

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF LAND

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February 25, 1997

The Hon. Rick Halford
Chair, Senate Resources Committee
State Capitol, Room 121
Juneau, AK 99801-1182

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Dear Senator Halford:

DNR is pleased to respond to your request for information about RS 2477 rights-of-way. This letter includes the following information:

1. What would be the cost of submitting the qualifying rights-of-way to BLM to complete the task begun by the Alaska Outdoor Council?
2. What would be the cost of recording all routes submitted to BLM in the appropriate recording district?
3. Under what circumstances has the state ever vacated an RS 2477 right-of-way?
4. What is the process by which the state authorizes the use of an RS 2477 right-of-way?

1. Submit 375+/- routes to the BLM [Cost: \$37.5]

The Alaska Outdoor Council (AOC) reported to the joint Resources Committee Hearing that preparing and filing 240 routes with the BLM cost AOC approximately \$800 in copy fees and required 1,000 hours to prepare. (Note: Not every trail filed by AOC was considered a "qualifying route" by DNR's RS 2477 standards. DNR research indicates there are 585 qualifying routes.) The AOC assertion package includes a notarized certification page with BLM date stamp, the state's RS 2477 trail number, a copy of the state's case file summary, and USGS maps at 1:63,360 scale.

As of February 1997, the Division of Land has identified 585 qualifying RS 2477 routes. Submitting approximately 350-375 additional routes to BLM to supplement AOC's filing would require between 2,100 and 2,252 hours. Salary costs are calculated based on two part-time Natural Resource Technicians and two part-time Administrative Clerks. The four would be required to complete the task within a four-month period (short-term non-permanent positions), approximately 563 hours per person.

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Considerations:

- Submitting these routes to BLM will establish a paper trail that might stop the clock on a possible 12-year statute of limitations for RS 2477 assertions within federal conservation system units.
- There is no guarantee that BLM will either accept or serialize (apply case file numbers to) the State's submittal.
- Conservation system unit managers have not been notified of the AOC submittals. As a courtesy, a letter to the appropriate land manager/superintendent informing the manager of the routes traversing the unit should also be submitted.

Assumptions for calculating costs: The average file contains a two-page case file summary and four USGS maps depicting the trail. It will take approximately six hours to prepare and submit to BLM and to update the state's land records system (LAS) with BLM filing information.

Cost to file "assertions" of RS 2477 routes with BLM

<i>Personal Services</i>	<u>Rate</u>	<u>Total Hours</u>	<u>Total Cost</u>
Two part-time Natural Resource Technicians	\$16.96	1126	\$ 19,097
Two part-time Administrative Clerks	\$13.36	1126	\$ 15,043
<i>Contractual Costs</i>	<u>Rate</u>	<u>No. Routes</u>	<u>Total Cost</u>
Copy costs	\$ 8.75	375	\$ 3,281
 <i>Project Costs:</i>			\$ 37,422

2. Record RS 2477 routes in the appropriate recording district [Cost: \$141.6]

Considerations:

- *Title searches* have been performed on only 11 of the 585 qualifying routes.
- *None of these routes has been surveyed.* The underlying land owners will likely differ from those presently identified along the historic route. An accurate location of the route and a title search are necessary.

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- Recording these routes without first doing a survey and title search would risk *clouding the title* of innocent property owners who may want to sell their interest in the property to a third party.
- The trail files are *dynamic*. *New information is continuously being added to the files*, and sometimes this information changes the alignment, nature, or status of the trail. The originally recorded routes could, in time, differ significantly from more current information. The public record would then be in error.
- The qualifying trail files range in documentation from slim to thorough. Often the information is just sufficient to say the right-of-way clearly existed, but historic maps are *not clear enough to determine the exact location* of these routes today. It would be risky to record a route without benefit of a survey.
- In addition to the 585 routes the Division of Land has identified as "qualifying" as of February 1997, several hundred additional routes have been identified as potential RS 2477's but still lack qualifying documentation. Nevertheless, many of these routes may be legitimate rights-of-way if the proper documents can be unearthed. Recording those presently identified as "qualifying" RS 2477's may undermine the status of those on "hold," "pending," or "deferred." The fact that we may not yet have identified them as RS 2477 routes does not mean they are not legitimate.

Assumptions for calculating costs:

For each RS 2477 route there is an average of 20 8.5"x11" sheets of paper to be recorded consisting of a cover sheet (with indexing information, recording districts identified, legal description, etc.), two-page case file summary, and 17 pages of maps depicting the route. A cover sheet will have to be prepared from the case file to meet recording standards. The State's computerized land record system would be updated with the recording information (book and page references).

Alternatives:

- Record only the 11 Phase I routes that have been "certified." (This includes public notice, title search, and a formal departmental decision.)
- Record only those routes entering litigation.
- Record only the latest edition of the RS 2477 research atlas, which lists each trail and its status, along with the digitized maps.
- Hold off recording any routes or documents until ownership has been resolved by the courts.

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Cost to record RS 2477 routes "asserted" to BLM

<i>Personal Services</i>	<u>Rate</u>	<u>Total Hours</u>	<u>Total Cost</u>
Two full-time Natural Resource Technician	\$16.96	1600	\$ 27,136
Two full-time Administrative Clerk	\$13.36	1600	\$ 21,376
 <i>Contractual Costs</i>	 <u>Rate</u>	 <u>No. Routes</u>	 <u>Total Cost</u>
Copy costs	\$ 15.00	585	\$ 8,775
Recording costs (@ \$72 per recording district)	\$ 144.00	585	\$ 84,240
 <i>Project Costs:</i>			 \$ 141,527

3. Vacation of RS 2477 rights-of-way

Most commonly a vacation involves an unconstructed easement along a section line, where alternate access is more practical and provides more efficient land use. In many cases, the section-line easement is unbuildable due to steep terrain or swamp conditions.

All section-line easements on federal land or on land the federal government conveyed to private owners are RS 2477 rights-of-way (33 feet on either side of the section line). Even with State Title 19 section-line easements, in many cases there was an RS 2477 easement already in place before the federal government conveyed the land to the State. Thus, many section-line vacations are RS 2477 vacations. **We are not aware of any RS 2477 right-of-way vacations that do not involve section-line easements.** However, it is possible that municipal platting authorities have vacated or relocated RS 2477 rights-of-way without notice to the State. This could happen if a municipal platting authority did not research how the right-of-way had been established, or did not know that the State asserts ownership of RS 2477 rights-of-way as a class, just as it does with section-line easements and easements that provide access to public waters under AS 38.05.127.

When the Division of Land acts as the platting authority or is asked by a municipal platting authority to consent to a vacation of a state easement, its long-standing practice is to ensure that neither state-owned nor private parcels will be "landlocked" by the vacation. Before a vacation can be approved, alternate access must be provided.

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Very rarely are constructed roads involved. However, sometimes a constructed right-of-way is realigned and the old road bed is abandoned.

Some cases involve encroachment of improvements onto the easement. In such cases, only the portion of the right-of-way needed to accommodate the improvement is vacated, if that is possible. The right-of-way would then be narrower, but is still continuous.

The number and location of vacation actions for the last three years are presented below.

Section-Line Easement Vacations 1994-1996:

Bristol Bay Borough	1
Fairbanks North Star Borough	8
Kenai Peninsula Borough	24
Matanuska-Susitna Borough	27
Municipality of Anchorage	11
Unorganized Borough	5
Other Vacations 1994-1996 (not RS 2477 rights-of-way)	
Unorganized Borough	11

4. DNR process for authorizing use of RS 2477 rights-of-way

The Division of Land does indeed issue land use permits authorizing the use of RS 2477 rights-of-way. Moreover, the Division of Land has developed a list, based on regulation (11 AAC 96), of activities that may occur on state land without any permit. This list is known as the "Generally Allowed Uses" list and is available at any regional office of the department. A copy is attached to this letter. We consider that RS 2477 rights-of-way are the same as other state lands and interests in land, and manage them as such. Therefore, the Generally Allowed Uses list applies to RS 2477 rights-of-way, as it does to other state land.

For instance, if someone wants to walk a Cat cross-country, that would require a permit because it is not a generally allowed use of state lands. However, if the person wanted to blaze a trail less than five feet wide without breaking through the vegetative mat, using a chainsaw or similar hand tools, that qualifies as a generally allowed use of state land and does not require a permit. One caveat: the Generally Allowed Uses list does not apply to lands owned/managed by other state agencies, to state parks, nor to lands that have been designated for a special use under 11 AAC 96.


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Other access uses that are "generally allowed" on RS 2477 rights-of-way, along with state-owned lands in general, are: 1) using a motorized vehicle, including a four-wheel-drive vehicle, stock pickup truck, snowmobile, or all-terrain vehicles (wheeled or tracked), on or off an established road right-of-way, if use off the right-of-way does not kill or break through the plant cover and expose the soil to erosion; 2) hiking, backpacking, skiing, climbing, and other foot travel; 3) bicycling; traveling by horse or dogsled or with pack animals.

When seasonal conditions require it, the Division of Land also uses its management authority under Title 38 to temporarily close a route to protect the trail/road. The instance Nancy Welch related at the hearing was not unique to the department. The department -- through the Division of Forestry or the Division of Land -- has closed roads to protect them from degradation, especially near break-up or before winter freeze-up. As Nancy mentioned, the Division of Land closed the Rex Trail, an RS 2477 right-of-way, to heavy equipment use at break-up last year.

If you would like additional information, I and my staff would be pleased to provide it.

Sincerely,


Jane Angvik
Director

Encl.

*c.c. members of the Senate Resources Committee
member of the House Resources Committee*



THE SECRETARY OF THE INTERIOR
WASHINGTON

Rod	Kathy
UIC	Norm
Dave	Randy
Betsy	Linda
Gary	Wicke
Martha	Paul
Boyer	Elliott
	P.R.
	P.A.

JAN 22 1997

Memorandum

To: Assistant Secretary, Fish and Wildlife and Parks
 Assistant Secretary, Land and Minerals Management
 Assistant Secretary, Indian Affairs
 Assistant Secretary, Water and Science

From: Secretary

Subject: Interim Departmental Policy on Revised Statute 2477 Grant of Right-of-Way
 for Public Highways; Revocation of December 7, 1988 Policy

Revised Statute 2477, which provided that "[t]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted," was repealed on October 21, 1976, by the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 et seq. FLPMA did not terminate valid rights-of-way established under R.S. 2477 prior to its repeal. The existence and extent of valid rights-of-way previously established pursuant to R.S. 2477 remains an issue in some places.

States or local governments asserting that R.S. 2477 rights-of-way exist on federal lands can in appropriate situations file a lawsuit in federal court seeking to establish the validity of that assertion. In the alternative or in advance of filing such a lawsuit, the Department of the Interior may also be asked to give its views on such assertions.

On December 7, 1988, Secretary Hodel signed a memorandum that discussed his policy for making determinations whether the Department would recognize claims for rights-of-way under R.S. 2477. That policy was not promulgated according to rulemaking procedures and is not a rule. In fact, because the Department has not been making such determinations in recent years, that policy has not been carried out for several years. The purpose of this memo is to revoke the 1988 policy and establish a revised policy for carrying out any determinations the Department might be called upon to make regarding R.S. 2477.

Background

At the request of Congress, the Department submitted a Report to Congress on R.S. 2477 in June 1993. In accordance with that Report's recommendations, the Department determined that regulations should be written for R.S. 2477, and a Notice of Proposed Rulemaking was published in 1994. 59 Fed. Reg. 39,216 (August 1, 1994). Thereafter, Congress attached a provision to the Department's appropriation for fiscal year 1996 that prohibited using funds appropriated by that statute for "developing, promulgating, and thereafter implementing a

rule concerning rights-of-way under section 2477 of the Revised Statutes." Pub. L. 104-134, § 110, 110 Stat. 1321-177 (1996). The Department's appropriation for fiscal year 1997 permits the publication of final regulations but says they shall not take effect unless "expressly authorized by an Act of Congress subsequent to the date of enactment of this Act." Pub. L. 104-208, § 108, 110 Stat. 3009 (1996).

I addressed the issue of whether the Department should continue to make determinations regarding R.S. 2477 claims in my May 28, 1993, letter to Congress transmitting the Department's Report: "Until final rules are effective, I have instructed the Bureau of Land Management to defer any processing of R.S. 2477 assertions except in cases where there is a demonstrated, compelling, and immediate need to make such determinations." This instruction is still in effect.

Revised Policy on R.S. 2477 Rights-of-way Determinations

Those making claims of the existence of valid R.S. 2477 rights-of-way continue to have the option of seeking to establish the validity of their claims in court. Nevertheless, it is possible that the Department may be asked, in advance of final rules taking effect, to make such determinations on the basis that such a demonstrated, compelling, and immediate need is claimed to exist. If so, until final rules are published and take effect, determinations regarding R.S. 2477 rights-of-way will be made by the Secretary of the Interior, in consultation with the appropriate Interior agency, according to the following policy:

1. **Claims.** An entity wishing the Secretary or any agencies of the Department of the Interior to make a determination whether an R.S. 2477 right-of-way exists shall file a written request with the Interior agency having jurisdiction over the lands underlying the asserted right-of-way, along with an explanation of why there is a compelling and immediate need for such a determination. The request should be accompanied by documents and maps that the entity wishes the agency to consider in making its recommendation to the Secretary. If, based on the information provided, the agency does not believe a compelling and immediate need for the determination exists, it should without further examination recommend the Secretary defer processing until final rules are effective.
2. **Withdrawals and Reservations.** The agency shall consult the public land records maintained by the Bureau of Land Management to determine the status of the lands over which the claimed right-of-way passes. If such lands were withdrawn, reserved, or otherwise unavailable pursuant to R.S. 2477 at the time that the highway giving rise to the claim of an R.S. 2477 right-of-way was allegedly constructed and remained unavailable through October 21, 1976, the agency will recommend the Secretary deny the claim.
3. **Construction.** If the lands were not withdrawn, reserved, or otherwise unavailable pursuant to R.S. 2477, the agency shall examine all available documents and maps and perform an on-site examination to determine whether construction on the alleged right-of-way had occurred prior to the repeal of R.S. 2477 on October 21, 1976. If the agency

determines that construction did not occur, the agency will recommend the Secretary deny the claim.

4. **Highway.** The agency shall evaluate whether the alleged right-of-way constitutes a highway. A highway is a thoroughfare used prior to October 21, 1976, by the public for the passage of vehicles carrying people or goods from place to place. If the agency determines that the alleged right-of-way does not constitute a highway, the agency will recommend the Secretary deny the claim.

5. **Role of State Law.** In making its recommendations, the agency shall apply state law in effect on October 21, 1976, to the extent that it is consistent with federal law. The agency will in no case recommend approval of claims that do not comply with the requirements of applicable state law.

6. **Secretary's Determination.** The agency will make recommendations on the above-described issues to the Secretary. The Secretary will approve or disapprove those recommendations.

The December 7, 1988 policy, including attachment 1, is hereby revoked.



Bruce Babbitt