

# STATE OF ALASKA

## DEPARTMENT OF NATURAL RESOURCES

### DIVISION OF LAND

# 706

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#### PROPOSED REGULATIONS

January 27, 1992

Dear Alaskan:

Enclosed are proposed new regulations of the Alaska Department of Natural Resources on the subject of "RS 2477" rights-of-way. The Division of Land is seeking comments on these proposed regulations at public hearings to be conducted in Juneau, Fairbanks, Nome, Glenallen, Anchorage, and McGrath on February 11-20, 1992, or by mail through March 15, 1992. Please see the enclosed public notice for more information on how, when, and where you can comment on the proposed regulations.

RS 2477<sup>1</sup> was a law passed by the U.S. Congress as part of the Mining Law of 1866. It said, "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

There was more than one way to accept this government offer and establish a right-of-way. A state or local agency could do so by taking some official action, such as spending tax dollars to build or maintain a road or highway across unreserved public (federal) land. Or, the public itself could accept the grant simply by building and using a road across unreserved public land.

Although RS 2477 was repealed in 1976, established rights-of-way were protected because they were valid existing rights. The question was, which ones qualified?

The proposed regulations are intended to help the state answer this question. They were written by the Department of Law as part of a joint project for Lieutenant Governor Jack Coghill, the Department of Transportation and Public Facilities, and the Department of Natural Resources. They set out a method for people to nominate roads that may qualify as RS 2477 rights-of-way.

Under the draft regulations, the Department of Natural Resources would then publish a newspaper notice about each road nomination and send copies to interested parties, including the city or

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<sup>1</sup>"Revised Statute" 2477; later renumbered 43 U.S.C. 932

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borough and adjacent landowners. Following a public comment period and in some cases an informal hearing to gather more information, the department would make a decision on the nomination. The decision could be appealed to the commissioner and to the courts. After a final determination that a nominated road was on a valid RS 2477 right-of-way, the road would be managed by the Department of Transportation and Public Facilities or the Department of Natural Resources.

The Department of Natural Resources welcomes your comments on the draft regulations. As you review them, you will notice some underlined wording in the first section. This underlining indicates new material that the department is proposing to add to an existing regulation, 11 AAC 05.010. The other regulations in the draft contain no underlining at all, meaning they are completely new sections that the department is proposing to adopt.

Your comments on the draft regulations will be most useful to the Division of Land if you refer to particular regulations by section number, rather than by page, and if you suggest specific wording changes to clarify the regulations or would constitute better public policy. If you have questions on any part of this proposal, please contact Denny Daigger or Jim Culbertson in our Anchorage office, phone 762-2660. The Department of Natural Resources thanks you for your time and interest in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Ron Swanson". The signature is stylized with a large, sweeping initial "R" and "S".

Ron Swanson  
Director

Attachment

NOTICE OF PROPOSED CHANGES IN THE  
REGULATIONS OF THE DEPARTMENT OF NATURAL RESOURCES

Notice is given that the Department of Natural Resources, under authority vested by AS 38.04.058, 38.04.900, 38.05.020, 38.05.027, and 38.05.035, proposes to adopt regulations in Title 11 (a new chapter 51) of the Alaska Administrative Code, pertaining to the nomination, evaluation, adjudication, and certification of RS 2477 rights-of-way (43 U.S.C. 932) within the state. The proposed regulations contain the following:

Sec. 010 explains the applicability of the chapter and limits the provisions to rights-of-way under RS 2477.

Sec. 020 sets out the procedure and requirements for nomination of an RS 2477 right-of-way.

Sec. 030 sets out the requirements for notification to affected parties and the public for a nominated RS 2477 right-of-way.

Secs. 040-050 establish criteria for evaluating and adjudicating a nomination application.

Sec. 060 allows for administrative appeals by a person or government agency that disagrees with an RS 2477 decision.

Sec. 070 establishes the administrative finality of the commissioner's decision and sets out the judicial remedy for aggrieved parties.

Sec. 080 allows the Department of Transportation and Public Facilities to classify a certified RS 2477 right-of-way under 17 AAC 05 (defining the particular class of road or trail).

Sec. 090 establishes management responsibilities for certified RS 2477 rights-of-way.

Sec. 900 defines new terms in the proposed regulations.

In addition, the Department of Natural Resources proposes to amend an existing regulation, 11 AAC 05.010, to add a \$100 filing fee to nominate a RS 2477 right-of-way.

Notice is also given that any person interested may present oral or written statements or arguments relevant to the proposed action at hearings to be held at:

Juneau	Tuesday, February 11, 1992	7 p.m.	Hammond Room, Centennial Hall
Fairbanks	Wednesday, February 12, 1992	7 p.m.	City Council Chambers, 410 Cushman

Nome	Thursday, February 13, 1992	7 p.m.	Conference Room, Northwest Campus
Glenallen	Tuesday, February 18, 1992	7 p.m.	High School
Anchorage	Wednesday, February 19, 1992	7 p.m.	S p e n a r d R e c r e a t i o n Center, 2020 W. 48th
McGrath	Thursday, February 20, 1992	7 p.m.	Cap'n Snow Center

In addition, written statements or arguments may be sent to the Director's Office, Division of Land, Department of Natural Resources, P.O. Box 107005, Anchorage, Alaska 99510-7005, to be received no later than March 15, 1992.

It is estimated that this action will require increased appropriations as follows: for the remainder of FY 92, \$9,200; FY 93, \$291,500; FY 94, \$169,900; FY 95, \$116,600.

Copies of the proposed regulations may be obtained by writing to the Department of Natural Resources at the above address or in person from the regional offices of the department's Division of Land: the Southcentral Regional Office (3601 C Street, Suite 1080 or Suite 880, Anchorage), Northern Regional Office (3700 Airport Way, Fairbanks), or Southeast Regional Office (400 Willoughby Avenue, Fourth Floor, Juneau).

The Department of Natural Resources may after the comment period adopt proposals within the scope of this notice without further notice or may decide to take no action on them.

Date: January 27, 1992



Ron Swanson, Director, Division of Land

TITLE 11 NATURAL RESOURCES

Part 1. Office of the Commissioner 11 AAC 03 -- 11 AAC 06

Part 6. Lands 11 AAC 51 52 -- 11 AAC 98

PART 1 OFFICE OF THE COMMISSIONER

Chapter

05. Fees for Department Services 11 AAC 05.010--11 AAC 05.900

CHAPTER 05. FEES FOR DEPARTMENT SERVICES.

Section

010. Fees

11 AAC 05.010(a)(7) is amended by adding a new subparagraph (H) to read:

11 AAC 05.010. FEES. (a) Non-refundable fees to apply for authorizations, and fees to obtain publications or services from the department, are as follows:

(7 other, or general, land management not covered elsewhere

(H) application to nominate RS 2477 right-of-way for certification, \$100;

(Eff. 1/1/86, Register 96; am 8/10/86, Register 99; am 9/28/86, Register 99; am 8/23/87, Register 103; am 1/29/88, Register 105; am 8/16/89, Register 111; am / /92, Register )

- Authority: AS 03.10.020 AS 41.06.020
AS 27.21.030 AS 41.21.020
AS 38.05.020 AS 41.21.026
AS 38.05.035 AS 44.37.020
AS 38.05.295 AS 44.37.025
AS 38.09.110 AS 45.50.315
AS 38.35.020 AS 46.15.020
AS 38.35.050
AS 38.50.160
AS 38.95.240

**DRAFT****PART 6. LANDS**

## Chapter

**51. Nomination, Identification, and Management of RS 2477 Rights-of Way (11 AAC 51.010--11 AAC 51.900)**

11 AAC is amended by adding a new chapter to read:

**CHAPTER 51. NOMINATION, IDENTIFICATION, AND MANAGEMENT OF  
RS 2477 RIGHTS-OF-WAY.**

## Section

- 010. Purpose and applicability
- 020. Nomination application
- 030. Identification and notification
- 040. Evaluation procedure
- 045. Informal adjudicatory proceeding
- 050. Evaluation criteria: departmental decision
- 060. Appeal
- 070. Final decision and judicial appeal
- 080. Classification
- 090. Management of RS 2477 rights-of-way
- 900. Definitions

**11 AAC 51.010. PURPOSE AND APPLICABILITY.** The purpose of this chapter is to set forth the procedures to nominate, identify, and certify those public rights-of-way established under 43 U.S.C. 932 (RS 2477). This chapter is applicable only to rights-of-way that may exist as a result of RS 2477. (Eff. /92, Register )

Authority: AS 38.04.058  
AS 38.04.900  
AS 38.05.020  
AS 38.05.035

**11 AAC 51.020. NOMINATION APPLICATION.** (a) A person, governmental agency, or local government may nominate an RS 2477 right-of-way for certification by the department.

(b) Any nomination made under (a) of this section shall be made by application to the department.

(c) An application nominating an RS 2477 right-of-way for certification must

(1) be received by the department on a form provided by the department;

(2) be complete and correct to the best of the applicant's knowledge;

(3) if known, contain the name of the nominated right-of-way;

(4) provide the general geographic description of the area where the nominated right-of-way is located;

(5) identify as precisely as possible the complete location and length of the nominated right-of-way, including the location of its route from beginning and end;

(6) identify as precisely as possible the date or the time frame that the nominated right-of-way was initially used by a member of the public;

include the application fee required by 11 AAC

05.010

(d) To the extent practicable, an application nominating a right-of-way should

(1) contain reliable historical accounts that make reference to the nominated right-of-way;

(2) contain a list of known persons, including their last known address and telephone number, if possible, who can supply knowledge of historical use of the nominated right-of-way;

(3) identify the location of the entire length of the nominated right-of-way on a United States Geological Survey map at 1:63,360 scale (1 inch=1 mile) or its equivalent.

(e) No more than one contiguous right-of-way or one non-contiguous right-of-way may be nominated for certification in a single application. (Eff. / /92, Register )

Authority: AS 38.04.058  
AS 38.04.900  
AS 38.05.020  
AS 38.05.035

**11 AAC 51.030. IDENTIFICATION AND NOTIFICATION.** (a) Upon receipt of a completed application, the department will establish a case file and assign the case file a right-of-way management

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identification number. The case file will contain all materials received by the department with respect to a nominated right-of-way including materials received during informal adjudication and appeals to the commissioner.

(b) After receiving a completed application, the department shall transmit notice and a copy of the application to the following:

(1) the local government or governments within whose boundaries the nominated right-of-way is located;

(2) the federal agency or state agency that has management responsibility for the land immediately adjacent to the route of the nominated right-of-way;

(3) the coastal management district or coastal management service area in which the nominated right-of-way is located;

(4) land owners whom the department reasonably believes have property immediately adjacent to the route of the nominated right-of-way;

(5) other interested persons or organizations that the department reasonably believes have an interest in or may be affected by the nominated right-of-way.

(c) When it gives notice under (b) of this section, the department will publish a summary of the nomination application in one newspaper with general circulation in the area of the route of the nominated right-of-way.

(d) A person, government agency, organization, or other interested party receiving notice under this section or any other interested party has 30 days from the date the notice was mailed under (b) of this section to provide the department with written comments regarding the application. (Eff. / /92, Register

Authority: AS 38.04.058  
AS 38.04.900  
AS 38.05.020  
AS 38.05.035

**11 AAC 51.040. EVALUATION PROCEDURE.** (a) After the comment period on a completed application, the department will take one of the following actions:



(1) render a written decision under 11 AAC 51.050(d) the application;

(2) request additional information from the applicant or other interested individuals or organizations;

(3) schedule an informal adjudicatory proceeding under 11 AAC 51.045 to gather additional factual information on the nominated right-of-way.

(b) If the department requests additional information under (a)(2) of this section, the department shall render a written decision under 11 AAC 51.050(d) after receiving the requested information, unless the department schedules an informal adjudicatory proceeding under 11 AAC 51.045. (Eff. / /92, Register )

Authority: AS 3 .04.058  
AS 3 .04.900  
AS 3 .05.020  
AS 3 .05.035

**11 AAC 51.045. INFORMAL ADJUDICATORY PROCEEDING.** (a) The purpose of an informal adjudicatory proceeding is to gather additional factual information about the nominated right-of-way.

(b) The department will, in its discretion, conduct an informal adjudicatory proceeding concerning a nomination application. If the department decides before giving notice under 11 AAC 51.030(b) that it will conduct an adjudicatory proceeding, it will state the time and place of the adjudicatory proceeding in the notice. If the department decides during or after the comment period that it will conduct an adjudicatory proceeding, it will give notice of the time and place of the adjudicatory proceeding to the applicant and to any person, government agency, organization, or other interested party who commented on the application under 11 AAC 51.030(d).

(c) Any person, government agency, organization, or other interested party receiving notice under 11 AAC 51.030(b) may request that the department conduct an informal adjudicatory proceeding concerning the nomination application.

(d) Any request for an adjudicatory proceeding under (c) of this section shall be made to the department within 30 days after the mailing of notice under 11 AAC 51.030(b).

(e) The department will assign an employee to conduct the informal adjudicatory proceeding. The informal adjudicatory

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proceeding will be held at a time and place convenient for the applicant, the department, and interested individuals and organizations. At the informal adjudicatory proceeding, the department, on its own, or any interested party may present evidence that is relevant to the question of the acceptance, location or use of the nominated right-of-way. The department or any interested party may also present relevant legal analysis. The adjudicatory proceeding will be conducted in an informal manner.

(f) After the conclusion of an informal adjudicatory proceeding under this section, the department will issue a written decision under 11 AAC 51.050(d). (Eff. / /92, Register )

Authority: AS 38.04.058  
AS 38.04.900  
AS 38.05.020  
AS 38.05.035

**11 AAC 51.050. EVALUATION CRITERIA: DEPARTMENTAL DECISION**

(a) The department will certify the RS 2477 right-of-way nominated in the application if the department finds that the requirements of this chapter have been met for the valid acceptance of an RS 2477 right-of-way grant.

(b) In determining whether the requirements of this chapter have been met for the valid acceptance of an RS 2477 grant of a public right-of-way, the department will consider

(1) if sufficient evidence has been presented to allow the nominated RS 2477 right-of-way to be located on a geological survey map;

(2) if sufficient evidence has been presented to show that the nominated RS 2477 right-of-way crossed public land that was not reserved for public use at the time the RS 2477 right-of-way grant is alleged to have been accepted; and

(3) if sufficient evidence has been presented

(A) to show that the public use of the nominated RS 2477 right-of-way constitutes acceptance of the RS 2477 right-of-way grant in accord with law, or

(B) when relevant, to show the existence of a positive act on the part of a public authority that constitutes acceptance of the RS 2477 right-of-way grant in accord with law.

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(c) Where the department finds under (a) of this section that the requirements of this chapter have been met for the valid acceptance of an RS 2477 right-of-way grant, the department shall determine the location and width of the right-of-way in accord with the following:

(1) For an RS 2477 right-of-way grant that was accepted by statute or ordinance, or by other official public dedication (including by construction and survey of a local road under Department of the Interior Secretarial Order 2665 dated October 16, 1951), the width of the right-of-way is as specified by that statute, ordinance, or official dedication.

(2) For an RS 2477 right-of-way grant that was accepted by public use, or by construction not subject to Secretarial Order 2665,

(A) the right-of-way width is the constructed width, measuring between the farthest limit of the backslopes on opposite sides of the highway, if the land was no longer federal public land or was reserved for public use as of April 6, 1963;

(B) the right-of-way width is as set out in AS 19.10.015 if the land was still federal public land not reserved for public use as of April 6, 1963, even if acceptance took place before that date.

(d) The department will prepare a written decision concerning an application nominating an RS 2477 right-of-way. The department will send a copy of its decision to the applicant and the individuals or organizations noticed under 11 AAC 51.030(b), including a notification of the right to appeal the decision.

(e) A decision under (d) of this section certifying all or part of an RS 2477 right-of-way nominated in an application constitutes recognition by the state of the valid acceptance of an RS 2477 right-of-way grant. (Eff. / /92, Register )

Authority: AS 38.04.058  
AS 38.04.900  
AS 38.05.020  
AS 38.05.035

**11 AAC 51.060. APPEAL.** A person, government agency, local government, or other interested party who disagrees with a decision of the department made under 11 AAC 51.050 may appeal to the commissioner under 11 AAC 02. (Eff. / /92, Register )

Authority: AS 3 .04.058  
AS 3 .04.900  
AS 3 .05.020  
AS 3 .05.035

**11 AAC 51.070. FINAL DECISION AND JUDICIAL APPEAL.** A final agency decision by the commissioner under 11 AAC 02 may be appealed to the superior court in accordance with the Alaska Supreme Court's Rules of Appellate Procedure. (Eff. / /92, Register )

Authority: AS 38.04.058  
AS 38.04.900  
AS 38.05.020  
AS 38.05.035

**11 AAC 51.080. CLASSIFICATION.** The department will refer an RS 2477 right-of-way that is certified under this chapter and that is not on the Alaska highway system to the Alaska Department of Transportation and Public Facilities for classification under 17 AAC 05. (Eff. / /92, Register )

Authority: AS 3 .04.058  
AS 3 .04.900  
AS 3 .05.020  
AS 3 .05.035

**11 AAC 51.090. MANAGEMENT OF RS 2477 RIGHTS-OF-WAY.** (a) The commissioner has management authority over the use of any RS 2477 right-of-way that is not on the Alaska highway system. The commissioner, in his or her discretion, may close or restrict the use of an RS 2477 right-of-way over which the commissioner has management authority in order to

1 protect public safety in accord with AS 38.04.058;

(2) protect the right-of-way against damage that may be caused by use during storms, floods, thawing conditions, or construction and maintenance operations; or

(3) protect or manage other resources in or near the right-of-way.

(b) In the event the commissioner closes or restricts the use of a right-of-way under (a) of this section, the department will

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(1) post notice in a conspicuous place of the closure or restricted use of the right-of-way and, in the department's discretion, place a barrier or obstruction on the right-of-way;

(2) post signs in a conspicuous place indicating the location of alternative routes, if any.

(c) Except in an emergency situation, the department, when practicable, will notify the nearest police unit having jurisdiction before closing or restricting the use of any right-of-way. The notice under this subsection will be in writing, if possible. In an emergency situation, the department will notify the nearest police unit as soon as possible.

(d) The commissioner and the commissioner of the Alaska Department of Transportation and Public Facilities, by agreement, shall determine whether an RS 2477 right-of-way managed under this section shall be transferred to of the Alaska Department of Transportation and Public Facilities for management purposes.  
(Eff. / /92, Register )

Authority: AS 38.04.058  
AS 38.04.900  
AS 38.05.020  
AS 38.05.027  
AS 38.05.035

11 AAC 51.900. DEFINITIONS. As used in this chapter,

(1) "Alaska highway system" means those roads compiled on the list described in 17 AAC 05.010;

(2) "application" means a right-of-way nomination application;

(3) "commissioner" means the commissioner of the Department of Natural Resources;

(4) "completed application" means a right-of-way nomination application furnished by the Department of Natural Resources that is completed by an applicant in accordance with the instructions on the application;

(5) "department" means the Department of Natural Resources;

(6) "resources" means timber, minerals, watershed, wildlife and fish, and any natural or man-made feature that has

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scenic, scientific, or historical value. (Eff. / /92  
Register )

Authority: AS 38.04.058  
AS 38.04.900  
AS 38.05.020  
AS 38.05.027  
AS 38.05.035