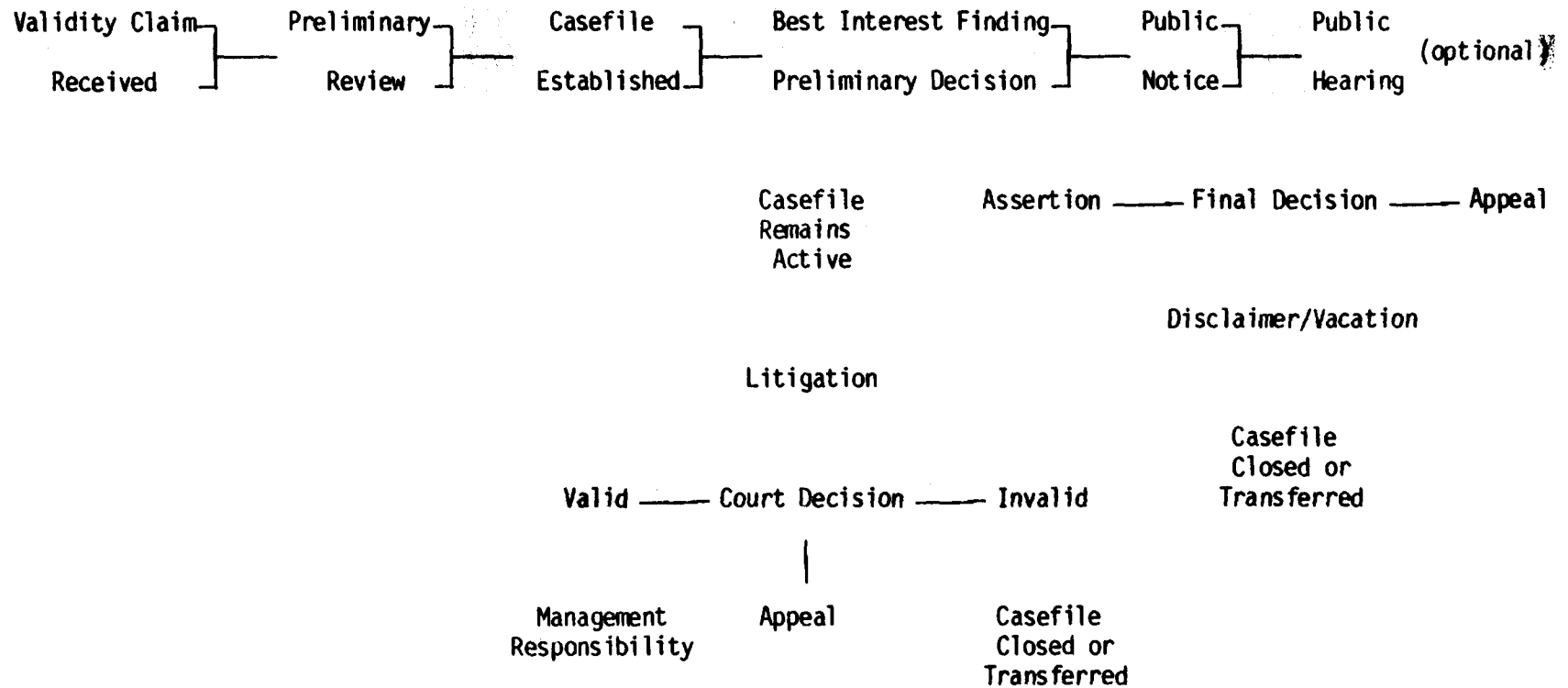
DNR and DOT/PF agree to comprehensively review and categorize the 1974 Existing Trail System Inventory and other available information regarding possible RS 2477 ROW's. The following steps will be used to perform this work:

FIGURE

FLOW CHART

STATE RS 2477 ROW ASSERTION PROCESS

(conducted by regional offices of DNR or DOT/PF)



1. Categorize all possible RS 2477 ROW's as "active" or "inactive" on the basis of historic purpose, evidence of prior public use, identification as section line easement availability of documentation, land title conflicts, etc
2. Assign responsibility to DNR or DOT/PF for potential RS 2477 ROW's included on the "active" list, in accord with Section III of this document.
3. Prioritize the "active" list for purposes of formal state assertion decisions, based upon documentation, public benefits and potential cost savings to the state.

A draft report will be issued and circulated by DNR and DOT/PF for public and agency review and comment. The report will then be finalized, and serve as the guide for subsequent DNR or DOT/PF actions pertaining to possible RS 2477 ROW's. DNR and DOT/PF agree to update this document as necessary, assuming the availability of sufficient funding and resources.

B. Assertions

The State of Alaska, acting through DNR or DOT/PF, may decide to formally assert the existence of RS 2477 ROW claims, using the results of the preliminary review process in Section IV.A. (above) as a guide. At least one of the following conditions must be present for the state to initiate a formal assertion review:

An RS 2477 ROW claim involves a portion of the designated state or federal-aid highway or trail system.

2. An RS 2477 ROW claim involves a portion of a right-of-way needed for future state transportation and access purposes, as identified in DNR's and DOT/PF's planning processes.
3. An RS 2477 ROW claim involves public access rights being curtailed or blocked by other parties.
4. A formal request has been made to pursue an RS 2477 assertion, or to vacate or disclaim an interest in a particular RS 2477 ROW claim.
5. An RS 2477 assertion is needed to preserve documentation of use and existence that might otherwise be lost.

6. An RS 2477 assertion enhances the state's legal position regarding RS 2477 ROW's

Following a determination that one or more of the above conditions are present, and in accord with the responsibilities established in Section III (above), the DNR or DOT/PF regional office shall immediately establish a casefile for the claim. This casefile shall subsequently become the administrative record used by the state as the basis for any future decisions. The regional office, working in concert with the DNR and/or DOT/PF central offices, shall then proceed to gather all available information concerning the route and prepare a written best interest finding and preliminary decision which shall address the below referenced criteria.

1. Identification of the land involved and the periods of time when it was "unreserved public land". In addition, identification of any positive acts on the part of the appropriate public authorities clearly manifesting an intention to accept the grant, or evidence of public use for such time and conditions to prove that the grant was accepted.

2. Identification of any reasonable, practical and legal alternative access which may be available to serve the intended purpose of the RS 2477 ROW (i.e., Omnibus Act Roads, ANCSA Section 17(b) easements).
3. Suitability of the route (i.e., grade, location) for the existing or proposed road, trail or other highway use.
4. Whether an RS 2477 ROW assertion is necessary to establish or confirm state ownership of an existing or proposed state maintained highway or trail (including realignment or extension).
5. Identification of the public benefits of the potential RS 2477 ROW, including but not limited to preservation of transportation system options, enhanced public use access for economic or recreational purposes, cost savings through avoidance of condemnation, negotiated purchase, land exchange or other more costly acquisition method
6. If the route will adversely affect the land management practices of the underlying and/or adjacent landowner, and

if so, what mitigating measures could be implemented to alleviate or eliminate any adverse impacts.

7. Identification of sufficient evidence to support a finding the the route qualifies as a valid RS 2477 ROW, such as the manner, type and frequency of public use, existence of the public records pertaining to the ROW, on-the-ground verification of the existence of the ROW and historical documentation (i.e., maps, newspaper/periodical references, Alaska Road Commission reports, treatises, etc.).

The best interest finding and preliminary decision shall then be referenced in a public notice to be issued by the regional office, consistent with the requirements of AS 38.05.945. This process entails distribution in newspapers of statewide circulation and notification of any parties known or likely to be affected by the action (including municipalities and ANCSA corporations). DNR and DOT/PF shall also compile and maintain a mailing list of interested parties which will receive notice of all RS 2477 ROW actions. The regional office also shall have the discretion to hold a public hearing on an action, if determined necessary. A written comment period of at least 30 days shall be

included in the process. Following completion of the public notice and written comment period, the regional office shall issue a final decision which may be subject to appeal. Affected parties including landowner(s) will be notified of the decision

Once it is determined that an assertion is in the state's best interest, the route shall be identified as an RS 2477 ROW on state title plats. It is the position of the state that federal agencies should also note applicable federal title plats.

The final decision is an official state position regarding the validity of the RS 2477 ROW claim and constitutes a determination by the state that there is both sufficient evidence in the casefile to support an affirmative action on the claim by a court, and that the assertion is in the best interest of the state.

Unless otherwise included in the final decision, an assertion decision by the state does not constitute formal acceptance of management responsibility by the state or assumption of liability for the ROW over non-state land. The state contends that management responsibility over a potential RS 2477 ROW can only accrue

to the state following a validity determination by the court or if the state voluntarily accepts management authority and gives notice prior to such action. Specific state management responsibilities over valid RS 2477 ROW's are articulated in Section V.

C. Vacation/Disclaimer

In addition to a decision to assert an RS 2477 ROW, the assertion review process can result in a decision by the state to vacate or disclaim an interest in the ROW.

A decision to disclaim an interest/vacate an RS 2477 ROW claim is similarly a determination that the claim will not be supported by the state. This decision does not preclude the right of the state or the public to again assert the claim at a later date. However, an effort to reassert a previously disclaimed/vacated RS 2477 ROW claim must be based upon significant new evidence or information which might be anticipated to influence and alter the original decision.

A vacation is appropriate where the route has already been determined by the court to be a valid RS 2477 ROW. In the case of

either a vacation or disclaimer of interest, the state casefile will be closed or remain inactive, depending upon circumstances. The state may provide another party with a copy of the casefile if such party decides to independently pursue the claim.

D. Validation

Once a decision is made to formally assert that a given RS 2477 ROW is valid, DNR or DOT/PF may also take steps to validate this interest.

A decision by the state to assert ownership of an RS 2477 ROW is also a determination that the state will defend the assertion from adverse claims, if necessary, in court and may proceed to initiate quiet title action or seek declaratory judgment from the court. In some cases, agreements may also be reached with affected landowners to address unresolved questions (such as width of the ROW).

E. Public Requests

Individual citizens may also assert and seek validation of RS 2477 ROW's. Additionally, the public may petition the state to assert, disclaim, or vacate its interest in a particular ROW. Procedures will be established providing the public single points of contact at DNR regional offices for this purpose. DNR will be responsible for coordinating the state's response with DOT/PF. Filing and processing fees may be charged to assist delivery of a timely response. All requests of the state by the public will be processed in accordance with the procedures contained in this section.

Management

A. State

Under Alaska Statutes, DOT/PF has management authority for RS 2477 ROW's on non-state land if recognized and accepted by the state and held to be valid by the courts. Where such recognized, accepted and valid ROW's occur on state land, DOT/PF and the state agency having management authority over the state land, usually DNR, have concurrent management authority over the ROW.

In the case where another state agency other than DNR or DOT/PF has management authority over the ROW, efforts may be made by DNR and/or DOT/PF to assume management responsibility.

Consistent with the responsibilities outlined in Section III, DOT/PF agrees to accept management authority for all RS 2477 ROW's asserted by the state and held to be valid, which are part of the designated state or federal-aid highway system. For those portions of the RS 2477 ROW's on the designated state highway system that occur on state land, concurrent management authority with DNR will continue, with DOT/PF as the lead agency. For all other RS 2477 ROW interests that have been held to be valid, DOT/PF agrees to transfer management responsibility to DNR. If a valid RS 2477 ROW is subsequently made part of the state or federal-aid highway system, management responsibility will be transferred from DNR to DOT/PF consistent with this section.

B. Local Government

In the case of a preliminary decision by DNR or DOT/PF to disclaim or vacate an RS 2477 ROW, local governmental entities can petition the responsible state agency (either DNR or DOT/PF) to reverse that decision, pursue validation (if appropriate), and transfer management responsibility to the local government entity if the following conditions met

- 1 The local governmental entity agrees to pay all of the state's costs to complete the assertion and validation process;
2. The local governmental entity agrees to hold the state harmless and accept all maintenance and legal liabilities associated with management of the RS 2477 ROW;
3. The local governmental entity furnishes reasonable proof of an ability to meet these management and responsibilities.

VI. General Provisions

A. Highway Definition

reference in RS 2477 to "right-of-way for the construction of highways" did not mean the construction of something to a modern public street. In its proper historical context, the "highways" language was used generically to include any public way, such as a path, wagon road, pack trail, street, alley, and so forth. The United States Department of the Interior, Office of the Solicitor, concurs state law controls what constitutes a highway within each state. DNR and DOT&PF accept this view and recognize AS 19.45.001(8) as the governing definition for the term "highway." AS 19.45.001 (8) defines "highway" to include a highway (whether included in primary or secondary systems), road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof.

B

state takes the position that once determined valid, an RS 2477 ROW may be used for any "highway" purpose as defined in Section VI.A. above. Such use may be limited, however, by the width of the ROW (see Section VI.C.) and be subject to specific management practices as applied by the state to the ROW.

C.

The width of an RS 2477 ROW depends on the way it was established. If established by statute or ordinance, or other formalized public agency dedication, then the language of such will control. For example, AS 19.10.010 was amended to specify 100 foot section line rights-of-way on land owned or acquired by the state. However, if the method for establishment of the RS 2477 ROW was by construction or use, width may be determined by the nature and extent of that construction or use, depending upon the date established.

Most RS 2477 ROW's fall into the public construction or use category. Accordingly, the width for each of these types of RS 2477 ROW's should be outlined by the state during the

assertion and validation process. The width is usually set as the distance from the farthest limit of backslope to the farthest limit of backslope on the opposite side. However, in the past, some courts have established the width for an RS 2477 ROW as that commonly established for highways designed for that particular mode of transportation (i.e., pedestrian trail, secondary road, etc.)

D. ANILCA Conservation System Units

Section 1109 of ANILCA specifically provides for the protection of valid existing rights. As valid existing rights may include RS 2477 ROW's, it is essential that these routes be identified and addressed through the federal Conservation System Unit (CSU) planning process.

In 1985, progress was made by the state to better coordinate RS 2477 efforts on a statewide basis with federal agencies, other affected landowners and the general public. State Senator Jack Coghill, his staff from the Senate Transportation Committee, and staff from the U.S. National Park Service, worked to ensure that possible RS 2477 roads and

trails will be noted and identified in the National Service General Management Plans. Similar efforts are being taken, working with the U.S. Fish and Wildlife Service, to include similar material in future Fish Wildlife Service Comprehensive Conservation Plans. purpose of this effort is to heighten awareness on the part of land managing agencies, affected landowners and public as to the existence of possible RS 2477 ROW's. is not meant to imply that these roads and trails necessarily available for public use prior to formal validation of the existence of the potential RS 2477 ROW's.

The following language was developed for inclusion in each federal CSU Plan:

RS 2477 (formally codified as 43 U.S.C. 932; enacted in 1866) provides that: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." The Act was repealed by P.L. 94-579 as of October 21, 1976, subject to valid existing claims.

The (name of CSU unit) is subject to valid existing rights, including rights-of-way established under RS 2477. The validity of these rights-of-way will be determined on a case by case basis. The following list identifies rights-of-way that the state contends may be valid under RS 2477:

(list of potential RS 2477 ROW's

A map illustrating the above list is found on page _____. This list and map are not necessarily all inclusive. Private parties or the State of Alaska may identify and seek recognition of additional RS 2477 rights-of-way within the (CSU unit). Supporting material regarding those rights-of-way identified by the state may be obtained through the Alaska Department of Transportation and Public Facilities, or the Alaska Department of Natural Resources.

Identification of potential rights-of-way on the list and map does not establish the validity of these RS 2477 rights -of-way and does not necessarily provide the public the right to travel over them.

and DOT/PF will continue to provide pertinent RS 2477 ROW information to appropriate federal agencies during the CSU plan review process. This information will include a and description of those potential RS 2477 ROW's (as determined by the state within the CSU plan area and a map generally depicting their location

Any attempt by the state to assert or validate an RS 2477 ROW in a CSU will occur in accord with the procedures outlined in Section IV

E. Legal Considerations

The policies and procedures in this document do not apply to any ROW held under Public Land Orders (PLO), the Omnibus Act

Claim Deed, ROW grants under Title 23 of the United States Code, or ROW interests other than those under RS 2477.

If necessary to respond to a challenge of the state's interest in a possible RS 2477 ROW that has not yet been processed under the procedures under Section IV of this document, DNR and DOT/PF reserve the right to suspend those procedures and assert that a particular RS 2477 ROW is valid.

The aforementioned RS 2477 ROW policy and procedures become effective upon the signature of both parties and will remain in effect unless terminated by mutual agreement.

Esther C. Wunnicke, Commissioner
Department of Natural Resources

Date

Richard J. Knapp, Commissioner
Department of Transportation
and Public Facilities

Date