

SJR

13

SENATE COMMITTEE REPORT

First Committee of Referral

DATE: 2/5/97

FURTHER:

Date of 5-Day Notice: 2/6/97
(in accordance with Uniform Rule 23)

DATE TURNED
IN TO OFFICE: 2/26/97

Resources Committee considered

SENATE JOINT RESOLUTION NO. 13

Relating to RS 2477 rights-of-way.

and recommends:

be replaced with _____ CS _____ (_____)

adopt previous _____ CS _____ (_____)

attached amendment(s)

adopt Letter of Intent by _____ Committee

further referral to the _____ Committee

Senate Bill:

same title

new title

House Bill:

same title

technical title

new: SCR# _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
<i>John L. Taylor</i>	<input checked="" type="checkbox"/>				
<i>Krew A. Jensen</i>	<input checked="" type="checkbox"/>				
<i>Bob Thomas</i>	<input checked="" type="checkbox"/>				
<i>Lyle Green</i>	<input checked="" type="checkbox"/>				
CHAIR: <i>Lyle Green</i>	<input checked="" type="checkbox"/>	CHAIR:			
<i>Kate Stafford</i>					

NEW FISCAL NOTE(S):

Department Date Zero Fiscal

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTE(S):*

Department Date Zero Fiscal

Department	Date	Zero	Fiscal

APPROPRIATION -- no fiscal note

*Include fiscal notes accompanying Governor's bill

Alaska State Legislature

Senate

**RICK
HALFORD**

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Official Business

Senate Joint Resolution 13 Sponsor Statement

" Opposing the Department of the Interior's R.S. 2477 policy "

Revised Statute 2477 was a right granted to the states by the United States Congress with the passage of the Mining Act of 1866. The purpose of this law was to provide for, and guarantee, the public's right to establish access across federal lands. Subsequent congressional action, and more than 100 years of case law, has recognized the state's authority to determine and define R.S. 2477 rights-of-way.

Although Congress repealed R.S. 2477 in 1976 with the adoption of the Federal Land Policy and Management Act, they specifically acknowledged the legal existence of R.S. 2477 rights-of-way established prior to the repeal. Current Federal Regulation explicitly provides that any rights conferred by the R.S. 2477 grant shall not be diminished. (43 CFR § 2801.4)

Disregarding the published federal regulations of his own Department, and the clear congressional prohibition to regulatory change, on January 22, Secretary of the Interior Bruce Babbitt issued an interim departmental policy on R.S. 2477. This "new policy" contains many of the bureaucratic roadblocks and "newly created" definitions present in the Department's 1994 proposed regulations that Congress specifically prohibited.

R.S. 2477 rights-of-way are crucial to the future of our young and still largely undeveloped state. R.S. 2477 rights-of-way are essential to provide surface travel to Alaska's many untapped mineral deposits and other natural resources, recreational areas and tourism opportunities, and access to and between Alaska's rural areas.

R.S. 2477 rights-of-way are an existing state right that we cannot allow to be "regulated away" by the Secretary of the Interior. Passage of SJR 13 provides the Alaska Legislature an opportunity to express our staunch support of this important state right and our strong opposition to what appears to be a continuing "War on the West" waged by Secretary Babbitt and the Clinton Administration.

Alaska State Legislature

Senate

Official Business

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Revised Statute 2477 (RS 2477) Rights-of-Way

- Revised Statute 2477 was enacted by Congress as part of the Mining Act of 1866 to provide for public access across federal lands.
- Federal regulation and over 100 years of case law recognizes state law as controlling the basis for determining and defining RS 2477 Rights-of-Way.
- Congress repealed RS 2477 with the passage of the Federal Land Policy and Management Act in 1976, but specifically acknowledged the legal existence of RS 2477 Rights-of-Way established prior to the repeal.
- Current federal regulation explicitly provides that any rights conferred by the RS 2477 grant shall not be diminished. (43 CFR § 2801.4)
- In 1988, Department of the Interior Secretary Donald Hodel issued a carefully crafted RS 2477 policy reflecting long-established law regarding these rights-of-way, which are typically owned and managed by the state.
- Recognizing the importance of RS 2477 rights-of-way to Alaska's historic and future transportation structure, in 1993 and 1994 the Legislature appropriated nearly \$1.2 million to the Department of Natural Resources, and tasked them with researching, documenting and asserting RS 2477 rights-of-way.
- The DNR effort resulted in some 560 rights-of-way being documented and readied for assertion.
- In 1994, Secretary of the Interior Bruce Babbitt proposed RS 2477 regulations that would have added significant regulatory roadblocks to the states exercising their RS 2477 rights conferred by Congress.

- Recognizing the proposed regulations as a substantial deviation from established law, Congress attached a provision to the Department's appropriation for fiscal year 1996 prohibiting the developing, promulgating and implementing of regulations concerning RS 2477 rights-of-way.
- Congress, in the FY 97 budget, permits the Department to publish final regulations regarding RS 2477, however, stipulates that they not take effect unless expressly authorized by a subsequent Act of Congress.
- January 22 of this year, Secretary Babbitt issued an "interim departmental policy" on RS 2477 containing many of the "regulatory roadblocks" and "revised" definitions of key terms in the previously proposed regulations that Congress denied.
- RS 2477 rights-of-way are an existing state right that cannot be regulated away by the Secretary of the Interior.

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. SJR 13

Revision Date 2/5/97 Dept. Affected _____
 Title Oppose DOI policy on RS 2477 BRU _____
 Component _____
 Sponsor Halford _____
 Requester _____ Component Serial No. _____

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES []						
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FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1091 Designated Program Receipts						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost: 0.0

POSITIONS

POSITIONS	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This resolution will have no fiscal impact on state departments.

Prepared by Senate Resources Committee Phone 465-4907
 Division _____ Date _____
 Approved by Senator Rick Halford, Chairman *Rick Halford* Date 2/21/97
 Agency _____

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FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. SJR 13

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Prepared by Senate Resources Committee

Phone 465-4907

Division _____

Date _____

Approved by Senator Rick Halford, Chairman

Date 2/21/97

Agency _____

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THE SECRETARY OF THE INTERIOR
WASHINGTON

JAN 22 1997

Memorandum

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

From: Secretary

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

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

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

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

Background

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

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

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

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

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

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

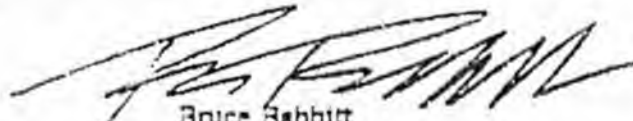
determines that construction did not occur, the agency will recommend the Secretary deny the claim.

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

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

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

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



Bruce Babbitt

Barbara H. Hiett

**WASHINGTON COUNTY
GARFIELD COUNTY**

WASHINGTON COUNTY WATER CONSERVANCY DISTRICT RECEIVED

Office of Special Counsel for Environmental & Public Lands Issues
197 EAST TABERNACLE STREET ♦ ST. GEORGE, UTAH 84770

(801) 634-5732
FAX ♦ (801) 634-5738

JAN 23 1997

Ans'd.....

**ANALYSIS OF INTERIM DEPARTMENTAL POLICY ON R.S. 2477
ISSUED JANUARY 22, 1997**

On January 22, 1997, Secretary of the Interior Bruce Babbitt "revoked" the Department of Interior's prior policy regarding R.S. 2477 rights-of-way, which form the bulk of the rural transportation network in the western public lands states. The revoked policy (the "Hodel Policy"), set forth by Secretary Donald Hodel in December of 1988, was an attempt to reflect long-established law regarding these rights-of-way, which are typically owned and managed by state and local governmental entities. Because of its reasonable approximation to the law, the Hodel Policy encountered little opposition.

By contrast, the Babbitt memorandum attempts to set policy which is inconsistent with established law. However, the Babbitt memo cannot stand up to scrutiny, because the Secretary of Interior is not free to substitute his judgment for that of Congress by ignoring its statutes, nor can he properly set policy which contradicts established legal doctrines. The Babbitt memo is also insupportable because it attempts to set policy which is in violation of the current published regulations of the Department of Interior, which explicitly provide that if administration by the Department would diminish or reduce any rights conferred by the R.S. 2477 grant, the provisions of the grant apply. 43 C.F.R. § 2801.4. But the Babbitt memo sets forth an approach which is clearly designed to diminish or do away with rights conferred under R.S. 2477.

The Babbitt memo must be considered in light of the actions of Department of the Interior under this administration, which have been focused at undercutting the ability of states and counties to utilize and manage their transportation infrastructure, contrary to more than one-hundred years of Interior policy and court rulings. Interior has battled to revoke these rights-of-way in Congress, in the courts, and by way of attempted promulgation of departmental regulations. Due to substantial public interest in protecting these vital transportation links and in honoring established legal rights, those efforts have largely been unsuccessful. As the Babbitt memo states, Congress has prohibited Interior from giving effect to its proposed regulations regarding R.S. 2477 rights-of-way. While the memo asserts that it is not a rulemaking, in practical effect, it provides guidance to the Department which would implement the fundamental purposes of the proposed regulations and thereby constitutes a new effort to find a way to undercut established law by administrative fiat.

Some of the flaws in the position adopted in the Babbitt memo (also reflected in the Department's proposed rulemaking) are addressed briefly below.

No approval by the federal government has ever been required to exercise the rights granted under R.S. 2477. In fact, Interior regulations in place over the last half century stated, "No application should be filed under this act, as no action on the part of the Federal Government is necessary." Once a right-of-way was established, it became a property right of the holder. The treatment of these vested property rights as "claims" has no legal merit.

No federal statute has granted the Department of Interior the authority to regulate, adjudicate or otherwise interfere with the proper exercise of these rights. However, implicit in the Babbitt memo, and explicit in the Department's actions in Utah, is the

threat that any exercise of the rights without prior judicial or Departmental approval will be met with harsh opposition by the Department, including the filing of burdensome and costly lawsuits.

The "approval" scheme reflected in *de facto* Departmental policy, now stated in the Babbitt memo, and as currently being carried out in Utah, is one of the most insidious aspects of Interior's attack. Justice Department attorneys, acting on behalf of the Department, have recently asserted in court that holders of R.S. 2477 rights-of-way can do nothing on these rights-of-way without prior authorization from the federal government. But, as the Babbitt memo declares, Department personnel have been instructed to offer no recognition of any R.S. 2477 right-of-way, no matter how clearly valid, unless the right-of-way holder gives evidence of a "demonstrated, compelling, and immediate need." Thus, Babbitt is creating (and has been implementing in Utah) a scenario where Department personnel say, in effect: "You can't exercise your right unless we acknowledge that it's valid (or you go to court to prove it), and we are prohibited from taking action to acknowledge its validity. Therefore, if you exercise your right, the United States may sue you." Obviously, the Department is picking and choosing which roads to sue on, targeting rural counties in Utah which have been unwilling to submit to these illegal policies.

The memorandum states that the agency will determine whether a right-of-way meets criteria concerning "withdrawals and reservations," "construction," and "highway." Given Interior's stated hostility toward existing law defining those terms, it should be expected that the criteria will be construed according to newly-created definitions reflected in the proposed regulations. Watch for Interior to decree a narrow definition of "construction" inconsistent with clear federal case law. Watch for Interior to attempt to invalidate many R.S. 2477 rights-of-way through its new definition of the term "highway," also inconsistent with federal court rulings.

Watch for Interior to disregard the thousands of legal interpretations concerning this grant offered by state courts, many of which have been relied upon by the federal courts. The memorandum asserts that state law will be applied only "to the extent that it is consistent with federal law." The problem with this statement is that, because federal law has adopted state law as the rule of decision for R.S. 2477, no federal law exists — for now. Therefore, for the Department to determine whether state law is "consistent with federal law" it must first make up the federal law.

The Babbitt memo sets forth an illegal policy, which will be carried by Departmental employees to state and local governments across the West as the only way to deal with R.S. 2477 rights-of-way. To the extent that these actions are successful in confusing and intimidating right-of-way holders, the Department will be successful in its ongoing attempt to defeat R.S. 2477 rights-of-way across the West.



ALASKA MINERS ASSOCIATION, INC.

501 W Northern Lights Blvd. Suite 203, Anchorage, Alaska 99503 FAX (907) 278-7897 Telephone (907) 278-0347

February 24, 1997

Honorable Rick Halford
Chairman
Senate Resources Committee
Capitol Building
Juneau, AK 99801

RE: SJR-13, Opposing DOI Policy on RS-2477

Dear Senator Halford,

The Alaska Miners Association wishes to go on record in strong support of Senate Joint Resolution 13 which relates to Revised Statute 2477 rights-of-way.

Approximately 215 million acres of Alaska's total 365 million acre area are owned and controlled by the federal government. The rest of the land is owned by the State of Alaska, private Native Corporations, or other private parties. However, it is necessary to cross federal lands in order to access much of these State and private lands.

RS-2477 rights-of-way were granted to the State by the federal government and the federal government must be held to the terms of this grant. RS-2477s are the only feasible means to cross many areas of federal land and these historic State-owned routes must be protected and kept under State ownership, management and control.

We agree that it is essential for the State of Alaska to be proactive and aggressive in asserting its ownership over RS-2477 routes. If the State of Alaska becomes lax or lowers its guard, our rights will be lost.

Thank you for this opportunity to comment on this extremely important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven C. Borell". The signature is fluid and cursive.

Steven C. Borell, P.E.
Executive Director