TONY KNOWLES, GOVERNOR

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To Fred

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July 26, 1995

The Honorable James V. Hansen
Chairman, National Parks, Forests & Lands Subcommittee
House Resources Committee
U.S. House of Representatives
812 OHOB
Washington, DC 20515

RE: H.R. 2081, Recognition of the validity of RS 2477 rights-of-way.

Dear Chairman Hansen:

On behalf of Governor Knowles, thank you for the opportunity to share our views as your Committee considers this bill.

The State of Alaska, as you know, has testified extensively to Congress regarding the issues associated with RS 2477 rights-of-way in Alaska. Most recently, we were pleased to respond to your invitation by participating in the hearing and discussion session you held in March. As an alternative to providing a witness to this week's hearing, we would ask that the testimony and accompanying materials submitted to the subcommittee in March be considered in your evaluation of H.R. 2081.

By its clear recognition of the role of state law, H.R. 2081 identifies and addresses what is, in our estimation, the most critical issue in the debate over RS 2477 rights-of-way. In our opinion your bill reaffirms what Congress intended in 1866 and what state and local governments and the courts have acted upon since that time. That is, state law governs the acceptance and scope of RS 2477 grants.

We also support the inclusion of a process to bring finality to RS 2477 assertions and will comment in detail on these provisions before the hearing record closes.

Statement of John D. Leshy
Solicitor, U.S. Department of the Interior
Before the House Resources Subcommittee on
National Parks, Forests, and Lands
"R.S. 2477 Rights-of-Way Settlement" Bill -- H.R. 2081

July 27, 1995

I am pleased to have the opportunity to testify here today on the recently introduced bill, H.R. 2081, regarding R.S. 2477 rights-of-way. R.S. 2477 is, of course, a subject of some controversy and of considerable interest to the Department and several of its agencies. Although we strongly oppose H.R. 2081, we welcome your interest in addressing this problem and would be happy to continue to work with you to find an acceptable solution.

As this Subcommittee knows, R.S. 2477 was originally enacted as part of the Mining Law of 1866. It read, in its entirety: "The right-of-way for the construction of highways across public lands, not reserved for public uses, is hereby granted." Congress repealed this statute nearly two decades ago, in Section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA). The repeal did not, however, terminate already existing highway rights-of-way created under R.S. 2477. While R.S. 2477 was a law appropriate for its time, Congress has since enacted several other statutes that provide access to and across federal lands.

Nearly two decades after its repeal the issue of preexisting rights-of-way is still unresolved. The profusion of unresolved claims presents a planning and management problem for federal land managers and other landowners and uncertainty for potential right-of-way holders and users of public lands. Confusion and controversy have resulted.

The Department published a proposed rule nearly one year ago, on August 1, 1994, to address these rights-of-way created no later than October 21, 1976 by the "construction" of "highways" across unreserved public lands. In order to allow full public participation and in response to Congressional requests, the Department extended the comment period to a full year; it is still, in fact, open. We have received over 3200 comments on the proposal.

The Department's goals in issuing the proposed regulation are simple: To explain how we will apply the statutory criteria and to provide a workable administrative process and standards for recognizing valid claims with finality. Unfortunately, this bill does not accomplish either of these goals and we cannot support it.

This proposal would stack the deck heavily in favor of R.S. 2477 claimants. The bill would make it too easy to file new and frivolous claims and too burdensome for the government to reject ones that do not meet the statutory criteria. The net result is that the bill could litter the public lands with thousands of new rights-of-way and quite likely restrict, without compensation, existing property rights in private lands that were once public lands. Under this bill, virtually anyone could file a claim within ten years of enactment. All the bill requires to support a claim is a "notice" along with a "map" and a "general description" of the "route, termini, and scope" of the right-of-way. The bill would require the United States to accept or reject every claim,

no matter how poorly demonstrated, within 2 years of filing and then to file a lawsuit against the claimant within 2 years in order to preserve its objections; otherwise, the claim is deemed valid. The bill would give the United States the burden of proof on "all issues."

A claimant's failure to file even this minimal notice within 10 years has no negative effect on the claim. Section 5(a) preserves anyone's right to file a lawsuit under the Quiet Title Act indefinitely, by failing to provide an effective trigger of the statute of limitations. Rather, claimants can file a lawsuit within twelve years of the Secretary's rejection of a notice (§ 5(a)(1)) (which, of course, greatly lessens the incentive to file a notice) or within 12 years of discovering that the federal government has a adverse claim to the right-of-way (§ 5(a)(2)). Section 5(b) goes on to specifically provide that failing to file a notice, even within 10 years, does not constitute relinquishment of the claim. This effectively requires the federal government to take piecemeal, individual, direct actions on every right-of-way claim in order to close the window of opportunity for new rights-of-way that the bill provides. These provisions render the bill ineffective and counterproductive. It would multiply, rather than reduce, the conflicts and confusion over R.S. 2477. The Department's most important goal in this exercise is to bring finality to the uncertainties left open by the repeal of R.S. 2477. The bill does exactly the opposite.

In effect, then, the bill actually resurrects this long dead provision, considerably broadening rather than narrowing the problems it has created. The bill reopens indefinitely the opportunity that R.S. 2477 once provided for obtaining rights-of-way across federal lands, and it does so at the expense of existing law, National Parks, military lands, wildlife refuges, and other sensitive federal lands, as well as Indian and Alaska Native lands and private lands.

Furthermore, the bill does not provide a workable process or standards to evaluate claims. Much of the Department's proposed regulation focuses on providing a clear public process with identifiable standards by which claims could be made and evaluated. This approach would spare individual claimants and the United States the haphazard results and considerable expense of proceeding in individual court battles to clarify the rights at issue. This bill takes the opposite approach.

Section 5(c) of the bill would order the application of state law to R.S. 2477 decisions, but does not require that the state law be consistent with the terms of R.S. 2477 itself. State law has a role to play in R.S. 2477 to the extent it does not conflict with the terms of R.S. 2477 itself. But state laws that do not require "construction" of a "highway" over unreserved public lands, for example, do not meet the requirements of R.S. 2477 and did not result in a grant of a right-of-way.

For example, Alaska Statutes § 19.10.010 purports to create rights-of-way along each section line 100 feet (or four rods) wide. As you know, section lines run in a grid, creating one-mile squares over the entire landscape. There has clearly been no construction and there are no highways over most of these section lines, but under this bill, rights-of-way on such imaginary lines would be deemed valid. As Secretary of the Interior Bliss said in 1898, this dedication of

or prior to the repeal of R.S. 2477. This bill would, by contrast, allow state laws that are

of prior to the repeal of R.S. 2477. This bill would, by contrast, allow state laws that are passed much later to redefine the terms of R.S. 2477, apparently without limitation. For example, the state of Utah passed a law in 1993 that purported to redefine the terms of R.S. 2477 very broadly, seventeen years after its repeal. This bill would validate this and other such laws.

The bill's approach is not workable or defensible. State law has a role to play in R.S. 2477's application, but it should not read out requirements of the underlying federal law or be allowed to reach back and rewrite history.

The bill does not protect private property or the lands of Indians or Alaska Natives. While the bill intends to provide access to private property, it does not consider the implications of creating access to and across private property not wanted by the owners of that property. An overly broad reading of R.S. 2477 could create unwanted public access across private property by authorizing claims of "public" roads in lands that have passed out of public ownership. The Department is especially concerned that individuals may seek to use R.S. 2477 as a method of securing access to and across Indian and Alaska Native lands, as well as private property.

The bill has other problems. We are troubled by the provision allowing anyone who uses or could use a right-of-way to access private property to have standing to claim it as an R.S. 2477. This could be read to eviscerate the longstanding requirement that an R.S. 2477 highway be public.

We disagree strongly with Section 3(d), which would prevent the public from participating in or challenging actions taken under the bill. The lands on which R.S. 2477 claims may be made in many cases remain public lands today. It runs against the whole tenor of modern public land law and of usual Congressional policy to preclude public participation in R.S. 2477 proceedings. We believe that the test that normally determines whether someone has standing to contest a Departmental action, that he or she be "adversely affected," should apply.

The bill would place the burden of proof "on all issues" on the federal government, even though

the Department does not have access to the basic information needed to resolve many of the questions raised. This places the Department in the difficult position of proving that someone else did not do something at any time since 1866. Clearly, the holder of a right-of way is in a better position to provide information substantiating the construction and use of a highway than the federal government. Furthermore, this reverses the longstanding rule of law, many times confirmed by the U.S. Supreme Court, that "doubts" regarding any federal land grants "are resolved for the Government, not against it." See, e.g., United States v. Union Pacific R. Co., 353 U.S. 112, 116 (1957).

We also question the wisdom and necessity of Section 3(g), which would provide new and restrictive procedures for road closures. It could endanger public safety, by precluding road closures in cases of flood, fire, or other dangerous conditions, or to lead to an inability to protect fragile historic, cultural, or natural resources.

In general, the bill complicates and prolongs the existing problems of dealing with R.S. 2477. I appreciate the opportunity to testify on this important matter. I will be happy to take questions.

Thank you again for your consideration of the Governor's views. We appreciate the opportunity to work with you and your staff on the continuing development and action on this legislation.

Sincerely,

John W. Katz

John W. Katz
Director of State/Federal Relations and
Special Counsel to the Governor

cc: Governor Tony Knowles
Congressman Don Young
Senator Ted Stevens
Senator Frank Murkowski