

JOINT SENATE/HOUSE RESOURCES COMMITTEE  
February 6, 1997  
1:12 P.M.

SENATE MEMBERS PRESENT

Senator Rick Halford, Chairman  
Senator Lyda Green, Vice Chairman  
Senator Bert Sharp  
Senator Robin Taylor  
Senator Georgianna Lincoln  
Senator John Torgerson

SENATE MEMBERS ABSENT

Senator Loren Leman

HOUSE MEMBERS PRESENT

Representative Scott Ogan, Co-Chairman  
Representative Bill Hudson, Co-Chairman  
Representative Beverly Masek  
Representative Ramona Barnes  
Representative Joe Green  
Representative Reggie Joule

HOUSE MEMBERS ABSENT

Representative Irene Nicholia  
Representative Fred Dyson  
Representative Bill Williams

COMMITTEE CALENDAR

RS 2477 Overview

WITNESS REGISTER

Ms. Kathleen Dalton  
Alaska Outdoor Council  
P.O. Box 73902  
Fairbanks, AK 99707

Ms. Barbara Hjelle  
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St. George, UT 84770

Mr. Stan Leaphart, Executive Director  
Citizen's Advisory Commission on Federal Areas  
3700 Airport Way

Fairbanks, AK 99709  
Mr. Doug Blankenship  
574 Grandview Ct.  
Fairbanks, AK 99709

Ms. Virginia Stonkis  
Division of Legislative Finance  
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Juneau, AK 99811-3000

Mr. Robert Bosworth, Deputy Commissioner  
Department of Fish and Game  
P.O. Box 25526  
Juneau, AK 99811-5526

Ms. Tina Cunning  
Alaska Department of Fish and Game  
333 Raspberry Rd.  
Anchorage, AK 99518

Commissioner John Shively  
Department of Natural Resources  
400 Willoughby Ave.  
Juneau, AK 99801-1724

Attorney General Bruce Botelho  
Department of Law  
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Juneau, AK 99811-0300

Ms. Elizabeth Barry, Assistant Attorney General  
Department of Law  
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Anchorage, AK 99501-1994

#### ACTION NARRATIVE

TAPE 97-9, SIDE A

Number 001

CHAIRMAN OGAN called the Joint Senate/House Resources Committee meeting to order at 1:12 p.m. He said in light of the recent announcement by the Secretary of Interior, Bruce Babbitt, they asked the Departments to give an overview of the RS 2477 issue.

MS. KATHLEEN (MIKE) DALTON, Alaska Outdoor Council, said she lived in Fairbanks and had been an Alaskan since 1949. She had been involved with RS 2477 research preparing files for possible assertion by the State of Alaska. She represented the Governor's Office and the Lieutenant Governor's Office in a project in

Fairbanks which was conducted by the DNR. She worked with them on a consistent basis until the end of the Hickel/Coghill administration. In that study the State identified about 1,500 possible RS 2477's. By July 1 they should have an additional 35 or 40. It's an on-going thing in DNR.

She said the federal definition of RS 2477 is "the right-of-way for construction of highways over public lands, not reserved for public uses, is hereby granted." The history of it in Alaska is that DOT has used it as a legal tool over the years in acquiring rights-of-way for certain routes and highways. Three examples are the DeBarr Road in Anchorage, The Goldstream Road in Fairbanks, and the May Creek Road in the Wrangell St. Elias.

In the 1970's, Bruce Campbell, then Commissioner of DOT, collected information from his department, ADF&G, and DNR and developed maps showing every route they could find that qualified as an RS 2477. This was in conjunction with the State's effort to identify lands prior to ANILCA. In 1974 Commissioner Campbell sent a list of 1,700 possible RS 2477's, with maps identifying these, to the BLM. In 1985 BLM responded and thanked them for the State of Alaska's Trail Atlas. They claimed that the State's documents did not constitute a request for nomination, that BLM could not accept because they had no authority to accept them; that the "Atlas" did not meet the requirements of the BLM manual, and that they were not the right scale. By 1992 there was absolutely no record of anything in BLM.

In the 1980's the Statehood Commission did a study about statehood issues in which they specifically talked about this issue. Senator Coghill knew about this and when he was chairman of the Transportation Committee he caused another study to happen which identified RS 2477's in conservation units. The State Senate published three volumes of that.

In January 1993 Governor Hickel and Lieutenant Governor Coghill requested a budget of \$720,000 to research RS 2477 rights-of-way. Up to 12 people began the intensive effort. The next year \$300,000 was appropriated to complete it. In the work each RS 2477 right-of-way has a file that contains proof of trail use in such documents as USGS maps, other official government maps, State and BLM land status plats, land ownership data, historical use narratives, US Postal dog team routes, and others. She said this was the end of State involvement.

This summer the Alaska Outdoor Council's Board of Directors authorized the formation of a committee to pursue this issue. It was comprised of Dick Bishop, Lisa Harbo, Byron Haley, and herself. They talked to the director of the Northern Region BLM, Dee Richie, and presented their requests. He said he would instruct his lands people to accept their assertions and they would be recorded as

accepted into the office. They went ahead and filed 12 then and after that they filed another eight or nine before July 1.

MS. DALTON noted that there was a question regarding the statute of limitations for certain units being July 1, 1996 so they filed assertions in those units before then. BLM date-stamped each file they presented. Those in the Fairbanks meridian were serialized and placed in BLM's rights-of-way filing system. The other 50% of the files went to the Anchorage area where they are sitting on someone's desk. They did not get processed.

She said that just about every move DNR made was monitored by the Northern Alaska Environmental Center which was there on a daily basis. However, this summer they filed another 240 routes without being monitored. They figured that each case cost them \$3.50 in paperwork and copying and four hours of manual labor. This added up to \$800 and close to 1,000 volunteer hours.

The last item she wanted to mention was Secretary Babbitt's new policy.

SENATOR HALFORD said thank you to "Mike" and the Outdoor Council on behalf of the legislature and the people of Alaska.

REPRESENTATIVE HUDSON said he was concerned with the legal claim might have for the 1,700 "with maps trail Atlas" process that was done. MS. DALTON replied that BLM did not accept them and a search in 1992 showed that there was absolutely no record of them in BLM offices. She reiterated that everything they filed this time was notarized first and date-stamped by BLM. She said they had established a legal record of action, not assertions. REPRESENTATIVE HUDSON said he hoped an attorney could tell them whether that constitutes a proper action that could be carried forward beyond the cut-off date. MS. DALTON replied that they believe it is.

REPRESENTATIVE GREEN asked her at any time they made the 240 filings were they led to believe that those would not be honored. MS. DALTON answered no, but they assumed they wouldn't be because of the current policy.

SENATOR SHARP asked if they had received any response to inquiries to the Anchorage BLM office as to what is going on there. MS. DALTON replied that they hadn't pursued that, yet. She said the one area that concerns them is the Wrangel/St. Elias area which is very, very rich in minerals, but also very rich in historic trails and access roads. She doubted that the Anchorage office would return their call especially in view of Secretary Babbitt's new policy.

REPRESENTATIVE OGAN again thanked them for their efforts in trying

to protect our rights.

Number 260

STAN LEAPHART, Executive Director, Citizen's Advisory Commission on Federal Areas, said he wanted to comment on his analysis of Secretary Babbitt's policy on RS 2477's. He said his knowledge was general and he had been working with the Commission since 1982. He had worked with Senator Coghill identifying potential RS 2477's. His was a major accomplishment because before that you could barely get acknowledgement from the agencies that those routes even potentially existed. They have had the opportunity to work with Secretary of Interior Hodel when he developed the policy that was just repealed by Secretary Babbitt.

He said more recently they reviewed the 1994 draft Department of Interior Regulations that were issued and there were some serious shortcomings with it. The new policy that Secretary Babbitt issued repealed the 1988 Hodel policy and the 1993 moratorium on processing any RS 2477 assertions except in cases where there was "demonstrated compelling and immediate need to make the determination." Secretary Babbitt reasoned that the Hodel policy was not promulgated according to rule making procedures and is not a rule. MR. LEAPHART said, while this is true, that the Hodel policy was developed after extensive consultation with Alaska and the other western states. He said he was surprised by Secretary Babbitt's new policy. Especially since he had met with his special assistant, Debra Williams, in December and she briefed them that because of the moratorium Congress had instituted with respect to adopting any final regulations that the Department was going to pull and review all the comments and then issue final regulations that were going to be considerably different from the ones that were proposed in 1994.

He thought this interim policy was an end-run around congressional intent. There are a number of terms that cause them concern. It recognizes that anyone making a claim on an existing RS 2477 continues to have the option of seeking validation of the claim in court. Their concern is that the content of the policy will color the court's decision particularly in any instance where the Department of Interior would be involved as a party in the action on a claim. The policy does provide for an entity to ask the Department of Interior to make a determination of validity in advance of adoption of final regulations if there is "demonstrated, compelling and immediate need" for such a determination. The policy contains no definition or explanation of what would constitute that. This is left to the discretion of the agencies and the Secretary. If after receiving an application, the agency doesn't believe there is a compelling need, they simply will not process the request. Some of the major problems with the policy reflect problems that were in the draft regulations of 1994. This

includes the definition of construction which required that intentional physical acts must have been performed with the achieved purpose of preparing a durable, observable, physical modification of land and that it be suitable for highway traffic. The public users standard would only be recognized if the right-of-way was subsequently maintained by acts of construction. He said the courts have recognized the validity of rights-of-way created by the passage of vehicles, pack animals, and foot traffic. Many trails in Alaska have been created by this type of use.

The definition of highway in the proposed 1994 regulations would have to constitute a thoroughfare used prior to October 21, 1976 by the public for the passage of vehicles carrying people or goods from place to place. It is unclear whether some of our mail trails and other trails used seasonally or infrequently, but nevertheless used, would meet that definition.

The interim policy requires that any claim for an RS 2477 must comply with State law which must comply with federal law, but doesn't specify which federal law and didn't provide a lot of protection for existing rights.

He hoped that Congress would not approve the final regulations if they are anything like this policy.

DOUG BLANKENSHIP, privately practicing attorney, Fairbanks, said his association with this issue started when he was an attorney with the Alaska DOL for five years. As a private attorney he handles RS 2477 cases, one of which came out of the Alaska Supreme Court reversing a Superior Court decision saying there was no RS 2477 trail. He said he wanted to know what was the policy of the Knowles administration regarding RS 2477s. He has collected information over the years and he has a questionnaire from the Alaska Miners Association to the Knowles administration asking if they would aggressively pursue the rights of the State of Alaska regarding RS 2477s rights-of-way in courts and administratively. The answer was yes. He wanted to know what the terms of the policy were and if there was going to be equal treatment of native corporations and other private lands as compared to state and borough lands. Is DNR allowing Alaskans now the use of RS 2477 rights-of-way, he asked.

MR. BLANKENSHIP noted that there hadn't been much public information released from the State on this issue.

REPRESENTATIVE HUDSON asked him to explain the decision that was overturned. MR. BLANKENSHIP said it was concerning the Knik Glacier trail which runs 22 miles from Palmer to Metal Creek. The trail traversed a five acre parcel and the owner sued his clients to keep them from crossing their parcel to get to his clients mining parcel on Metal Creek. The Superior Court ruled that an RS

2477 was not proven. His client filed a pro se and the Alaska Supreme Court reversed the Superior Court with some principles that were cited in the Schultz case.

SENATOR HALFORD asked him who actually owns RS 2477s that crosses different properties. He asked if the State has the authority to give it away or can the federal government take it away. MR. BLANKENSHIP replied in his analysis the owner is going to be the State, but the State is not the only one who can assert the right. They are the most appropriate one. The existing right should prevail over any other later transfer of the property.

SENATOR HALFORD asked if a private individual had to sue the State as well as the federal government if his right has been bargained away. MR. BLANKENSHIP replied that if the State vacated any of the rights-of-way that would be a disposal, and the Alaska Constitution says there has to be a public process which would bring people with concerns forward, and hopefully it would be preserved for the public to use.

VIRGINIA STONKIS, Legislative Finance, said she had identified for the committee appropriations that were specifically for RS 2477 activity. DNR, DOL, and ADF&G are the agencies that she has figures on, but the DOT report was arriving as she left for this meeting. Two appropriations \$700,000 and \$320,000 totalled about \$1,000,000. Those that are starred are clearly RS 2477 appropriations. Those that are on state's rights that might include RS 2477s were put on the list for their information.

TAPE 97-9, SIDE B

BARBARA HJELLE said she had been representing Garfield County in Utah on RS 2477 issues for the last 11 years. She said current federal regulations provide that the Department of Interior can only regulate rights-of-way in so far as they don't diminish or reduce any right conferred by the grant (RS 2477). Furthermore, she said, if you look at the background materials on those regulations, the Department of Interior made it very clear that it was not the intent to reduce or diminish these rights at all and it was their intent to rely on prior existing regulations that were in effect before the repeal of RS 2477 to interpret the grant. Those regulations made it clear that the grant was based on state law and that there's no roll for the federal government to play in acknowledging or documenting the rights-of-way. She thought it was clear that Department of Interior was seeking to take over a dominance that it had never sought to take before and for which there is no basis in law. These actions, including the Babbit memo are in direct violation of the existing published regulations of the Department of Interior.

Looking at the Babbit memo, what's not said is more significant

than what is said. The definitions are in the proposed regulations, but are not covered in the memo. It is also implied that if you don't either go to court or process a right-of-way by persuading the Department of Interior to approve it, you can't exercise your right legally. People in Utah have been exercising their right anyhow, and they are now being sued.

MS. HJELLE said that she believed it was the state's duty to stand up for the rights of its citizen and it didn't mean going to the Department of Interior for acknowledgement of those rights and permission to exercise them.

She said the statute of limitations doesn't defeat their rights. She suggested having a well-thought-out Department of Transportation plan and exercising the right through that plan. Where there is a plan, BLM is required to coordinate its actions. She said Utah is intervening on all the lawsuits to protect the state's interest. Their governor has tried several times to negotiate or find constructive solutions with the Department of Interior and Secretary Babbit, but those actions have been rebuffed.

SENATOR HALFORD asked if they were currently being sued on specific actions on specific roads. MS. HJELLE answered yes and they were early in the process and were operating under an interim agreement between the parties.

SENATOR HALFORD asked if there was any other kind of restraining order in effect now other than what they had agreed to. MS. HJELLE replied that for several roads there is an agreement in place. Garfield County has been told by a Judge not to touch its roads until he says otherwise. There is no written order, but they are honoring his request.

SENATOR HALFORD asked how long it would be before they got any final decisions at the U.S. District Court level. MS. HJELLE said it is really hard to predict; she thinks the federal government wants to win. If they go to trial, it may be in early 1998.

SENATOR HALFORD asked if they have any private user cases where a user of the RS 2477 road is the person who is in the initial suit or have they joined in the county's existing lawsuits. MS. HJELLE answered that they don't have private users who have joined yet.

SENATOR HALFORD asked her if she could make suggestions to the State of Alaska on this issue. She said she has been impressed with the work the State of Alaska has done to research and document the RS 2477 issue. She thought that was absolutely essential. The historical evidence has to be put together. She thought we also needed to exercise our rights.

REPRESENTATIVE HUDSON asked if she had determined if there was any



congressional solution or relief in this matter. She thought it would be very problematic primarily because the environmental groups and the Department of Interior wage a propaganda campaign which is so confusing that it is difficult to come to a constructive conclusion that way. She hoped that congress might sometime say you can't change the status quo of your regulatory provisions and that you have to honor them as they stand today.

SENATOR LINCOLN asked if she knew of other states dealing with this issue and were they taking a different approach. MS. HJELLE replied that the only other state she hears from is Idaho and she hears from individuals, not the state. She thought the DOI was focusing on Alaska and Utah for two reasons. They are both large areas having few access roads now and they want to close them off entirely. They down-play the issue in other states.

SENATOR TAYLOR asked if there are opportunities available for her to bring a writ of mandamus action against the government itself demanding and having the federal courts forcing the federal governments to pass and enforce the laws on its books. MS. HJELLE said she hadn't tried that because her philosophy is that permission is not required of the federal government to allow a local government to exercise vested property rights.

SENATOR TAYLOR asked if she had filed suit directly on behalf of the state against the federal government to enjoin the extra legal action being taken by the Secretary of Interior for which he has no legal authorization. MS. HJELLE replied no, but it is an issue in the case. SENATOR TAYLOR asked if that was what they were asking for from the court. MS. HJELLE replied yes.

REPRESENTATIVE OGAN thanked Ms. Hjelle for her comments.

Number 328

MR. ROBERT BOSWORTH, Deputy Commissioner, ADF&G, stated they are not the lead agency in this matter.

THE FOLLOWING IS A VERBATIM TRANSCRIPT:

MR. BOSWORTH: In the years after ANILCA was passed, ADF&G coordinated the State's involvement in review of federal plans for parks, refuges, wild and scenic rivers, etc. Since that time the Department has been perhaps the most active of the State agencies that has been involved in the review of those plans - specifically in recent years in the Division of Governmental Coordination. This has include monitoring federal land management plans, regulations, and policy documents.

Our emphasis has been to pursue changes in those documents as necessary to assure State management of fish and wildlife and the

public's ability to access federal lands as guaranteed by ANILCA and other statutes. As part of this progress, we have also participated with DGC to assure that these federal land plans and other documents recognize the State's RS 2477 rights-of-way. Obviously, the public cannot make use of fish and wildlife if they can't get to them.

This gets us well to the documentation issue which was so appropriately highlighted by the woman from Utah. We have participated for a number of years in the documentation of rights-of-way. I suspect if there is an individual in the Copper Basin or the Wrangell Mountains area that was contacted by a State agency with regard to their personal knowledge of historical, traditional, trails, it was probably someone for ADF&G who made that phone call.

During the early 1990's DNR and DOT participated in the CIP project which documented several hundred RS 2477s for possible assertion. The Department staff assisted DNR's compilation of data on these routes whenever possible by locating historical use information, identifying priority routes, and in many cases interviewing witnesses. Over the last few years the Department has continued to be involved in monitoring federal and state agency actions to assure the rights-of-way are appropriately recognized. This has included participating in policy discussions with the Governor's Office, evaluating litigation options with the Department of Law, assisting in preparing testimony for congressional hearings, and coordinating with other states in responding to actions by the Secretary's office. Again, I think Ms. Cuning can speak to some of the specifics of those activities.

We expect to continue our involvement in RS 2477 issues, including helping to identify traditional access routes, appropriate right-of-way quiet title assertions, and helping to evaluate further litigation options with the direction of the Department of Law.

So in brief, our Department's involvement in the State's RS 2477 efforts is a small, but we consider, an important part of our overall effort in the area of access. We believe we've been doing a good job in addressing access issues where they arise around the State. Although, I should point out that our concern is focused on access for the purpose of hunting and fishing rather than general access. That's all I have for this time.

SENATOR TAYLOR: Why are you only focused on access for fishing and hunting purposes, if you're the only agency in the State that's heading this up. Do we have no interests in this State in timbering, mining, basic transportation corridors, or are we only going to focus upon some pathway that may get me back into a nice trout way.

MR. BOSWORTH: First of all I didn't mean to give you the

impression we are the only agency that's involved in this area. But we are restricted by our funding source - namely the fish and game funds that are used for this purpose.

SENATOR TAYLOR: Is someone else duplicating your efforts only they're looking at it from a highway perspective at DOT, and someone else from maybe a parks perspective at DNR, and...

SENATOR LINCOLN: Just real quickly, you said that you had documentation and that's been ongoing. How many cases or access projects have you filed or that you've documented.

MR. BOSWORTH: Mr. Chairman, Senator Lincoln, that sounds like a question I'd like to defer to Tina Cuning, if she's available in the Anchorage office. She's been directing our access project for several years now. Tina, are you there?

MS. Cuning: I'd like to answer the earlier statement first and that is we do not duplicate efforts with other agencies. We have worked very much as a team with DNR, DOT, and DEC. We have not operated independently. To answer Senator Lincoln's question, we do not do anything independently of that group except that we did conduct the Wrangell/St. Elias traditional access study and are about to publish the Kenai Refuge traditional access study. These are not specific to RS 2477. We all see ANILCA access as occurring in those areas.

SENATOR LINCOLN: As follow-up, perhaps I misunderstood. I thought you said you were helping with documentation with individuals that have the access problem with hunting and fishing in regard to RS 2477. Did I misunderstand?

MR. BOSWORTH: Mr. Chairman, Senator Lincoln, I think I'll ask Tina, again, to clarify that. My understanding is that it is part of the larger access project as was indicated recently focused in the Wrangel/St. Elias area. We have been documenting it with local help - the situations where a specific trail or a specific transportation corridor has had use whether or not it's officially recognized. We're doing the documentation in that case. We have done, as I understand, hundreds, we've identified hundreds of trails in that process.

As far as working with people on specific cases or claims, I'm not aware that we've been involved in that part of, say, an individual action.

CHAIRMAN OGAN: Ms. Cuning, did you have a comment on that?

MS. Cuning: We do assist individuals who call our office with problems or questions related to access primarily on federal lands. That's not helping them in litigation cases, but letting an

individual know what their rights are.

REPRESENTATIVE GREEN: My question was similar to what Senator Lincoln asked. It seems to me that as far as RS 2477 was concerned, what might have been an access characteristically or historically for fish and game might have already been done. I'm wondering now if there are resources being expended where I would think DOT or DNR might be the lead agencies. Are you still expending funds to look for prior traditional access for fish and game as it deals with RS 2477? What I thought I heard was more of a current nature of accessibility.

MS. Cunning: The access research we've been doing has been not specific to RS 2477s and we make every effort to go through and limit our searches of documents which have already been prepared by other agencies before we ever set foot out of libraries that aid in documentation. What we have is [indisc] on federal lands where there's certain federal access rights such as Title 11 of ANILCA that we believe these restrictions are not based on and so there's documentation of traditional access. This is to protect access for subsistence for commercial fishing.

REPRESENTATIVE HUDSON: Ms. Cunning, I suppose this is for you. Who would we refer as being in charge of this multi-agency effort to pursue the State's interests in the RS 2477 issue? Obviously, you've got a part of it. I suppose DNR, certainly DOT, and other agencies. Does the administration have singular plan that could give us what the goal of that plan is, what the current status is, and what the total funding might be so far - a status report?

MS. Cunning: The Governor is in charge and I would defer to DNR who has taken the lead in all the RS 2477s.

REPRESENTATIVE HUDSON: So then, DNR is the lead agency, is that correct?

MS. Cunning: Yes, that's correct.

CHAIRMAN OGAN: Ms. Cunning, I have a question for you. This is Chairman Ogan here. What should we be doing that we're not - in your opinion. I don't want to get you in trouble with your boss.

MS. Cunning: I'm sorry, sir, you cut out for a minutes there.

CHAIRMAN OGAN: There's static. I think I saw it in a movie somewhere. What should we be doing that we're not.

MS. Cunning: I thought you didn't want to get me in trouble.

CHAIRMAN OGAN: Well, I tell you what, we'll just save that question for your boss or for all the bosses.

SENATOR HALFORD: I think we should be a little more specific. What should we be doing with regard to fish and game and recreational access to better protect State's interests that we may not be doing? Any suggestions?

MR. BOSWORTH: If that's directed at me, Mr. Chairman, I'd be happy to respond. One of the most successful projects we've been involved with recently I've already referred to at least twice now which is the Wrangell/St. Elias access project. It was a focused effort with staff under Ms. Cunning's direction that established precisely the kind of documentation that can help the most - now, or for all I know, indefinitely into the future to identify rights-of-way and traditional access routes that either the State or an individual may choose to pursue. It was an intensive effort that took a couple of years, as I understand, to accomplish. It involved a computer mapping effort which, again, archived the specific trail sites. In my mind that was a tremendously valuable project that -- and developed a model and a format that could easily be applied elsewhere in the State where we have probably an equal number of traditional access routes that have not been documented.

SENATOR LYDA GREEN: How many routes has Fish and Game actually documented?

MS. Cunning: That's a hard one to answer because a lot of the use areas were not routes per se, but for example, were airplane landing areas or dog team routes, or pack animal routes that were not necessarily consistently over the same route each year. This is an attempt to document traditional access prior to the 1980 Parks and Recreation as opposed to RS 2477 which has a different criteria. We use the RS 2477 information that had been prepared by DNR and DOT extensively before we went out and did additional documentation of these landing areas or routes of access. I'd be happy to mail a copy of these documents to any of the committee members who would like to have copies. The GIS maps are phenomenally detailed.

CHAIRMAN OGAN: Ms. Cunning, maybe you could mail it to the committee chairman at the House and Senate Resources and we can make it available to the members.

MS. Cunning: Will do.

SENATOR TAYLOR: Just to follow-up on Senator Green's question. Did I hear you indicate there was a distinction in that which was selected as a route or a trail depending upon whether or not you were looking at the route or trail under the terms of ANILCA or under the terms of RS 2477 and, I guess, my broader question is how many routes have we identified or were initially identified and then what happened to those? In other words, is someone making an

executive decision within the department as to which ones are going to be quote true routes and we are going to log those and work towards making certain that they're protected or is someone making a judgement call about which ones are valid in that person's opinion and which ones are not? I guess it's two questions. Is there a distinction between the two laws and the way you look at these things and is there an administrative override decision made about what's going to show up on the final list of trails and routes?

MS. CUNNING: I can't answer your question in relation to the RS 2477 work group that DNR headed up and how they actually made their cuts and what fits the final list of 500 or so. In terms of our documentation of the traditional access routes and areas, we documented it all. If there was any written or verbal documentation for individuals of use prior to the 1980s, we rarely documented it, we made no phone calls for documentation.

SENATOR TAYLOR: So the other question, was there a distinction between the review process you went through under ANILCA and the review process you went through under RS 2477?

MS. CUNNING: The RS 2477 process that DNR headed up has a lot stricter criteria for determining if we want to pursue it or not. The statutory direction under Title 11 and 811 under ANILCA were protecting traditional and subsistence access is much more general. The criteria under the statute is whether or not it simply was generally occurring in the area at the time of designation. That's a very loose criteria compared to RS 2477s.

SENATOR HALFORD: Is there an intertie between RS 2477 accesses and the Section 17 access provisions in the Claims Act?

MR. BOSWORTH: Mr. Chairman, if that's directed at me, I don't know the answer to that. Perhaps Ms. Cunning knows. If not, perhaps Commissioner Shively.

MS. CUNNING: I can answer it, but it would be far better to be answered by the Department of Law.

COMMISSIONER SHIVELY: Thank you, Mr. Chairman, for the record my name is John Shively. I'm the Commissioner of Natural Resources and prior to my taking over as Commissioner, DNR was, as has been indicated by [indisc] and others who have been put in charge of the documentation portion of the RS 2477 effort. I'd like to make a couple of comments. I think the lawyer from Utah made one - I guess there's a little bit of confusion about. These rights really exist now. We have these rights-of-way. It's not like a homestead where you have to go out and apply for them and Bruce may want to spend some time on this, but they really do exist now. I think one of the differences between us and Utah and some other states is

that in many cases down there, they are actually dealing with roads - real roads. We are, for the most part, dealing with uses that created trails and require much more indepth documentation in terms of past usage because they are not as well identified. I also think it's important as I think others, including Mr. Blankenship have mentioned to talk about - or just to mention that really - RS 2477s are not necessarily a panacea for all our transportation needs. And I would just point out that two of the major development projects in the State, Prudhoe Bay and Red Dog, did not and, I don't think, could have used RS 2477s. If there's some question...

TAPE 97-10, SIDE A [BEGINS MIDSPEECH]

COMMISSIONER SHIVELY: ...when I came on board the capital projects, and I think there was pretty close to a million dollars if not a little over appropriated over two or three years by the Legislature to work on the kind of documentation that Mike Dalton and others have talked about. That project was just coming to an end, I think, at the end of my first partial fiscal year in office. That was centered in Fairbanks, there was specific staff dedicated to it, and that project came to an end. As a result of that project, there were about, I think, 1,200 sort of nominations, or what we thought were serious nominations of trails or rights-of-way, and I think we've now documented around 500 that we think we have enough documentation to say these are legitimate RS 2477 rights-of-way. We are still working on that. It was sort of a crash project.

There were perhaps a number of differing philosophies as to what constitutes a qualifying route, so for the last year we've basically been going back reviewing all the work that was done on these files, updating it, and then seeing on some of the other ones that we thought were maybe close calls as to whether or not there's some documentation that we could get up. I think the attorney general will talk about our litigation strategy, but once we're actively involved in litigation, then it will be the job of the Department of Natural Resources to take these files that we've been working on and provide them as a major part of the litigation.

We are, however, continuing that effort and among other things we're sending a staff member to Anchorage to go further into the federal archives and the archives at the Anchorage Museum of History and Art. If we were able, as the woman from Utah said, to negotiate a reasonable approach on these RS 2477 rights-of-way with the Department of Interior, a lot of this work probably wouldn't be necessary. But I think that the department has clearly thrown down the gauntlet and, most recently, with the secretary's new policy I think we were perplexed about the timing of it, we were perplexed about the lack of consultation, and we were perplexed about the need for doing anything at this time, particularly given the action

that had been taken by Senator Stevens in the appropriations language. However, the secretary saw to do what the secretary saw to do.

A couple of other things that we're working on. We're continuing to try to update our GIS information so that the trails appear on our mapping system. We are continuing to work the data base that's the basis of that. We have a volunteer that is a masters student, who is working on developing a WEB page for us so that we will have information available through that media that will talk about the history of the project; will talk about what policy guidelines we might have; frequently asked questions about RS 2477s; list the publications that might be available; how people can nominate a trail; and how they can provide us further information on trails they feel are important.

We do actually, sort of, manage RS 2477s. At least we have regulations, although as I've mentioned, they're unlike in Utah where you actually have a roadway that you might be really managing. I would say that we are managing, sort of, as we do a lot of the state's land given our limited resources, somewhat by default, but there are regulations on the books relating to RS 2477s and how they are to be managed, and access is allowed by the public on RS 2477s. However, for sort of more traditional uses as with other state lands, major activities like bringing heavy equipment on or upgrading the RS 2477 to a road would require a state permit.

Mr. Chairman, the other thing I would like to say because it answers some -- I think this really has been, in terms of the collection of the information, a major team effort. We've certainly gotten some good direction from the Department of Law in some of the criteria we looked at, but the real work has been done by people at Fish & Game, people at the Department of Transportation, people at DNR, and then people like Mike Dalton and other people, people in the mining community and others who have gone out of the way to help us find ways to document the RS 2477s that we have identified. So, Mr. Chairman, I would be happy to answer any questions.

CHAIRMAN OGAN: Senator Taylor.

SENATOR TAYLOR: One -- is the Yunik [ph] River wagon road part of the your 500 you've selected?

COMMISSIONER SHIVELY: Yes, it is on our list.

SENATOR TAYLOR: The only other question I would have would be -- you indicated that before a person would have a right to continue to use or expand the use, I guess, of an RS 2477 trail -- say wanted to walk a piece of heavy equipment into his mining claim that he has been walking to and from for years -- he would have to



have some permit from the state to utilize his trail?

COMMISSIONER SHIVELY: I don't know that we've had a lot of experience with that, Mr. Chairman, Senator Taylor. A lot of what we have documented are trails that are not currently in use, and I think Nancy Welch, who is with our Fairbanks office, is on line. Nancy, have we had any experience with people that are currently using the RS 2477s that have had to get permits from us to continue that usage?

NANCY WELCH, Regional Director, Division of Land, Department of Natural Resources: Yes, Commissioner Shively, we have issued some permits for RS 2477s where they've wanted to construct.

SENATOR HALFORD: She said "wanted to construct" and that was a different question.

COMMISSIONER SHIVELY: Yeah, Nancy, the question was whether or not -- lets say that the person had been running a Cat back and forth over an RS 2477 and we identify it as an RS 2477, have we then gone out and asked them to apply for a permit they didn't used to have to get?

NANCY WELCH: That is correct. On the [indisc.] trail in particular, last year we closed it for a portion of the season and we required permits for heavy equipment use on that trail.

SENATOR TAYLOR: I guess that's what I was getting at, and I didn't understand where anybody thought they had the authority to do that since it is a federal law and the right exists from that law to the person who is using it.

COMMISSIONER SHIVELY: Well, Mr. Chairman, and I don't want to try to practice law here, but it's a federal law that gave the state the right. But the state, in order to get that right, had to pass its own legislation, and the first piece of legislation that related to this was passed by the territorial government, I think in 1923. And one of the things that we've argued very strenuously with the department is that the management of rights-of-way are under state law, not under federal law, so we do have the right and, I think, as a government the responsibility to manage these rights-of way.

SENATOR HALFORD: Well, you know, in the real world of applications of how the -- if you look in the Iditarod district, in the Minto Flats district, in the whole area south of Ruby, they may not have used a road for 40 years, but you see it and you see the equipment at the end of it and the mining operation is still there. And it may be once every 10 years that a piece of equipment has to go back and forth across that, but I think they would be violently opposed to not being able to use that and not saying that was clearly an RS 2477. They're more visible on the ground than the dog sled mail

routes were.

COMMISSIONER SHIVELY: Well, Mr. Chairman, Senator Halford, that's somewhat true, but they are not their rights-of way, they are public rights-of-way and the state manages public rights-of-way. For instance, I can't drive my snow machine on the highways. That's a management decision that we have made for safety reasons and in order to protect certain resources in ways that perhaps they didn't used to be protected 40 years ago. We may need to regulate -- I mean, I think that in these cases where people ask for the right to do this our inclination is to give the permit, not to not give them it. But that's our current regulations and we operate under those regulations.

SENATOR HALFORD: Okay, let's take one of these that's fairly complex. Again, you leave a community with a piece of heavy equipment and you're trying to go to some place that's 60 miles further away. It's got a state land segment, it's got a private land segment, it's got a Native selection segment, it's got a federal segment, and it's got a federal segment with added restrictions. Now, it sounded like the best, or at least the Utah advice was use it and let somebody else sue you. Now where is the state going to come down in the five different law suits filed against the guy that used it.

COMMISSIONER SHIVELY: Well, Mr. Chairman, Senator Halford. First of all, under the theory as I understand it, it's a legitimate RS 2477, we currently own it, so the only person that that individual would have to come to is us for a permit because we manage the RS 2477, the Native corporation doesn't, the federal government.... Now I'm not saying that when we did that if part of that was across Denali National Park that the Department of Interior wouldn't attempt to do exactly what they've done in Utah, in fact I suspect they would. They would try to stop it. If we thought it was legitimate, you know, depending on where we were with the litigation and everything else, we might or might not support the person in their attempts to combat the federal government if the federal government took them to court.

SENATOR HALFORD: Okay, lets carry our example to -- and lets say this is one of the routes on the 500, or whatever it is, that have been clearly documented and the data base is there so that the factual questions of prior use have been answered, but that this route includes state land, private non Native, private Native and federal land. Will you treat all of that land the same way in issuing the permit if the trail is of the same use and history in the whole group?

COMMISSIONER SHIVELY: At this point, Senator Halford, we treat the whole trail the same way. I think that as we get into this and get into more management, notification of people who, particularly

private land owners, I think it would be appropriate, you know, if people were applying for permits. The other thing that I think is important that -- lets go back to the Fish & Game examples -- that an RS 2477 trail across private lands does not give the person the right to shoot anything on those private lands just to get from one set of public lands to the other set, assuming that the private land owner would want access to those lands restricted.

SENATOR HALFORD: Yeah, and I don't disagree with that. One of the considerations I think that some have heard is that the state would be trying to force people to use section line easements instead of RS 2477s or to buy access instead of using RS 2477s in some cases, and I just wanted to make sure that wasn't the case.

COMMISSIONER SHIVELY: Mr. Chairman, Senator Halford. I have not heard of that. There is a whole legal issue, as you know, about unsurveyed section line easements, and most of the state is unsurveyed. Where we've vacated easements -- it's actually often section line easements that we vacate in communities once there's an established transportation pattern, but I know nothing in policy that I'm aware of where we're telling people to go use section line easements. And section line easements work very well when I go back to Nebraska to visit my wife's family and drive on all of those roads that are in squares. They are a little more difficult to use up here.

REPRESENTATIVE GREEN: We have 500 and some trails that have been delineated and we say that we have authority over those. Does it make any difference in your estimation, and probably this should be to the attorney general, but in either of your estimation, that if we have exercised, such as the example that the senator has given, some sort of decision making over trail "a", but there is "b", "c", "d" and "e" that we really haven't done much with -- we maybe just only found out about them the last year or so -- but they're there and we're still claiming them, but we haven't done anything. Does that make any difference as to whether the state has or has not exercised prior authority in our claims for, or is it RS 2477 yes or no and it doesn't matter?

COMMISSIONER SHIVELY: Well, Mr. Chairman, Representative Green, the basic underpinning of RS 2477s is usage that occurred prior to 1976 when FLMPA was passed, and so that basically gives you your right. Once we've identified the trail, if we've got a case where on one trail people have come to us for permits because they're running a Cat across and four other trails really aren't currently being used, that really should not affect the basic legal underpinnings. In fact, on the other hand it will be precisely when we start issuing some of those kinds of permits when the RS 2477s cross Native and federal land that some of these issues will come head to head with the federal government.

SENATOR HALFORD: You know, the question of definition of "prior use" -- it seems that the state policy then says that there are an infinite number of different RS 2477s over the same route depending on what degree of use that you decide that there was. What is the previous, not so much the current, what is the previous federal policy with regard to how they viewed RS 2477s prior to the Babbitt letter.

COMMISSIONER SHIVELY: Mr. Chairman, senator, I can't answer that.

SENATOR HALFORD: Okay, maybe the attorney general can. We'll wait until we get to him. Thanks.

CHAIRMAN OGAN: Senator Lincoln, impatiently waiting?

SENATOR LINCOLN: Yes, and this might be for the attorney general, but I'll ask it since DNR was in charge of the RS 2477. Just to clarify for the Administration's effort into identifying the RS 2477s across the state, I noted that in your little "How to Nominate" of January of '94 you talk about the one-year funding and the documentation up to the 500 rights-of-way that you have eluded to here of the 1,200 that were nominated. So as the general public and I think some of us within this building here don't feel that the Administration has been dragging their feet in identifying and filing these particular parcels, I'd like to hear your response on why from '94 on, -- and I know someone eluded to the funding that was received -- but why 500 cases were sort of stopped in '94 and there haven't been anymore added to the list since then. I would ask that in that question -- we heard, and I don't know if Mike was representing the Outdoor Council, but that the Wrangell-St. Elias had not been filed and they wished they had time to have filed in that area, and whether some of the Wrangell-St. Elias has been in fact documented and is a part of that 500, and why the Outdoor Council would have to scurry around really quickly to get I think it was 240 areas filed under this 2477?

COMMISSIONER SHIVELY: Mr. Chairman, Senator Lincoln. Well, I actually am not clear about the whole legal basis of the notification of the federal government and what that means in terms of the RS 2477 process. I do know that there is some discussion about whether a statute of limitations exists on certain conservation system units. We have identified some rights-of-way within Wrangell-St. Elias and I can't tell you how many right now. We did not stop the process in 1994. We have continued to work the existing files, we've continued to add a few new ones, I think each year. And I think the attorney general may want to talk when he gets his turn about the whole assertion process and then the legal challenges that we may face as we take some of these things to court.

SENATOR GREEN: I didn't understand the last sentence that you

said. It was something "unless we go to court it would require..."

COMMISSIONER SHIVELY: What I was saying, I mean, there's the whole process of the official notification of the federal government, and I'm not sure what -- you know, we in notifying them, if we really believe they exist is an important part of the process if we've got the legal basis. I can't answer that, and the attorney general can probably answer that plus some of those issues that will come up as we start to litigate some of these where the federal government clearly objects to our management or private land owners who might object to our management.

REPRESENTATIVE HUDSON: For the lay person, is there a common statement as to what the current is? You know, we heard from Mike Dalton about the action that they've taken up there and what was done back in Bruce Campbell days, and some of us are laboring under just where we are, what do we own, what's our goal, are we going to have to try each one of these, or there is sort of a blanket case? Perhaps the attorney general can answer some of these questions, but just, you know, if there is any help you can give us along those lines, that would be beneficial.

COMMISSIONER SHIVELY: Well, Mr. Chair and Representative Hudson, we may ultimately have to litigate each and every one if the federal government wants to fight us or private land owners. Obviously, if the RS 2477 is on state land, we can declare it and its ours and we manage it. I think it is our hope as we start to litigate some of these and also look at other litigations such as the litigation that's currently going on in Utah that there will be some principles set, just as there were some principles set in the navigability issue, that will resolve a lot of these issues. But I can't predict, and particularly the RS 2477s that are in conservation system units. I suspect, absent ultimately some kind of negotiation with the Department of Interior, which they seem very unwilling to participate in, we'll probably go one by one because they will just come up and say "Well, you don't have the information to validate that that's an RS 2477" and then we'll have to say "Well, yes we do and here it is."

CHAIRMAN OGAN: Senator Halford.

SENATOR HALFORD: If a group of citizens with very little money can assert 240 or whatever it is of these, if we fund the money, will you assert the remainder of the ones that you have researched, at least file them with BLM, get them stamped in, and take them and record them at the state recorder's offices so they are actually recorded and part of the record in that way?

COMMISSIONER SHIVELY: I don't see any reason why we wouldn't do that, senator, given what I understand is the governor's interest in this issue right now.

SENATOR HALFORD: I would very much like an estimate of those costs if you would get that back to us. I think it only cost, you know, two hours and \$8 apiece for the ones done by volunteers, and if this could be done for 10 times that, it would still be a bargain for the future of the state of Alaska I would think.

COMMISSIONER SHIVELY: Well, Mr. Chairman and Senator Halford, I think that what they filed was largely our work, if I understand it, and which many of them had participated in.

CHAIRMAN OGAN: On that point, commissioner, is there any reason why a citizen's group had to pick up that ball and run with it?

COMMISSIONER SHIVELY: They felt it was necessary to do and we hadn't gotten there, and that's all I can tell you.

CHAIRMAN OGAN: Is that a matter of an internal policy call from the third floor or groups that are influencing the third floor?

COMMISSIONER SHIVELY: No, I think it's more a matter of the fact of different priorities within the department and where we place our workload.

CHAIRMAN OGAN: Thank you, sir. Any other questions of the commissioner? Hearing none, last, but certainly not least, the attorney general of the state of Alaska, Bruce Botelho.

ATTORNEY GENERAL BOTELHO: Thank you, Mr. Chairman. My name is Bruce Botelho, attorney general. Before I get into my more prepared remarks I would comment that this has been a very impressive hearing in terms of the caliber of people you brought beginning with Mike Dalton, who more than any other person has been associated with the RS 2477 issue in this state, and ending in terms of the private participants with Barbara Hjelle with whom my staff has worked, and, in particular, Elizabeth Barry who is the assistant attorney general who heads our Natural Resources Section in Anchorage and which includes our statehood defense component. Ms. Barry is in the room here today and she is certainly available to elaborate on questions that I'm unable to answer. But I would note that both Ms. Hjelle and Ms. Barry have worked together in Washington, D.C., not only in testifying against efforts by the Department of Interior to unduly restrict the vindication of state rights of RS 2477, but also to work with the respective delegations of Utah and Alaska in fashioning some congressional solution.

I think that as I've heard the testimony today there's probably been three or four questions that are overriding which I will, during the course of comments, try to address, but I think probably the beginning point relates back to Chairman Hudson's comments about the process, whether we have to litigate each and every one

of these issues, and where does that take place.

As I think others have amply made clear, the RS 2477 statute was one first enacted in 1866 and it was repealed in 1976, but with the understanding that it did not in any way extinguish rights-of-way, construction of highways that had taken place prior to that date. The Department of Interior did adopt regulations, and in addition, in 1988, most importantly I think in terms of what the current secretary of Interior has done, Secretary Hodel adopted in December of 1988 a policy which was the result of extensive negotiations between Alaska and other western states about how those regulations would be interpreted in Interior and taking into account issues that were of particular concern to Alaska. And I think one most importantly highlighted was the definition of what constituted a highway.

Early on in the Clinton Administration, beginning in about July of 1993, Secretary Babbitt first indicated his intention to move on regulations within the Department of Interior to bring RS 2477 under control by which he meant that regulations would have the effect of restricting the definition of "construction"; the definition of "highway" would attempt to impose a very specific process for having the RS 2477 adjudicated; and perhaps most importantly, from my perspective, trying to do a cutoff date after which no more RS 2477 rights-of way could be established.

The consequence -- well, the next step elaborated on was his follow-through on that announced intention which was to adopt regulations, which took place in 1994. And that led to actions by Congress in 1995 and 1996 where our staff, the Administration, returned to Washington, D.C. to work with our delegation in ultimately getting language which prohibited the secretary from implementing any such regulations, and we thought obviously a very successful effort until 15 days ago when the secretary announced a policy which in many respects attempts to reimpose by this policy statement what he could not do in the regulatory process that he already initiated and had blocked by Congress.

The reaction of this Administration and this, I think, directly relates to one of Doug Blankenship's concerns: what is the policy, what is the position of the Knowles Administration with respect to the action of the secretary. I think I can make it fairly plain by a statement which the Governor included in his address in Fairbanks the day before at a combined meeting of the Chamber of Commerce and the Fairbanks Rotary, and that is as follows:

"We will fight this ill-advised policy on three fronts: first, I've directed the attorney general to pursue all our legal options in halting implementation of the secretary's new policy; second, we will present test cases that have broad Alaska support to administratively challenge the secretary's new policy to the

Department of Interior; and third, we will work with our congressional delegation to resolve the issue legislatively."

The Governor's three-prong approach, I think, brings into focus the fact that there are two fundamental avenues by which we in litigation may achieve a final determination on our RS 2477 rights-of-way. The first is in the courts, and those can happen both in federal and state, although, again, if it implicates federal lands currently held by the federal government, those must be done in federal court though we have RS 2477 claims that do not run over current federal lands, but make it a variety of private or quasi-governmental instrumentalities. The second avenue, and it's the one to which Secretary Babbitt's latest action most applies, and that's to do it administratively in front of the Department of Interior.

Now some people, including Babbitt, would suggest that we shouldn't be very concerned about this particular policy because it really only applies to the Department of Interior, and, in fact, there's nothing new. We have a moratorium in the department and therefore no one is being blocked in the vindication of their rights that they weren't a day before this new policy. What troubles us most is in the language of the policy itself is the fact that we expect to see this policy reflected in the advocacy by the federal government trying to persuade federal courts, in particular, that this represents the views of the Department of Interior for which deference should be given. And so, while it has been portrayed by the secretary as rather an innocuous confirmation of previous policy that should not have any adverse effect on any party, our concern again is that it will be used to buy the federal government in arguing its position in cases that are brought in court.

We specifically intend, as the Governor has announced, to try and challenge that policy by bringing cases directly to the secretary of Interior in the administrative process so that we can directly challenge that policy. But we also intend to file, and we expect to be doing that within the month, test cases primarily in federal court as an alternative.

Let me talk next about what we have been doing in an ongoing way. There has reference to the case Schultz versus the United States, which was originally decided in the Ninth Circuit in 1993, which, however, was then on reconsideration and that opinion was withdrawn and a new one was issued which denied a right-of-way to a person trying to cross at Fort Wainwright where a claim of RS 2477 right-of-way had been asserted. The state of Alaska had participated as an amicus in supporting Mr. Schultz in his claim, and in speaking with Mr. Schultz's counsel, it is their intent at this point to petition the U.S. Supreme for assert in this latest decision. That will not happen until there is a final technicality in that Ninth Circuit case to bring it to a closure so the time will run, and we



have committed to participate as an amicus in that case in seeking the petition for assert and to solicit assistance from other states in joining our amicus effort.

Mr. Blankenship made reference to the Puttycomb and Fitzgerald case. What he did not note was that the state of Alaska had joined as an amicus on Ms. Fitzgerald's behalf before Mr. Blankenship became involved in the case. And again, we think we made a significant contribution in outlining the state's view about RS 2477.

The third case that we have ongoing right now involves a Chickaloon road case in which there has been an assertion that our right-of-way is over Indian country and that we do not have a right of access. We have asserted, among other things, RS 2477 as a basis for access that is nearing briefing on the merits, and I would expect full argument and a decision sometime during the course of this year.

Three years ago in the process that has been discussed here in terms of whittling down the 500 routes where we felt that there was great documentation, we asserted or gave notice, and the federal courts began using the second mechanism, setting the administrative process, the court process, eleven particular routes that we thought were most promising to establish certain principles of RS 2477 rights in the state. We have gone back -- we've actually prepared complaints in a couple of those, we have not filed. We've gone back through and we've discovered several what I would describe as problematic issues. For example, two of the eleven, actually as it turns out, occur entirely, exclusively on state land, and it makes absolutely no sense to go into federal court to establish that we have a right-of-way. Several others cross significant numbers of mining claims, and I guess to be very candid, we're not interested in engaging in a lot of battles with Alaskans over RS 2477. We're trying to establish some principles in a very measured way that has us focusing on the federal defendants and not looking primarily at private targets.

So though we will invariably be asserting them in many instances where private parties are certainly a part of the litigation -- I think using the example that Senator Halford gave -- it actually is a very frequent one when you're talking about a distance of 20, 30, 50, 60 miles that you are actually covering, many different land patterns, and many different potential defendants.

Another issue that I think is appropriately raised and that is the statute of limitations and do we have a major problem. And I think Mr. Blankenship did a good job in expressing concern, particularly with the conservation system units: is there some statute of limitations running. We've spent a great deal of time looking at this. We were quite confident that, in fact, the management plans

are not of that caliber, of that character to have triggered a conclusion that the federal government has asserted a claim adverse to the RS 2477 right-of-way. But it will be one of the issues that we will first be shooting out of the box again to test.

I think Ms. Hjelle's particular remark, and I think reinforced by Commissioner Shively, is, again, recognition. That the 12-year statute of limitations only is a statute with regard to the ability of the state to assert or to obtain quiet title. It does not in any way affect the underlying right-of-way itself. It does not in any way extinguish it. What it does do is put people at peril in exercising the right-of-way against, in most instances, a federal defendant who might well claim that that assertion is not well founded.

Let me take a quick look here to see if I've covered most of the topics here. Let me, Mr. Chairman, at this point maybe take a pause and allow you to direct questions, or, if it might also be appropriate, to ask Ms. Barry at the table if there are more specific or technical legal questions to ask.

CHAIRMAN OGAN: I think Senator Halford has a question to ask.

SENATOR HALFORD: I think initially the question I have is the same question I asked Commissioner Shively. Would the Department of Law support recording all of those that we now have researched in their respective recording districts so that they are recorded in that fashion and filing all of the ones that are researched adequately, that haven't been filed by the Outdoor Council?

ATTORNEY GENERAL BOTELHO: Mr. Chairman, I would support that. I think my only reservation is to not create the allusion that we have achieved some major legal status by that activity.

SENATOR HALFORD: If they're filed in the recording district, at least there is notification to contrary land owners and to the public that there is something here. You know, it may not be finally determined at the federal level, but if it is the state's position that these are a prior grant and then they are a prior existing right, then there is an obligation that a buyer of property or anyone else be notified of that, and the recording at least does that.

ATTORNEY GENERAL BOTELHO: Mr. Chairman, I do not dispute that. I think that point is well taken. My only point again is not to lull the public into a false sense of security that by having taken that initial step we have somehow adequately asserted the claim, because ultimately that determination will be done case by case. I would expect that we will first have to see a pattern of litigation which will lead the Department of Interior to generalize about whatever principles of law are ultimately established.

SENATOR HALFORD: But isn't this a matter of if we assert and if we use them, they have to sue us? If we don't assert them, if we don't use them, then we have to sue them to quiet title. I mean, it still seems that the first step is record them, treat them as they are ours, as we believe them to be, and go forward and make them sue us.

ATTORNEY GENERAL BOTELHO: Again, Mr. Chairman, I think the two courses of action suggested there are both legally correct answers. Again, I think the concern that has to be out there for a person, whether it's a private individual, a corporation or the state itself by asserting and having it then challenged not only by the Department of Interior but perhaps by other federal agencies, one runs the risk of Corps of Engineers violations. It is a risky business, I think, for an individual to put his or her capital at risk, their livelihood at risk, and it's not, in my view, going to be the case that the state will intervene in every RS 2477 case. There may be situations where we would have a bad actor, and we've had in our state's history situations where people have taken bulldozers straight through streams in trying to assert right-of-way claims, and the state should not in every instance be in the position of having to endorse that activity, even if it believes that the right-of-way is properly asserted in the sense that it belongs to us.

SENATOR HALFORD: Well, we can defend them with regard to RS 2477 while in turn we prosecute them for the abuse of the RS 2477.

ATTORNEY GENERAL BOTELHO: Mr. Chairman, we certainly could. I think that hard issue...

SENATOR HALFORD: At least your defending them from the federal government in the third parties.

ATTORNEY GENERAL BOTELHO: It's a hard issue, I think, to explain to the public, and I think most importantly, obviously we don't want to be in the position of being crosswise with most of our citizens. That's why it strikes me that one would take a more measured approach. There may be circumstances where the kind of aggressive step being taken in Utah would be appropriate. I'm not prepared to say that that should be foreclosed altogether.

SENATOR HALFORD: Mr. Chairman, I have a question for Elizabeth Barry. The question comes out of your testimony in Congress on March 14, 1996, and I understand that we have to tailor our comments a little bit to the audience. One of the questions that I asked Commissioner Shively and I was concerned with is that we treat everything equally. One of the comments was "if access across Native owned and other private land is determined to be necessary through a process involving public review, right-of-way

authority other than the application of RS 2477 rights-of-way will be utilized if available." And I wonder what you meant by that, I mean, is there going to be a different standard applied to private lands than there is to federal lands, or is that what that meant?

ELIZABETH BARRY: Mr. Chairman, Senator Halford. My understanding of current policy in the Administration is, no, there will not be a different standard applied, but I would have to...

TAPE 97-10, SIDE B

ELIZABETH BARRY: ...Commissioner of DNR and the Attorney General for further [indisc.]

SENATOR HALFORD : I guess, I would ask what you meant by that statement.

ELIZABETH BARRY: There have certainly been discussions regarding whether or not there, when there is other right-of-way authority available whether that should be used rather than getting into a RS 2477 battle. For instance, there are sometimes 17B easements already reserved across Native Corporation land. It could be much simpler to use an existing 17B easement for access than to get into a protracted court battle about an RS 2477.

SENATOR HALFORD : I guess my concern is that we treat all landowners equally. That's unknown and if there is available, workable alternative access that is equally economic, you know, that may work and RS 2477 obviously. And Commissioner Shively has got the best example in Red Dog. You know, you try, you work, you go through the process, it doesn't work. You have to go back to Congress and get a whole special provision.

COMMISSIONER SHIVELY: Well, Mr. Chairman. The problem is that not all land is the same, so you can't treat them all the same. State land, we don't have to do anything. Native lands, there are other alternatives which don't exist on federal lands. And federal lands, all that exists is a process. On Native lands there exists actual dedications of rights-of-way. And so, it may be in order particularly when there are disputes, because ultimately if the landowner says its not ours and wants to fight this, we are gonna have to prove every single one of these by litigation. There may be a quicker way to get to the access we need than through the RS 2477. And I think that was the point of discussing a different approach to try to get to the same end.

BRUCE BOT ELHO : One other aspect of it as well, Mr. Chairman, is recognizing that not only is not all land the same, not all landowners are either. And again, I would distinguish between the federal government and others, in the sense that there is a mechanism for dealing with this adversely with the federal

government in the court or the administrative process to the extent that they contest our assertion. But we also have in mind that we would look to work with all landowners as we're developing rights-of-way to try and resolve short of having to go to court. And I, I think that is also a part of the tenor of this: is to be able to look not only at alternatives in the sense of other legal mechanisms, but to try and resolve short of litigation with landowners the ability to access those routes.

SENATOR HALFORD : Well, as long as the basic premise is that everyone is treated equally. I think that's the concern that I had and it was a concern that was brought to me with regard to different classifications of land. And I realize that when you get into 10 different mining claims and - you got one route, you got 10 different mining claims, three different Native Corporations, two different federal units, and you're gonna fight with all of them. You may not choose to fight that one first.

BRUCE BOTELHO: Exactly, and again that's one of the highest priorities identified of the 11, actually cross 47 mining claims. And it's just not in the State's best interest, in my judgement, to be suing 47 holders of claims in order to assert this particular right-of-way as being one of the first out of the chute.

SENATOR HALFORD : From a practical point of view, I absolutely agree. But from an ideologically point of view, the 47 mining claims don't own the right-of-way. The State of Alaska does on behalf of all the people.

BRUCE BOTELHO: I understand Mr. Chairman ...[indisc]

REPRESENTATIVE HUDSON: Bruce, obviously on all State property we pretty much control that and we have property rights there. Are we asserting any property rights on the federal RS 2477 right-of-way lands? I mean, if we have property rights, perhaps if somebody needed to put up a shelter or something like that. Then we would be able to authorize that. Do we have property rights on these trails?

BRUCE BOTELHO: Mr. Chairman, if I might defer to Ms. Barry in terms of uses that aren't directly right-of-way uses.

ELIZABETH BARRY: Mr. Chairman, Representative Hudson, I don't believe there's a clear cut answer to that question. You're going to have to look at what the scope and the width of the right-of-way is. Just within the Alaska context, we've had cases where [indisc.] RS 2477s, but rights-of-way are set aside for road purposes we've not been allowed to [indisc.] transition lines, for instance. So, I think that's going to be an issue that will have to be determined in the courts ultimately on what rights we have besides, if any, besides getting from point A to point B.

REPRESENTATIVE HUDSON: And my second question, if I might? Mr. Attorney General, you mentioned that you had three essential elements and you've described those: the legal challenging Congressional, and the Governor had mentioned this. What if any, I asked Ms. Hjelle, if they had any Congressional solutions or help that they might recommend. Have you identified some specific action that we might ask of our Congressional delegation?

BRUCE BOTELHO: Mr. Chairman, again Ms. Barry has worked closely with the delegation, in particular Senator Murkowski, on this issue. And perhaps, I could ask her again to describe the efforts in the past. Obviously, there's been a new suggestion today which Ms. Hjelle had raised as a possibility of something we have not discussed before.

ELIZABETH BARRY : Mr. Chairman, in the last Congress there were bills introduced in both the House and the Senate that would have put the black letter federal law that state law control RS 2477 grants. And that allowed for the more casual type of use that prevailed over a lot of Alaska's highways, in terms of less restrictive definitions of construction and highway. Neither of those bills passed and instead, there was the moratorium put in place only the federal regulations taking effect. My understanding is that nothing has yet been introduced in this Congress, but they just got started a few weeks ago. Things are moving pretty slowly there, at this point.

BRUCE BOTELHO: Mr. Chairman, if it would be helpful, I think we'd be willing to provide Representative Hudson a copy of the Legislative proposals that were circulated.

REPRESENTATIVE HUDSON: I would appreciate that, I'm sure both chairman would appreciate a copy.

CHAIRMAN OGAN : Well, I find I'm next on the list so I have a question for you. If a private person uses a 2477 right-of-way where there's no state regulations like on a national wildlife refuge; would the state intervene on behalf of that individual if he got in trouble with the feds?

BRUCE BOTELHO: Mr. Chairman, let me answer it this way. Conceptually, the answer would be - we would do so. Having said that, I would look at the facts of any given situation. It's quite clear from my earlier testimony that we have actually supported private individuals who have asserted RS 2477 rights-of-way in the state, in the courts of both the State of Alaska and the Federal Courts. And so, as a matter of principle, we are not adverse to lending the weight of the State of Alaska. Whether we would do it in every case, I think would depend on the circumstances, what legal principles would be advanced in the case, what are the resources available at that particular time and again, the good

faith efforts of the individual. So that again we're not in a situation where we have a black sheep, for lack of a better way of describing it. But in principle, the State of Alaska would, subject to the kind of concerns I've expressed.

CHAIRMAN OGAN: I think I have one other question. At a Joint Senate/House State Affairs Committee meeting during the interim, between the first and second half of the session of the 18th or the 19th Legislature, you stated. There was some, quite a bit of concern on the part of the committee members that there was only a very small amount of these right-of-way assertions being litigated. And you stated that, it wasn't that big of a priority, that you had - your first priority was the protecting children which is a good cause. Do I see that there's, can we from your testimony and testimony of Commissioner Shively - that the Administration has now shifted that position. That is now a much bigger priority with them, now that Secretary Babbit has taken the action he has.

BRUCE BOTELHO: Mr. Chairman, I think it is fair to say that the action of the Secretary of Interior has created an urgency on RS 2477. And not simply from a political sense, but our concern about its possible impact on litigation. That has really propelled it, obviously, to be a major concern of the Governor such that he has put his credibility on the line on this issues. So, I would say that there is a heightened attention statewide of the issue. And the Governor intends to make sure the State of Alaska is a leader on the issue.

CHAIRMAN OGAN: Well, as a comment, I welcome that action. I gotta tell, to be quite honest, I see a bit of a trend of the Administration to take - not take a proactive stance on this and other issues and then when we get in trouble. But I do welcome the departure from the less proactive stance. And there was a question from Senator Lincoln, the Senator Halford, and then I think we should probably wrap it up.

SENATOR LINCOLN : I think it pulls very nicely to what your last question was and that is if we do start to litigate, and it sounds like we may. And we've got 500 documented parcels and more to come that it seems to me that if we're going to - if Administration is going to have this as a priority, then we are going to have to budget accordingly. I don't think that we can say that this is something that Administration better get on and find that we're gonna cut the budget or that you have to then litigate [indisc.] utilize the budget, your normal budget. I would, I guess I would ask what kind of a plan that you see over time and are you going to then come back to the Finance Committee and ask for funding to litigate the RS 2477s.

BRUCE BOTELHO: Mr. Chairman, Senator Lincoln. We have prepared a five year schedule of alternative scenarios. The Legislature has

funded our work in RS 2477. And we've anticipated that in terms of our budget planning. So, I'd be delighted to share that with you and I don't have that information at hand.

CHAIRMAN OGAN: And Senator Halford.

SENATOR HALFORD : Just a question from the opposite direction. With regard to the vacation of RS 2477s, I know that DOT in actual construction projects sometimes vacates pieces of an RS 2477 road in the same sense that they also take access and they sometimes trade with an adjacent landowner to straighten out a curve or something else. But other than those kinds of cases, are there any cases where the state has vacated an RS 2477 and if so, how have they done it?

BRUCE BOTELHO: Mr. Chairman, that question I believe would be most appropriately directed to Commissioner Shively. [indisc.]

COMMISSIONER SHIVELY: Chairman and Senator Halford. I think largely the RS 2477s that we have vacated are section line easements which people believe are RS 2477s in communities. We have not to my knowledge vacated any of the RS 2477s that we've identified here, but and I don't know; Nancy Welch, if you're still on, whether you have anymore information on that question than that.

An unidentified person via teleconference stated that Ms. Welch had left the Fairbanks office.

SENATOR HALFORD : I would like a follow-up on that question just to know what has been vacated. Again, not the - I mean, I know that DOT makes, you know adjustments back and forth and when they sometimes get something else they back away from both the PLO easements and the RS 2477 easements when they get the other side and finally build something to specification.

COMMISSIONER SHIVELY: Mr. Chairman and Senator Halford. As I said, the ones that I've been aware of are all section line easements in developed communities where we have alternative transportation.

SENATOR HALFORD : But they're actually RS 2477s and section line easements.

COMMISSIONER SHIVELY: Well, most people believe. I think that there is a theory that a section line easement is an RS 2477 easement, it is a different kind of RS. It's not what you think of. I mean most people think of, when they talk about RS 2477s as the mining trail that people used for years, but it's my understanding that in the territorial legislation that accepted reservation of RS 2477s and because of the way that was written,



that section line easements are considered under the same law. Bruce, you may or Elizabeth maybe.

BRUCE BOTELHO: Nodding our heads in agreement.

SENATOR HALFORD : I would like a list of the RS 2477s that are section line easements that have been vacated and the process by which they're vacated.

CHAIRMAN OGAN: And would you provide that to the House Resources Committee as well. Well, if there are no other questions. I'd like to thank everyone that participated today. I think we had a very in-depth and informative discussion of the issue. And thank you for enduring the long meeting and for your time out of your busy schedules, all of you. And with that this meeting is adjourned (3:50 p.m.).