THE STATE of ALASKA

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Senator Dennis Egan
Chairman of the Senate Transportation Committee
State Capitol Room 9
Juneau, Alaska 99801

Re: Department of Law Concerns Regarding SB 94

Dear Senator Egan:

At the hearing before the Senate Transportation Committee on March 20, the Department of Law voiced a number of concerns regarding SB 94 dealing with R.S. 2477 rights-of-way. This letter responds to Senator Fairclough's request that Law provide a white paper discussing its concerns.

I. SB 94 Relinquishes State Property Interests.

One of the concerns raised by SB 94 is that it would cause the State to relinquish on a large scale and without compensation R.S. 2477 property interests it currently possesses. From a legal perspective, this would make R.S. 2477 a far less valuable and effective tool to the State of Alaska.

SB 94 would relinquish property interests in four separate ways:

1. narrowing the width of R.S. 2477 rights-of-way across private property from the typical 100' width to a narrower 60';

2. greatly limiting the allowed scope of uses of R.S. 2477 rights-of-way on private property[1];

3. freezing R.S. 2477 rights-of-way to the condition, mode, and method of use that existed as of the time of its repeal in 1976[2]; and

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[1] For instance, Klutina Lake Road R.S. 2477 (as discussed below) could no longer be used to access the river for fishing or boat launching.

4. effectively granting private landowners veto authority over the State's maintenance[3] and improvement activities on R.S. 2477 rights-of-way across private property.

The State currently claims in excess of 20,000 linear miles of codified R.S. 2477 rights-of-way. The Department of Natural Resources ("DNR") estimates that today approximately 50 percent of these rights-of-way exist across private land. As discussed in the fiscal note, the limitations and transfer of property interests under SB 94 on private land would likely result in a fiscal impact in the many tens of millions of dollars.

II. SB 94 Potentially Violates Requirements Contained in the Alaska Constitution and the Public Trust Doctrine to Preserve Public Resources and Access to Those Resources.

Another legal concern raised by SB 94 is whether it would violate requirements contained in the Alaska Constiution and the public trust doctrine to preserve public resources and access to those resources.

Article VIII, section 1 of the Alaska Constitution provides: "[i]t is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest." Article VIII, section 2 provides: "[t]he legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people." The public trust doctrine provides that the State holds certain resources (such as land, wildlife, minerals, and water rights) in trust for public use, and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary.

R.S. 2477 rights-of-way are important to both the State and the public. They provide public access to lands and resources, including access for hunting, fishing, and subsistence activities. They enable the State to reasonably manage, maintain, and develop the lands, resources, and opportunities it owns and holds for the public.

Below is an image of the State of Alaska Highway System without taking R.S. 2477 rights-of-way into consideration.

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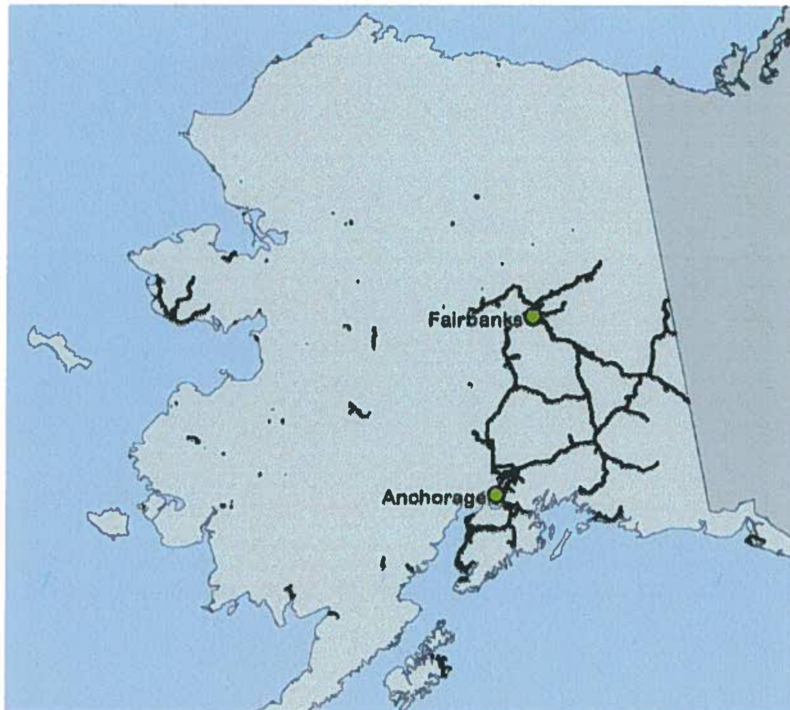
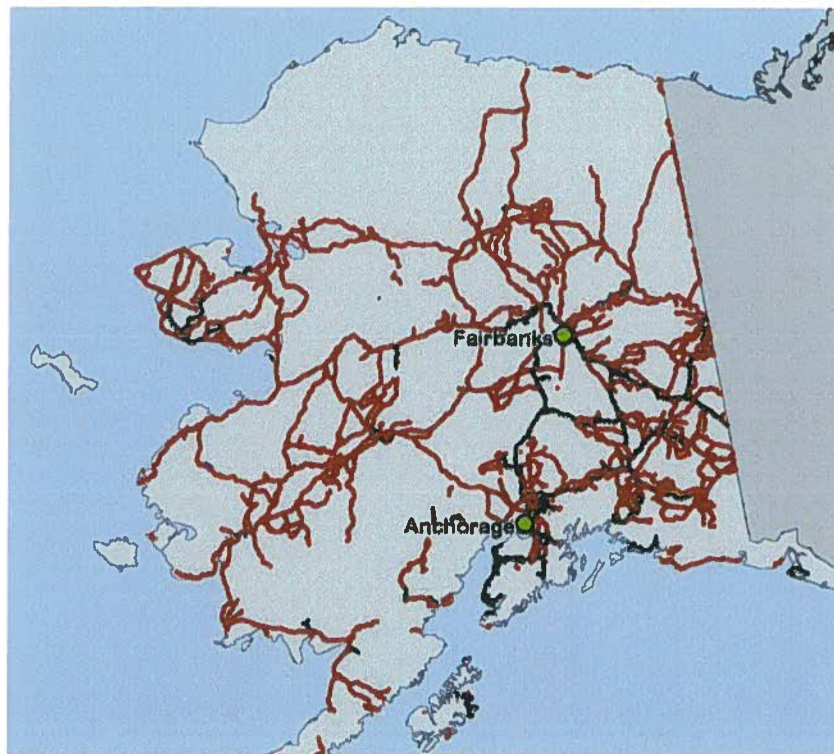
[2] Since the vast majority of R.S. 2477 rights-of-way are presently undeveloped, this would likely ensure that these rights-of-way remain undeveloped.

[3] Although SB 94 purports to allow routine maintenance to occur without landowner consent, routine maintenance excludes activities necessary to preserve the condition of the road as it existed after October 1976. *See* Sec. 2(e). Consequently, in many instances, the State's routine maintenance activities will require landowner approval.



The following image depicts public highways in the State after taking into account the over 20,000 linear miles of R.S. 2477 rights-of-way presently claimed.



Due to the importance of R.S. 2477s to the State and its citizens for access to land and resources, it is questionable whether the State would violate the Alaska Constitution

and the fiduciary duties owed under the public trust doctrine by voluntarily ceding its R.S. 2477 property interests as contemplated in the current version of SB 94.

III. SB 94 Would Create a Patchwork of Disparate Rights and Interests.

R.S. 2477 rights-of-way often traverse lands owned by different parties, including federal, State and private land owners. This can occur even within relatively short distances. SB 94 would create a patchwork of disparate rights and interests depending on the underlying property ownership. If the property is private, one set of rules would apply. If it is in State or federal ownership, a completely different set of rules would apply. Depending on the underlying property ownership, the rights-of-way would be subject to different widths, modes of use, and rights and obligations concerning maintenance and improvement. This would create mangement issues for the State and also impact the ease with which the public can use and rely on the rights-of-way.

IV. SB 94 May Promote Litigation.

SB 94 provides that in the event of a dispute between a private landowner and the State regarding proposed improvements, the dispute will be submitted to mediation. If the the parties are still unable to resolve their dispute, suit shall be brought in superior court. Further, no improvements can occur until resolution of the dispute. This provision may cause significant delays in right-of-way maintenance and improvement, and it may promote significant amounts of litigation. SB 94 also requires the State to rely on State condemnation statutes found at AS 09.55.240 - 09.44.460 if the State needs to realign a right-of-way which also may lead to litigation.[4]

V. SB 94 Would Abrogate the State's Claims and Defenses in the Klutina Lake Road Litigation.

SB 94 also would abrograte the State's claims and defenses as presently asserted in *Ahtna, Inc. v. State,* Case No. 3AN-08-6337 CI. In that case, Ahtna, Inc. sued the State claiming that the Klutina Lake Road near Copper Center is not a valid R.S. 2477 right-of-way. Klutina Lake Road is a portion of the historic Valdez to Copper Center Trail, one of Alaska's most historically rich R.S. 2477 rights-of-way. Beginning in 1898, thousands of miners, after being dropped off in Valdez, attempted to travel over the Valdez Glacier into interior Alaska on this trail.

SB 94 would vacate the State's claimed R.S. 2477 right-of-way where it overlaps with 17(b) easements reserved under the Alaska Native Claims Settlement Act

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[4] In addition, the Alaska federal district court has recently held that it has no jurisdiction to apply those statutes, via 25 U.S.C. § 357, to Alaska Native allotment lands. The State has appealed that ruling to the Ninth Circuit.

("ANCSA"). 17(b) easements are reserved to the United States during the land selection and transfer process under ANCSA. Because that process is still continuing, 17(b) easements are still being created to this day, but at the earliest, vested contemporaneous with selection and subsequent conveyance to Alaska Native corporations.

In contrast to 17(b) easements, R.S. 2477 was an open congressional grant of public rights-of-way for the benefit of miners, ranchers, homesteaders, and members of the public who had need to travel across public lands. The R.S. 2477 grant by the federal government constituted a standing offer of federal lands for the creation of public rights-of-way. Per Alaska law, the offer could be accepted, prior to its repeal in 1976, by: a) public use for such a period of time and in such a manner as to demonstrate acceptance of the grant; or b) by an action on the part of appropriate public authorities clearly manifesting an intent to accept the grant of a right-of-way. R.S. 2477s do not require court action in order to be created or vest. R.S. 2477 rights-of-way spring into legal existence when all elements have been satisfied for their creation. Acceptance and vesting of an R.S. 2477 right-of-way requires no administrative formalities; no entry, no license, no patent, no deed on the federal side, and no formal act of public acceptance on the part of the states or localities in whom the right was vested.

SB 94 overlooks critical distinctions between R.S. 2477 rights-of-way and 17(b) easements, including:

Issue	**17(b) Easements**	**R.S. 2477 Rights-of-Way**
Who Owns/Has the Right to Possess and Manage?	Federal Government	State of Alaska on behalf of the public and in trust for the public.
Is the easement/right-of-way terminable without State action?	Yes	No
Can the easement or right-of-way be moved or realigned as reasonably necessary due to natural occurrences (flooding, erosion, landslides, etc.)?	No, except by written application to BLM, concurrence by both the dominant and servient estates, and lengthy application/approval process (which takes several years). It is presently unknown whether the successful movement/realignment of a 17(b) easement has ever occurred.	Yes, under appropriate circumstances this can occur, as long as it is consistent with the purpose and intent of the right-of-way and as long as it does materially increase the burden to the servient estate.
Do the easements/rights-of-way closely match physical locations of roads and/or historic use on the ground?	Generally speaking, no. Although existing trails are purportedly reserved, 17(b) easements have often been drawn on maps with little or no effort made to ground-truth the 17(b) locations with	Yes. Because R.S. 2477 rights-of-way are generally based on historical use, their location often tracks very closely with where the historic use occurred. There are instances where use has shifted slightly over time and courts have

	actual or historic routes.	confirmed that in some instances, slight adjustments or realignments are acceptable and appropriate.
Are the easements/rights-of-way susceptible to being discontinuous?	Yes. 17(b) easements cannot be created across Alaska Native allotments or non-Native corporation lands. Due to the frequency with which 17(b) easements traverse Native allotment or non-Native corporation lands, 17(b) easements are sometimes discontinuous, which greatly compromises their use and utility. They are also frequently discontinuous because 17(b) easements drawn on maps often do not closely track the location of roads and trails on the ground. Where these locations do not match up, the 17(b) is discontinuous from the physical location of the roadway, thus further compromising the easement's utility.	No. Assuming all other elements are satisfied, R.S. 2477 easements apply to unreserved federal lands. As long as the land was unreserved at the time that acceptance of the R.S. 2477 occurred, it does not matter that the land may now be owned by someone other than the federal government. What is determinative is when the R.S. 2477 was created. As long as its acceptance pre-dates the creation of other legal interests such as homesteads, mining patents, federal reservations, Native corporation conveyances, Native allotments, etc., the law is clear that these interests are subject to the R.S. 2477 as a previously created existing right. *State v. Alaska Land Title Association,* 667 P.2d 714, 726-27 (Alaska 1983)(By operation of law, land conveyed by the United States is taken subject to previously established rights of way even where instruments of conveyance are silent as to the existence of such rights of way. "No suit to vacate or annul a patent in order to establish a previously existing right-of-way is necessary because the patent contains an implied-by-law condition that it is subject to such a right-of-way.").
What is the scope of use of the easement/right-of-way?	17(b) easements are limited to travel only. Their scope varies depending on the specific language of each particular grant. For instance, with regard to the Klutina Lake 17(b) easement, it was established between 1980 and 1983. It is a variable 25-60 feet wide right of passage from the Richardson Highway to Klutina Lake. In places, it is limited to a "25 Foot Trail" only,	R.S. 2477 rights-of-way support, at a minimum, the uses they sustained from their establishment through modernization and to the present day. *Ball v. Stephens,* 68 Cal.App.2d 843, 158 P.2d 207, 210 (1945)(An existing right of way recognized as such, primitive at its conception, may evolve from trail to road as frontier conditions give way to modernization. "The route was used first as a trail, later by horse-drawn vehicles, and went through a gradual process of

	available for use by foot, dogsled, animals, snowmobiles, two and three-wheel drive vehicles and small terrain vehicles (less than 3,000 lbs. in Gross Vehicle Weight).	occasional improvement and use until it became a road suitable for automobiles and trucks."). Such uses may include, subject to State regulation, nearly all modes of travel and may also include rest stops, parking, sight-seeing, camping, picnicking, and boat launching as well as travel to and fro. However, such uses are limited to those occurring within the right-of-way itself.
What is the width of the easement/right-of-way?	Variable. *See above.* However, generally narrower than a R.S. 2477 right-of-way.	In most instances, R.S. 2477 rights-of-way are 100' in width per AS 19.10.015 and Department of Interior Order 2665.
What is the legal relationship between 17(b) easements and R.S. 2477 right-of-way?	R.S. 2477 rights-of-way and 17(b) easements exist wholly independent of one another. *Doyon, Limited,* 181 IBLA 148, 156 (2009). A decision of the Alaska Native Claims Appeals Board held that the existence of an R.S. 2477 right-of-way precluded neither the reservation of an overlapping section 17(b) easement nor the conveyance of the underlying fee. *State of Alaska,* 5 ANCAB 307, 88 I.D. 629 (1981). Neither easement will enlarge or diminish the other. *State of Alaska v. Alaska Land Title Ass'n,* 667 P.2d at 726-27.	See middle column.
Can the easement/right-of-way be unilaterally maintained by the State?	No. No existing regulations address maintenance or management of 17(b) easements. However, Department of the Interior Departmental Manual 601, § 4.3(d) suggests that Department of Interior authorization may be required.	Yes, the dominant owner (the State) is legally entitled to perform routine maintenance of the right-of-way without the permission or consent of the servient owner.
Can the Easement/right-of-way be lost through disuse?	Yes. A 17(b) easement may be terminated by BLM on a determination that it is no longer needed for public use. 43 CFR	No. State right-of-way interests cannot be lost or abandoned through non-use. Instead, there must be a positive act on the part of the State to relinquish such

	2650.4-7(a)(13). The State has been required to litigate termination decisions by BLM in the past. The fact that 17(b)s may be terminated by BLM are a major distinction between 17(b)s and RS 2477s.	rights. *See* AS 38.95.010; AS 19.30.410; Restatement (Third) of Property § 7.4 (Modification and Extinguishment by Abandonment) ("[a] servitude benefit is extinguished by abandonment when the beneficiary relinquishes the rights created by the servitude."); 62 ALR 5th 219 (an easement "cannot be lost by mere nonuse, however long continued, unless accompanied by an affirmative act on the part of the owner of the easement indicating an unequivocal intention to abandon it."); *Safeway, Inc. v. State* , 34 P.3d 336, 339 (2001) (land or rights in land acquired by the State can only be vacated by the appropriate State agency); *See also, Ahtna, Inc. v. State, Dept. of Transp. & Public Facilities,* 296 P.3d 3, 8-9 (Alaska 2013).

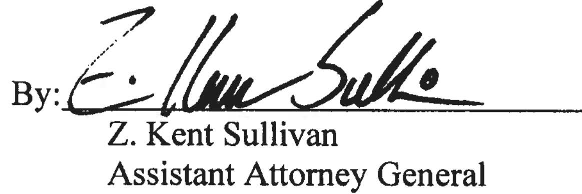
Based on these distinctions, SB 94 would result in the State possessing an easement that is a disparate amalgamation of an ANCSA 17(b) easement and an R.S. 2477 right-of-way with differing widths, scope, and allowed uses.The 17(b) easement would be very restrictive and under federal management and ownership. It could only be used for travel and the current use by the public for access to the river, launching boats, and camping within the right-of-way, would not be allowed.

Finally, several property owners use the Klutina Lake Road R.S. 2477 in order to access their property with highway vehicles. As noted above, the 17(b) easement does not allow highway vehicle use all the way to the lake, but instead, on the last portion of the road preceding the lake it is limited to a "25 Foot Trail" only, available for use by foot, dogsled, animals, snowmobiles, two and three-wheel drive vehicles and small terrain vehicles (less than 3,000 lbs. in Gross Vehicle Weight). Under SB 94 the private property owners at the outlet of Klutina Lake would no longer have highway vehicle access to their property.

Thank you for allowing me the opportunity to raise these issues and concerns regarding SB 94. To the extent you have any questions, or if I can provide anything further, please let me know.

Sincerely,

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By: 
Z. Kent Sullivan
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ZKS

cc: Senator Donald Olson (via email)
David Scott, staff to Senator Olson (via email)
Heather Brakes, Legislative Director, Office of the Governor (via email)
Scott Ogan, Natural Resources Manager, DNR