

HJR

40

<TARGET><BILL>HJR 40</BILL><SUBJECT>HJR
40</SUBJECT><COMM>HJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

COMMITTEE MEMBERS:
REP. STEVE THOMPSON, VICE CHAIR
REP. BOB LYNN
REP. WES KELLER
REP. LANCE PRUITT
REP. LINDSEY HOLMES
REP. MAX GRUENBERG



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JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

DATE: April 3, 2012
TO: Suzie Lowell, Chief Clerk
Alaska House of Representatives
FROM: Representative Carl Gatto, Chair
House Judiciary Committee
RE: House Judiciary Committee Hearing Notice

A handwritten signature in black ink that reads "Carl Gatto".

Monday, April 9, 2012 at 1:00 p.m. in Room 120

HJR 40 RS 2477 RIGHTS-OF-WAY

Bills Previously Heard

House Judiciary ~ Monday, April 9th, 2012

(GAVEL IN) Let's call this meeting of the House Judiciary Committee to order.

It is ____ p.m. Monday, April 9th, 2012.

Present are:

- ___ Representative Lynn
- ___ Representative Keller
- ___ Representative Pruitt
- ___ Representative Gruenberg
- ___ Representative Holmes
- ___ Representative Gatto is excused

See: CACFA
long-range transp.
plan

And Myself Representative Thompson

First things first: Housekeeping: Please disable your electronic devices, if they're left on - even on vibrate - they may interfere with the recording system. Thank you.

We have one new Resolution to hear today:

HJR 40

RS 2477 Rights of way

CS FOR HOUSE JOINT RESOLUTION NO. 40(RES)

Commending the governor and the administration for aggressively working to enforce the rights of the state in R.S. 2477 rights-of-way; urging the governor and the attorney general to develop a working alliance with other western states to protect and enforce the states' interests in ensuring access using rights-of-way authorized by R.S. 2477; urging the governor and the attorney general to support the State of Utah and the southern counties of Utah in a lawsuit against the federal government concerning R.S. 2477 rights-of-way, including filing an amicus brief in support of Utah; urging the

governor to dedicate state resources to establish, protect, and enforce the state's interests in R.S. 2477 rights-of-way and to preserve state rights-of-way against encroachment by the federal government; urging the governor to reestablish a federalism section in the Department of Law and sections in the Department of Natural Resources and the Department of Fish and Game to support the preservation of the state's rights and powers in compact cases; and urging the governor to prepare an appropriation request to fund an aggressive effort by the state to resolve issues relating to R.S. 2477 rights-of-way, including possible litigation, and to continue to work to preserve the rights of the state in regard to R.S. 2477 rights-of-way.

Here to present HJR 40 is Jim Pound, Aide to Rep. Wes Keller. Mr. Pound, please put your name on the record and provide your overview on HJR 40

BILL PRESENTATION

Thank you Mr. Pound.

Are there any further questions for Mr. Pound or the sponsor?

Is there anyone online or in the room who would like to provide public testimony?

f/c Rod Amos ✓

Public testimony:

- Malcolm Roberts, Assistant AG, Dept. of Law
- Kent Sullivan, Assistant AG, Dept. of Law

_____ please put your name and affiliation on the record and begin your testimony.

Does the committee have any questions for _____.

Is there anyone else who would like to provide public testimony on HJR 40?

Public comment is now closed.

Can I have a motion to move CS for HJR 40 (RES) (27-LS1407/I (eye), with individual recommendations, and with attached fiscal note?

Rep. Thompson: I move to report CS for HJR 40 (RES) (27-LS1407/I (eye), with committee recommendations, and with attached fiscal note from committee.

Any objection, have Susan call the roll. If not, HJR 40 moves from committee.

Having concluded our scheduled business for today... At _____ p.m., I adjourn today's meeting of the House Judiciary Committee (GAVEL OUT).

ALASKA STATE LEGISLATURE

Interim:

600 East Railroad Avenue
Wasilla, Alaska 99654
Phone (907) 373-1842
Fax: (907) 373-4729



Session:

State Capitol Building
Juneau, Alaska 99801-1182
Phone: (907) 465-2186
Fax: (907) 465-3818

REPRESENTATIVE WES KELLER DISTRICT 14

SPONSOR STATEMENT

HJR 40

“RS 2477 RIGHTS-OF-WAY”

House Joint Resolution 40 is the next step in moving transportation corridors forward in Alaska. All across the state there are hundreds of traditional trails and routes that have been used for centuries. These corridors are a critical part of how we will transport goods and services in the future.

Even Congress recognized that when it enacted and repealed Revised Statute 2477's that these trails have the tradition and need to be continued and even expanded to improve commerce. In several states across the west, including Alaska the repeal included language allowing the identification of existing potential RS 2477's as they have become to be called.

So far Alaska has identified 670 right-of ways that clearly qualify. These are part of the more than 20,000 R.S. 2477s already identified in the West. The problem now is convincing the federal government to release these to the states.

This resistance by Federal departments has resulted in the state's having to take the issue to court. Presently the lead suit is Utah and Alaska needs to join in that effort with a minimum of an amicus brief.

This resolution commends the administration for its efforts so far and also directs it to continue its efforts by supporting Utah's lawsuit. It also raises the current Alaska bar by asking the Governor to provide a request to the next legislature for specific funding to continue the RS 2477 efforts.

Without this effort commerce in Alaska will continue to be expensive and nearly impossible. RS 2477s are a critical key that cannot be ignored.

E-Mail: [Representative Wes Keller@legis.state.ak.us](mailto:Representative_Wes_Keller@legis.state.ak.us)
Call Juneau Toll free: (800) 468-2186
Website: www.akrepublicans.org/keller/

Rep Keller

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as amd.

O.K.

CS FOR HOUSE JOINT RESOLUTION NO. 40(RES)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE RESOURCES COMMITTEE

Offered: 4/3/12

Referred: Judiciary

Sponsor(s): REPRESENTATIVES KELLER, Tammie Wilson, Pruitt, Thompson, Millett, Costello, Johansen, Muñoz, Peggy Wilson, Feige

A RESOLUTION

1 **Commending the governor and the administration for aggressively working to protect**
2 **the interests of the state in rights-of-way under R.S. 2477; urging the governor and the**
3 **attorney general to develop a working alliance with the governors, attorneys general,**
4 **and legislatures in other western states to protect and enforce the states' interests in**
5 **ensuring access using rights-of-way authorized by R.S. 2477; urging the governor and**
6 **the attorney general to support the interests of the State of Utah and southern counties**
7 **of Utah in R.S. 2477 rights-of-way by actively seeking confirmation of R.S. 2477 rights-**
8 **of-way through various means, including initiating litigation in this state; urging the**
9 **governor and the attorney general to develop a strategy for resolving the dispute over**
10 **the right to continued access using R.S. 2477 rights-of-way in the state, including the**
11 **possibility of bringing lawsuits against the federal government to preserve the state's**
12 **interest in rights-of-way; urging the governor to further strengthen the resources of the**
13 **state for protecting the state's rights by continuing to focus the efforts of the Department**

1 of Law, the Department of Natural Resources, the Department of Fish and Game, and
2 other departments on defending the state's rights and powers with regard to access and
3 federalism issues; and urging the United States Congress to enact legislation requiring
4 federal agencies with land management authority to establish a process to recognize
5 valid R.S. 2477 rights-of-way claims expeditiously after a notice of intent to claim an
6 R.S. 2477 right-of-way has been filed without the need to dispute those claims in court
7 and to participate in good faith in the process.

8 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

9 **WHEREAS**, in 1866, R.S. 2477 granted rights-of-way across unappropriated federal
10 land to encourage the development of western land; and

11 **WHEREAS** R.S. 2477 rights-of-way were perfected by simple use or development;
12 and

13 **WHEREAS** R.S. 2477 rights-of-way were established in the state through use or
14 development until virtually all federal land in the state was withdrawn in 1969; and

15 **WHEREAS**, when R.S. 2477 was repealed in 1976 under the Federal Land Policy
16 Management Act (43 U.S.C. 1701), valid existing rights under R.S. 2477 were expressly
17 protected; and

18 **WHEREAS** the Alaska State Legislature has recognized 602 rights-of-way in statute,
19 and the Department of Natural Resources has identified at least 67 additional valid R.S. 2477
20 rights-of-way; and

21 **WHEREAS** historic R.S. 2477 rights-of-way represent a key component of the
22 mandate in art. VIII, sec. 1, of the Constitution of the State of Alaska to encourage the
23 settlement of the state's land and the development of the state's land and resources; and

24 **WHEREAS** the United States Department of the Interior and the United States Forest
25 Service refuse to recognize an R.S. 2477 right-of-way unless adjudicated and validated in a
26 decision by a court of competent jurisdiction; and

27 **WHEREAS** unilateral resistance by the federal government to the existence of the
28 state's rights-of-way causes great harm to the ability of the state to execute its duty to manage

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to Alaskans. OK. 4/9

1 state resources by making them accessible/and available for maximum use consistent with the
2 public interest, as required in art. VIII, sec. 1, of the Constitution of the State of Alaska; and

3 **WHEREAS** the State of Utah recently filed notices of intent to sue to enforce its
4 interests in more than 18,000 R.S. 2477 rights-of-way in that state; and

5 **WHEREAS** the State of Alaska and the State of Utah share similar objections to the
6 large withdrawals of Federal Conservation Units that are managed by the United States
7 Department of the Interior and the United States Forest Service, agencies that both
8 unilaterally deny the existence of valid state easements; and--

9 **WHEREAS** virtually all of the state's natural resource development projects are
10 unnecessarily burdened by numerous federal laws, including the Endangered Species Act, the
11 Clean Water Act, and myriad arbitrary federal regulators and policies implementing and
12 enforcing those and other federal laws;

13 **BE IT RESOLVED** that the Alaska State Legislature commends the governor and the
14 administration for aggressively working to protect the interests of the state in rights-of-way
15 under R.S. 2477 and urges the governor and the attorney general to develop a working
16 alliance with the governors, attorneys general, and legislatures in other western states to
17 protect and enforce the states' interests in ensuring access using rights-of-way authorized by
18 R.S. 2477; and be it

19 **FURTHER RESOLVED** that the Alaska State Legislature urges the governor and the
20 attorney general to support the interests of the State of Utah and southern counties of Utah in
21 R.S. 2477 rights-of-way by actively seeking confirmation of R.S. 2477 rights-of-way through
22 various means, including initiating litigation in this state; and be it

23 **FURTHER RESOLVED** that the Alaska State Legislature urges the governor and the
24 attorney general to develop a strategy for resolving the dispute over the right to continued
25 access using R.S. 2477 rights-of-way in the state, including the possibility of bringing
26 lawsuits against the federal government to preserve the state's interest in rights-of-way; and be
27 it

28 **FURTHER RESOLVED** that the Alaska State Legislature urges the governor further
29 to strengthen the resources of the state for protecting the state's rights by continuing to focus
30 the efforts of the Department of Law, the Department of Natural Resources, the Department
31 of Fish and Game, and other departments on defending the state's rights and powers with

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1 regard to access and federalism issues; and be it

2 **FURTHER RESOLVED** that the Alaska State Legislature urges the United States
3 Congress to enact legislation requiring federal agencies with land management authority to
4 establish a process to recognize valid R.S. 2477 rights-of-way claims expeditiously after a
5 notice of intent to claim an R.S. 2477 right-of-way has been filed without the need to dispute
6 those claims in court and to participate in good faith in the process.

7 **COPIES** of this resolution shall be sent to the Honorable Barack Obama, President of
8 the United States; the Honorable Joseph R. Biden, Jr., Vice-President of the United States and
9 President of the U.S. Senate; the Honorable Ken Salazar, United States Secretary of the
10 Interior; the Honorable John Boehner, Speaker of the U.S. House of Representatives; the
11 Honorable Nancy Pelosi, Minority Leader of the U.S. House of Representatives; the
12 Honorable Harry Reid, Majority Leader of the U.S. Senate; the Honorable Mitch McConnell,
13 Minority Leader of the U.S. Senate; the Honorable Jeff Bingaman, Chair of the Energy and
14 Natural Resources Committee of the U.S. Senate; the Honorable Gary R. Herbert, Governor
15 of Utah; Kathy Davis, Assistant Attorney General, State of Utah, Office of the Attorney
16 General, Division of Public Lands; the Honorable Lisa Murkowski and the Honorable Mark
17 Begich, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the
18 Alaska delegation in Congress; and all other members of the 112th United States Congress.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version CSHJR 40(RES)
 Fiscal Note Number 1
 (H) Publish Date 4/3/12

Identifier (file name) CSHJR40-LEG-SESS-04-02-12 Dept. Affected Legislature
 Title "Commending the Governor and the administration for aggressively working to protect the interests..re: RS 2477" Appropriation Legislative Council
 Allocation Session Expenses
 Sponsor Reps Keller, Wilson, Pruitt, Thompson, Millett, Costello...
 Requester House Resources OMB Component Number 782

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates					
			FY13	FY13	FY14	FY15	FY16	FY17
OPERATING EXPENDITURES								
Personal Services								
Travel								
Services								
Commodities								
Capital Outlay								
Grants, Benefits								
Miscellaneous								
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		0.0	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS								
Full-time								
Part-time								
Temporary								

CHANGE IN REVENUES								
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Estimated **SUPPLEMENTAL (FY12) operating costs** _____ (separate supplemental appropriation required)
 (discuss reasons and fund source(s) in analysis section)

Estimated **CAPITAL (FY13) costs** _____ (separate capital appropriation required)
 (discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial Version

Prepared by Jessica Geary, Finance Manager
 Division Legislative Affairs Agency
 Approved by Pamela Varni, Executive Director
Legislative Affairs Agency

Phone 465-6626
 Date/Time 4/2/12 3:41 PM
 Date 4/2/2012

FISCAL NOTE #1

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHJR 40(RES)

Analysis

This Legislation has zero fiscal impact on the Legislative Affairs Agency.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Sean Parnell, Governor

1031 W. 4th Ave., Ste. 200
Anchorage, AK 99501
PHONE: (907)269-5100
FAX: (907)269-5110

March 28, 2012

The Honorable Paul Seaton
Co-Chairman, House Resources Committee
State Capitol, Room 102
Juneau, Alaska 99801-1182

The Honorable Eric Feige
Co-Chairman, House Resources Committee
State Capitol, Room 126
Juneau, Alaska 99801-1182

Re: HJR 40

Dear Representatives Seaton and Feige:

On Monday the House Resources Committee heard HJR 40, addressing RS 2477 rights-of-way and other matters. Included in the resolution is language encouraging the Governor to re-establish federalism sections within the Departments of Law, Natural Resources, and Fish and Game. I am informed that the Committee would like to know whether the Department of Law supports creation of a federalism sub-section.

While the Department welcomes the Legislature's strong support and encouragement to defend State title to RS 2477 rights-of-way and to pursue other challenges to federal overreach, creation of a federalism section is unnecessary.

The Department established a statehood defense subunit within its Natural Resources Section during the Hickel administration to initiate several state's rights cases against the federal government. Although the functions of this subunit were later integrated into other sections, the focus of the former subunit has continued. The Department emphasizes federalism issues, which pervade many of the areas in which our sections work, including Natural Resources, Environmental, and Oil, Gas & Mining Sections. The attorneys in these sections have the specialized backgrounds necessary to address the issues that arise from state/federal jurisdictional disputes. Maintaining the Department's existing administrative structure gives the flexibility to assign federalism matters to the attorneys with the most expertise in the particular contexts in which they

arise. It is a priority of mine to continually coordinate Law's staff so that each of the issues raised in our cases are addressed by the most capable and experienced attorneys.

Under the Parnell administration, Law and all State agencies are closely monitoring federal actions that could impact the State. Law is working with other agencies to pointedly comment on federal land management plans, environmental impact statements, and regulatory proposals; to assure the State is proactively conducting scientific studies; and to litigate where necessary to enforce the State's right to access and develop natural resources. We also actively team with other Western states to oppose unnecessary federal action. For example, nine other states joined an amicus brief that Alaska drafted for the recent *Sackett v. EPA* case in U.S. Supreme Court, to urge the Court to overturn an EPA action that threatened the property rights of an Idaho couple. We have dedicated an attorney to RS 2477 cases and assigned others to assert the State's navigability claims, challenge the application of the Forest Service 2001 Roadless Area Conservation Rule to the Tongass and Chugach National Forests, resist unwarranted listings under the Endangered Species Act, oppose the EPA's extraordinary assertions of federal jurisdiction under the Clean Water Act, and pursue the development of oil and gas resources on the Outer Continental Shelf.

I assure you that the Department's focus on defending Alaska's statehood rights will continue under my leadership.

Sincerely,



Michael C. Geraghty
Attorney General

IN THE SENATE OF THE UNITED STATES.

JULY 19, 1866.

Ordered to be printed.

AMENDMENT

Reported by Mr. STEWART, from the Committee on Public Lands, to the act (H. R. 365) granting the right of way to ditch and canal owners over the public lands in the States of California, Oregon, and Nevada, viz: Strike out all after the enacting clause, and insert as follows:

3 That the mineral lands of the public domain, both surveyed
and unsurveyed, are hereby declared to be free and open to
5 exploration and occupation by all citizens of the United
6 States, and those who have declared their intention to become
7 citizens, subject to such regulations as may be prescribed by
8 law, and subject also to the local custom or rules of miners
9 in the several mining districts, so far as the same may not be
10 in conflict with the laws of the United States.

1 SEC. 2. *And be it further enacted,* That whenever any
2 person or association of persons claim a vein or lode of quartz,
3 or other rock in place, bearing gold, silver, cinnabar, or cop-
4 per, having previously occupied and improved the same

5 according to the local custom or rules of miners in the district
6 where the same is situated, and having expended in actual
7 labor and improvements thereon an amount of not less than
8 one thousand dollars, and in regard to whose possession there
9 is no controversy or opposing claim, it shall and may be law-
10 ful for said claimant or association of claimants to file in the
11 local land office a diagram of the same, so extended laterally
12 or otherwise as to conform to the local laws, customs, and
13 rules of miners, and to enter such tract and receive a patent
14 therefor, granting such mine, together with the right to fol-
15 low such vein or lode with its dips, angles, and variations, to
16 any depth, although it may enter the land adjoining, which
17 land adjoining shall be sold subject to this condition.

1 *SEC. 3. And be it further enacted,* That upon the filing
2 of the diagram as provided in the second section of this act,
3 and posting the same in a conspicuous place on the claim,
4 together with a notice of intention to apply for a patent, the
5 register of the land office shall publish a notice of the same
6 in a newspaper published nearest to the location of said claim,
7 and shall also post such notice in his office for the period of
8 ninety days; and after the expiration of said period, if no
9 adverse claim shall have been filed, it shall be the duty of
10 the surveyor general, upon application of the party, to survey
11 the premises and make a plat thereof, indorsed with his ap-
12 proval, designating the number and description of the loca-

13 tion, the value of the labor and improvements, and the
14 character of the vein exposed; and upon the payment to the
15 proper officer of five dollars per acre, together with the cost
16 of such survey, plat, and notice, and giving satisfactory evi-
17 dence that said diagram and notice have been posted on the
18 claim during said period of ninety days, the register of the
19 land office shall transmit to the General Land Office said plat,
20 survey, and description; and a patent shall issue for the same
21 thereupon. But said plat, survey, or description shall in no
22 case cover more than one vein or lode, and no patent shall
23 issue for more than one vein or lode, which shall be expressed
24 in the patent issued.

1 *Sec. 4. And be it further enacted,* That when such
2 location and entry of a mine shall be upon unsurveyed lands,
3 it shall and may be lawful, after the extension thereto of the
4 public surveys, to adjust the surveys to the limits of the
5 premises according to the location and possession and plat
6 aforesaid, and the surveyor general may, in extending the
7 surveys, vary the same from a rectangular form to suit the
8 circumstances of the country and the local rules, laws, and
9 customs of miners: *Provided,* That no location hereafter
10 made shall exceed two hundred feet in length along the vein
11 for each locator, with an additional claim for discovery to the
12 discoverer of the lode, with the right to follow such vein to
13 any depth, with all its dips, variations, and angles, together

14 with a reasonable quantity of surface for the convenient
15 working of the same as fixed by local rules: *And provided*
16 *further*, That no person may make more than one location
17 on the same lode, and not more than three thousand feet shall
18 be taken in any one claim by any association of persons.

1 SEC. 5. *And be it further enacted*, That as a further
2 condition of sale, in the absence of necessary legislation by
3 Congress, the local legislature of any State or Territory may
4 provide rules for working mines involving easements, drain-
5 age, and other necessary means to their complete develop-
6 ment; and those conditions shall be fully expressed in the
7 patent.

1 SEC. 6. *And be it further enacted*, That whenever any
2 adverse claimants to any mine located and claimed as afore-
3 said, shall appear before the approval of the survey, as pro-
4 vided in the third section of this act, all proceedings shall be
5 stayed until a final settlement and adjudication in the courts
6 of competent jurisdiction of the rights of possession to such
7 claim, when a patent may issue as in other cases.

1 SEC. 7. *And be it further enacted*, That the President
2 of the United States be, and is hereby, authorized to establish
3 additional land districts and to appoint the necessary officers
4 under existing laws, wherever he may deem the same neces-
5 sary for the public convenience in executing the provisions
6 of this act.

1 *SEC. 8. And be it further enacted,* That the right of
2 way for the construction of highways over public lands, not
3 reserved for public uses, is hereby granted.

1 *SEC. 9. And be it further enacted,* That whenever, by
2 priority of possession, rights to the use of water for mining,
3 agricultural, manufacturing, or other purposes, have vested
4 and accrued, and the same are recognized and acknowledged
5 by the local customs, laws, and the decisions of courts, the
6 possessors and owners of such vested rights, shall be main-
7 tained and protected in the same; and the right of way for
8 the construction of ditches and canals for the purposes afore-
9 said is hereby acknowledged and confirmed: *Provided, how-*
10 *ever,* That whenever, after the passage of this act, any person
11 or persons shall, in the construction of any ditch or canal,
12 injure or damage the possession of any settler on the public
13 domain, the party committing such injury or damage shall be
14 liable to the party injured for such injury or damage.

1 *SEC. 10. And be it further enacted,* That wherever, prior
2 to the passage of this act, upon the lands heretofore designated
3 as mineral lands, which have been excluded from survey and
4 sale, there have been homesteads made by citizens of the
5 United States, or persons who have declared their intention
6 to become citizens, which homesteads have been made, im-
7 proved, and used for agricultural purposes, and upon which
8 there have been no valuable mines of gold, silver, cinnabar

9 or copper discovered, and which are properly agricultural
10 lands, the said settlers or owners of such homesteads shall
11 have a right of pre-emption thereto, and shall be entitled to
12 purchase the same at the price of one dollar and twenty-five
13 cents per acre, and in quantity not to exceed one hundred and
14 sixty-acres; or said parties may avail themselves of the pro-
15 visions of the act of Congress approved May twenty, eigh-
16 teen hundred and sixty-two, entitled "An act to secure
17 homesteads to actual settlers on the public domain," and acts
18 amendatory thereof.

1 SEC. 11. *And be it further enacted,* That upon the sur-
2 vey of the lands aforesaid, the Secretary of the Interior may
3 designate and set apart such portions of the said lands as are
4 clearly agricultural lands, which lands shall thereafter be sub-
5 ject to pre-emption and sale as other public lands of the United
6 States, and subject to all the laws and regulations applicable
7 to the same.

Fact Sheet

Title: R.S. 2477 Rights-of-Way



Alaska Department of
**NATURAL
RESOURCES**

Division of Mining, Land & Water
September 2001

This fact sheet explains the origin of a century-old mining law that has broad implications for Alaska's future. It is intended to illustrate the potential this law has in helping preserve Alaska's public access options for the future.

What is R.S. 2477?

Revised Statute 2477 is found in section 8 of the Mining Law of 1866. It granted states and territories unrestricted rights-of-way over federal lands that had no existing reservations or private entries. The law remained in effect until Congress repealed it in 1976. In Alaska, the opportunity to establish new R.S. 2477 rights-of-way generally ended December 14, 1968, when the federal government issued PLO 4582—the “land freeze”—to prepare for settlement of Alaska Native land claims. Though no new rights-of-way could be established after federal land was reserved or appropriated, or after the law was repealed in 1976, these actions did not extinguish pre-existing rights.

Revised Statute 2477 states: “The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”

What did Congress mean by “highways”?

It's important to distinguish the historical meaning of “highways” from the modern. The word “highway” was historically used to refer to foot trails, pack trails, sled dog trails, crudely built wagon roads, and other corridors for transportation. R.S. 2477 was included in the first comprehensive mining law and was used initially by miners and homesteaders on federal land. The broad wording of the law does not limit the type of right-of-way to which it applies.

Alaska Statute 19.45.001(9) defines a highway to include “a highway (whether included in primary or secondary systems), road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof...”

What does this mean for Alaskans?

R.S. 2477 rights-of-way could be established in Alaska from 1884 (the Organic Act, which extended general land laws to the new territory), to 1968 (PLO 4582). From its territorial origins to today, Alaska has consisted mainly of federally owned land. During its 84 years of application in this state, many rural mail routes, mining trails, and other transportation routes became R.S. 2477's through construction and/or use. The State of Alaska, Department of Natural Resources

has documented hundreds of historic routes that qualify as R.S. 2477 rights-of-way. Surface transportation between Alaska's hundreds of rural communities and other resource destinations still relies heavily on our cross-country trails, primarily used in the winter by snowmachines, dogsled teams, and four-wheel all-terrain vehicles.

What are some examples of R.S. 2477's?

Some examples include DeBarr Road in Anchorage and Farmer's Loop Road in Fairbanks. Other routes that the State believes to qualify as R.S. 2477's include the Stampede Trail in Denali National Park and Preserve, the Nabesna-Chisana Trail in Wrangell-St. Elias National Park, the Dalton Trail in the vicinity of Haines, the Eureka-Rampart Trail in the Interior, and the Chilkoot Trail near Skagway.

How many R.S. 2477 rights-of-way have been asserted?

While hundreds of R.S. 2477's have been validated within the western states, only a handful of routes have been cooperatively validated in Alaska with BLM. During 1993-1995, the Department of Natural Resources' R.S. 2477 Project researched more than one thousand trails. The project found that some 600 of these qualified as R.S. 2477 rights-of-way under state standards. In 1998 the Legislature listed these trails in AS 19.30.400, stating that they had been accepted as R.S. 2477 rights-of-way. That same legislation requires the department to continue researching trails and to prepare an annual report identifying those found to qualify as R.S. 2477's. Many additional trails have been reported to the Legislature since then.

What if land has been conveyed without specifying that there is a valid R.S. 2477 right-of-way across it?

In Alaska, millions of acres once controlled by the federal government have been transferred to Native corporations or into other private ownership. Land conveyances are always subject to “valid existing rights.” Courts have ruled that where an R.S. 2477 right-of-way exists, the new landowner's title is subject

to the right-of-way, which must still be honored. There are many Alaskan land owners who want the assurance that their rights and interests will not be adversely affected in the process of R.S. 2477 identification and platting. The Alaska Legislature instructed in its 1998 law that, while providing for the public's right to use these historic access easements, "every effort should be made to minimize the effect on the affected private property owners."

What is some of the R.S. 2477 case law?

One of the most frequently quoted cases affecting R.S. 2477 is Hamerly v. Denton, decided in 1961. The court clearly explained that R.S. 2477 was one-half of a grant—an offer to dedicate an easement across unreserved, unappropriated federal land. That offer of a right-of-way grant could be accepted by either of two methods:

- a) By "some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention" to accept it; or
- b) By "public user for such a period of time and under such conditions as to prove that the grant has been accepted."

Additionally, Girves v. Kenai Peninsula Borough, 1975, established that some section-line easements are R.S. 2477's. Shultz v. Army, 1993, concerning a right-of-way claim across Fort Wainwright, established that the public right-of-way between the origin and termini of the route need not be absolutely fixed, and upheld the broad definition of a highway found in state law. On rehearing, the 9th Circuit Court of Appeals reversed its original ruling in the Shultz case. However, the legal reasoning that produced that original decision has been used to support other cases.

What are the rules for using R.S. 2477 rights-of-way?

Some rights-of-way will likely be improved for access to valuable state resources, communities, and land. Others will be used as they have been in the past. Some might not be used at all, or might be developed only as foot trails. If you are not sure whether a trail you want to use is an R.S. 2477 right-of-way, check public land records and consult with each land owner or managing agency before crossing the property. Typically R.S. 2477 rights-of-way are available for public use under DNR's regulations. DNR's management rules can be found in DNR's recently revised chapter of public easement regulations, 11 AAC 51. However, the Department of Transportation and Public Facilities' regulations apply to R.S. 2477 rights-of-way that are part of the Alaska Highway System or that DNR has otherwise transferred to that department. In some cases, the State might transfer management of an R.S. 2477 right-of-way to a city or

borough, but without giving it the right to "vacate" or officially erase the right-of-way. That is because municipalities are prohibited by law from vacating R.S. 2477 rights-of-way.

For additional information:

An R.S. 2477 Atlas is available for purchase at the DNR Public Information Offices in Anchorage, Fairbanks, and Juneau. The Atlas lists approximately 560 routes, identified and located on map inserts. The department has also made documentation on many qualifying R.S. 2477 routes available at the State and University Archives.

Another source is DNR's website on R.S. 2477 rights-of-way, <http://www.dnr.state.ak.us/mlw/trails/rs2477/>

From that site you can reach a map of Alaska that links to descriptions of many R.S. 2477 trails. In addition, if you know the official "RST" number of any R.S. 2477 right-of-way, you can find its complete casefile documentation and description in DNR's public land records at

<https://nutmeq.state.ak.us/ixpress/dnr/case/RequestRpt.dml>

These two websites provide the most up-to-date R.S. 2477 information available. You can find RST numbers of more than 600 routes, cross-referenced by trail name, in AS 19.30.400. For RST numbers of additional routes that DNR has documented since that law was passed in 1998, check DNR's annual reports to the legislature. All of the sources mentioned here are public documents that everyone has a right to see.

For further information or to buy an Atlas, contact:

Dept. of Natural Resources
Public Information Center
550 W. 7th Ave. # 1260
Anchorage, AK 99501-3557
(907) 269-8400

Div. of Mining, Land and
Water Public
Information Office
400 Willoughby Ave.,
Suite 400
Juneau, AK 99801
(907) 465-3400

Public Information Center
3700 Airport Way
Fairbanks, AK 99709-4699
(907) 451-2705



American Land Rights Association

30218 N.E. 82nd Ave, PO Box 400
Battle Ground, WA 98604



RS 2477 RESOURCES

[ALRA-AK](#) [AGENCIES, LAWS, REGS and SOURCES](#) [ANILCA](#) [NAVIGABILITY](#) [TRAIL MAINT](#) [FIREWOOD - LOGS](#) [FIRE PROTECTION](#)

ACCESS CLOSURE TO PATENTED PRIVATE LAND IN LOWER 48 STATES

Alaska DNR RS 2477

[AS 19.30.400. Identification and acceptance of rights-of-way.](#) [includes list of 659 accepted RS2477 routes]

[11 AAC 51.055. Identification of R.S. 2477 Rights-of-Way](#)

[11 AAC 51.100. Management of Public Easements, Including R.S. 2477 Rights-of-Way](#)

[11 AAC 53.110. General survey standards](#) - Class III required for RS 2477, seems excessive!

STATE OF ALASKA COMMENTS ON PROPOSED RULES RS 2477 RIGHTS-OF-WAY

Published at 59 Fed.Reg. 49216 et seq. (August 1, 1994)

ALASKA RS 2477 TRAILS

The State of Alaska has achieved Quiet Title to the Harrison Creek - Portage Creek Trail (RST 8) in the Circle Mining District. Because the original trail has been moved many times to accommodate active mining since 1976, (the guideline for identification of existing rights-of-way), the State has entered into a consent decree accepting a mutually agreeable 60-foot right-of-way to substitute for abandonment of portions of the existing trail. This was one of 11 of the 620 "Qualified" trails that was "Certified" as a test case, and was selected for litigation because it had the broadest potential for setting precedent. The Department of Law and the Division of Mining, Land & Water require funds for this legal effort to file "quiet title" actions in court to determine the validity of the routes.

U.S. v VOGLER

1988 granted permanent injunction prohibiting placer miner from operating off-road vehicles in national preserve without first obtaining access permit and from conducting placer miner operations without submitting and obtaining approval of mining operations plan. Miner appealed. The Court of Appeals, held that: (1) Federal Government had authority to regulate access and mining within Alaska's national parks; (2) regulations did not deprive placer miner of "adequate and feasible" access to his claims and were within power granted under property clause; (3) Federal Government had authority to regulate travel on trail, even assuming it was established right-of-way; and (4) claim alleging unconstitutional taking of property rights was not ripe for judicial resolution.

SHULTZ v DEPARTMENT OF ARMY

Shultz v. Army, 1993, concerning a right-of-way claim across Fort Wainwright, established that the public right-of-way between the origin and termini of the route need not be absolutely fixed, and upheld the broad definition of a highway found in state law. On rehearing, the 9th Circuit Court of Appeals reversed its original ruling in the Shultz case. However, the legal reasoning that produced that original decision has been used to support other cases. Paul G. Shultz appeals the district court's judgment in favor of the government in his quiet title action under 28 U.S.C. S 2409a. Shultz argued that he has a right-of-way across Fort Wainwright to get back and forth between Fairbanks and his property under either R.S. 2477, 43 U.S.C. S 932, or Alaska common law, or both. Because we ultimately agree with the district court that Shultz has not sustained his burden to factually establish a continuous R.S. 2477 route or a right-of-way under Alaska common law, we affirm the district court. We do not reach Shultz's argument that the district court erred by holding that his action was time-barred by 28 U.S.C. S 2409a(g).

Exchange with NPCA on RS 2477 in Wrangell St. Elias News 5/04

2/03 FEDERAL RECORDABLE DISCLAIMER REGULATION

11/25/03 - Off-road organizations. San Bernardino County. petition to own areas - DON THOMPSON, Associated Press - The county's claim was the nation's first under the new federal regulation adopted by the Interior Department in February.

OTHER RS 2477 RESOURCES

GOOGLE SEARCH: RS2477 AND SALT LAKE TRIBUNE -- A bonanza of information on the unfolding RS 2477 process in Utah

4/9/02 - MOU U.S. Dept of the Interior and State of Utah - <http://www.doi.gov/news/mours2477.htm>

7/16/03 - Congress likely to kill roads deal, Christopher Smith, Salt Lake Tribune - WASHINGTON -- Congress is poised to kill Utah's landmark agreement with the Department of Interior to transfer rights to old roadbeds across federal lands to counties as the House begins debate on the Interior appropriations bill today, with a vote expected Thursday.

8/17/03 - History essential to understand road rights, Alan D. Gardner, Salt Lake Tribune - In April the Department of Interior announced that it had signed an MOU Utah resolving the road issue (R.S. 2477). Southern Utah Wilderness Alliance and other extreme environmental groups (including some of the groups that want to drain Lake Powell) are very strongly opposed to this decision, stating that these "aren't roads, but ways." It seems as if their goal is to eliminate public access to public land. To make a fair judgment on this issue, some background history is essential. As each new area of this country developed, the federal government owned all of the land. Gradually land was sold or homesteaded, with almost all land transferring to private ownership. However, in the Western states, this transfer from federal to private ownership in many cases was never completed.

5/20/03 - Greedy Socialists - Salt Lake Tribune - Until wilderness advocates and R.S.2477 opponents tell the truth about socioeconomic impacts on rural communities and the tax base of Utah, I and many other rural citizens will remain angry with greedy, socialistic environmental groups striving to take away our rights to "life, liberty and the pursuit of happiness."

7/29/97 - Letter to GAO about RS2477

Utah County Roads (R.S. 2477) Presentation BE PATIENT! LONG TIME TO LOAD (12 MB Adobe PDF Document)

4/20/03 - Finding Common Ground on County Roads - Op-Ed by Governor Mike Leavitt - Imagine the confusion that would result if the county recorder's office burned down and ownership records for the entire community were lost. Utah finds itself in a somewhat similar situation with respect to county roads. Our mostly rural transportation system used by ranchers, miners, hikers, hunters, federal land managers, county officials, tourists and others is caught in a divisive and costly legal battle over rights of way on potentially thousands of roads.

What is "Revised Statute R.S. 2477"? - National Public Lands News

What is "Jarbidge South Canyon Road" ?

R.S. 2477 - BLM is proposing new rules to process "road claims" on public lands. The subject law, a one-sentence, 21-word statutory provision, known as Revised Statute 2477, was passed on July 26, 1866. Twenty six years after its repeal by FLPMA, the process of asserting claims under the statute is far from consistent and has been the subject of litigation between the Federal government, the states and the counties. 43 CFR Part 1860 [WO-350-1864-24 1A] RIN 1004-AD50 Conveyances, Disclaimers and Correction Documents
AGENCY: Bureau of Land Management, Interior. ACTION: Final rule.

<http://www.nplnews.com/fedregister/2003/jan62003-blm-rs2477.htm>

SUMMARY: The Bureau of Land Management (BLM) amends its regulations pertaining to recordable disclaimers of interest in land. We are amending the regulation by: removing the 12-year regulatory filing deadline for states; removing the requirement that an applicant be a "present owner of record" to be qualified under the Act; allowing any entity claiming title, not just current owners of record, to apply for a disclaimer of interest; defining the term "state" as it is used in this rule; clarifying how we will approve disclaimer applications involving another Federal land managing agency.

12/28/02 - [Little Wyo interest in old road law](#) - Casper Star Tribune - The state of Wyoming has not taken much interest in an old federal law making it possible for local governments to claim rights-of-way through federal lands.

RS 2477 in California

<http://www.death-valley.us/article500.html>

<http://www.death-valley.us/article499.html>

http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=18049

ACCESS CLOSURE TO PATENTED PRIVATE LAND IN LOWER 48 STATES

9/11 - Catron Co, NM - [Forest Service Probes Road Grading](#) - There are 4 parcels of unimproved, uninhabited tracts of land located on the San Francisco River that are surrounded by national forest lands. The road servicing these tracts is an old historic road (RS 2477) connecting Glenwood with Reserve. This 17 mile stretch of road has not been maintained by the county for many years. However travelers and landowners have continually gone up the river anyway. The Gila Forest wishes to purchase this property and has had it appraised. Our county land plan calls for no net loss of private land. Private land is our tax base and provides a nucleus for any future economic benefits. One of the landowners would not consent to sell. This land owner received a letter from Gila Forest Supervisor Kelly M. Russell stating that the area had been designated as the Devils Park Road-less area. He was informed that his only access was by foot or horseback. He could be granted a vehicle permit if he consented to pay the forest service to do a full blown NEPA study. Nobody else, to our knowledge was informed of this road-less designation including Catron County. One of the strongest rights in the U.S. is to have full access to ones private land.

For More Information Contact:
American Land Rights Association
Tel: 360-687-3087
FAX: 360-687-2973

[\[_private/navbar.htm\]](#)

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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF ALASKA
2002 Alas. AG LEXIS 13
File No: 665-01-0201
July 17, 2002

Request By:

John F. Bennett, PLS, SR/WA
Right of Way Chief
DOT/PF, Northern Region

Opinion

Opinion by: Paul R. Lyle, Assistant Attorney General

Question

What public uses are authorized within the R.S. 2477 right-of-way for the Klutina Lake Road?1

Ahtna, Inc., the landowner whose lands are traversed by the Klutina Lake road, claims that travelers may use the road only for continuous travel. According to Ahtna, the traveling public may not make rest stops, park for any purpose within the right-of-way except for emergencies, or camp overnight within the right-of-way.

Ahtna also claims that R.S. 2477 easements are of no effect until established by a court judgment. In addition, Ahtna asserts that the state's R.S. 2477 right-of-way for the Klutina Lake road is superceded by an overlapping ANCSA 17(b) easement reserved for the road in the interim conveyances conveying the lands traversed by the road from BLM to Ahtna and Kluti-Kaah Corporation, hereinafter collectively referred to as "Ahtna."

Summary of Advice

In our opinion, the public may make reasonable use of the right-of-way for the activities listed above. Department of Transportation and Public Facilities (DOT&PF) may make improvements to the road reasonably necessary to accommodate the uses made of the road from its establishment circa 1898 through October 21, 1976 (the date R.S. 2477 was repealed) and may take reasonable steps to render the road convenient for those public uses.

A judgment is not necessary to perfect R.S. 2477 easements. The state's R.S. 2477 right-of-way is not superceded by the overlapping ANCSA 17(b) easement contained in Ahtna's conveyances. Rather, the overlapping R.S. 2477 right-of-way is impressed on the land by operation of law and is enforceable even if it is of greater scope than the ANCSA 17(b) easement.

Legal Analysis

We first address the uses to which the right-of-way may be put and then address Ahtna's arguments that the state's R.S. 2477 right-of-way must be perfected by litigation and is supplanted by the ANCSA 17(b) easement for the Klutina Lake road included in Ahtna's conveyances.

1. The uses the public may make of a perfected R.S. 2477 right-of-way are those uses to which the public has traditionally put the road.

The issue of what public uses of a right-of-way are authorized by law is an issue concerning the "scope" of the right-of-way.

The "scope" of a right-of-way refers to the bundle of property rights possessed by the holder of the right-of-way. This bundle is defined by the physical boundaries of the right-of-way as well as **the uses to which it has been put.**

Sierra Club v. Hodel, 848 F.2d 1068, 1079 n. 9 (10th Cir. 1988), overruled in part on other grounds, *Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970, 973 (10th Cir. 1992) (emphasis added).2

Because the Klutina Lake road was established under a federal statute, we must, as a threshold matter, examine whether state or federal law controls the scope issue.

a. The uses to which an R.S. 2477 may be put will probably be controlled by state law.

There is controversy over whether state or federal law controls the perfection of R.S. 2477 rights-of-way. The controversy centers on whether R.S. 2477 required actual road construction in order to perfect a right-of-way, as opposed to establishment by user or an act of a public authority. See *North Dakota Op. Att'y Gen. No. 2000-05*, 2000 WL 146636 (N.D.A.G.

Jan. 26, 2000)(containing a general summary of this controversy and of state and federal cases addressing this issue).

The "actual construction" controversy is irrelevant to your question. The perfection of an R.S. 2477 right-of-way for the Klutina Lake road through actual construction by a public authority is not an issue in this case. The road was constructed and state funds expended on improvements well before R.S. 2477 was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA) on October 21, 1976, with a savings provision for existing rights-of-way. See 701(a), 706(a) Pub.L. 94-579, 90 Stat. 2743, 43 U.S.C. 1701 (note). Nevertheless, we have examined federal and state cases to ascertain whether state or federal law controls the scope of an R.S. 2477.

(i) Decisions of the Ninth Circuit Court of Appeals indicate that the Ninth Circuit would probably apply state law to the issue of the scope of an R.S. 2477 right-of-way unless federal law expressly dictates otherwise.

At least one circuit applies state law to determine the scope of an R.S. 2477 right-of-way. In *Sierra Club v. Hodel*, 848 F.2d at 1080-83, the Tenth Circuit unequivocally held that state law controls the scope of an R.S. 2477 right-of-way, including the uses to which the road may be put.

No Ninth Circuit decision directly holds that the scope of an R.S. 2477 is a matter to be determined under state law where federal law is otherwise silent on the issue of which law controls. However, several Ninth Circuit decisions imply that state law would be applied to determine the uses to which an R.S. 2477 may be put where, as here, the perfection of the R.S. 2477 right-of-way by actual construction is not in doubt. See *Shultz v. Dep't of Army*, 10 F.3d 649, 655 n. 8 (9th Cir. 1993) (holding that both the establishment and scope of an R.S. 2477 right-of-way is a question of state law, citing *Standage Ventures, infra.* and *Hodel, supra.*), *withdrawn*, 96 F.3d 1222 (1996) n3; *Standage Ventures, Inc. v. Arizona*, 499 F.2d 248, 250 (9th Cir. 1974); *Adams v. U.S.*, 687 F.Supp. 1479, 1490 (D.Nev. 1988), *affirmed in part, reversed in part on other grounds*, 3 F.3d 1254 (9th Cir. 1993) ("[A] right of way could be established by public use under terms provided by state law."); *U.S. v. Rogge*, 10 Alaska 130 (D. Alaska Terr. 1941), *affirmed*, 128 F.2d 800 (9th Cir. 1942); *see also*, lower court decisions within the Ninth Circuit, *e.g.*, *U.S. v. 9,947.71 Acres of Land*, 220 F.Supp. 328, 332, 335-36 (D.Nev. 1963); *Berger v. Ohlson*, 9 Alaska 389, 395 (D. Alaska Terr. 1938), *vacated on other grounds*, 9 Alaska 605 (D.Alaska Terr. 1939); *Clark v. Taylor*, 9 Alaska 298, 305 (D. Alaska Terr. 1938).

In *Vieux v. East Bay Regional Park District*, 906 F.2d 1330, 1341 (9th Cir. 1990), cert. denied, 498 U.S. 967 (1990), a case concerning a public highway established within a railroad right-of-way under 43 U.S.C. 912, the Ninth Circuit, held that:

State law determines what is a "public highway legally established" for the purposes of federal land grant statutes....

(quoting 43 U.S.C. 912, citing *Standage Ventures, supra.*); accord, *King County v. Burlington Northern Railroad Corp.*, 885 F.Supp. 1419, 1422 n. 5 (W.D. Wash. 1994).

While *Vieux* did not address R.S. 2477, its holding is broadly applicable to all "federal land grant statutes" of which R.S. 2477 was a part.⁴ *Vieux*, 906 F.2d at 1341. Therefore, there is a good argument that the holding in *Vieux* applies to the establishment of R.S. 2477 rights-of-way as well.

Furthermore, in a case that arose out of the Supreme Court of California, the U.S. Supreme Court recognized that R.S. 2477 authorized the creation of highways over the federal public domain in any manner consistent with state law. *Central Pacific Railway Co. v. Alameda County*, 52 S.Ct. 225, 226-27, 229 (1932). The right-of-way at issue in *Central Pacific* was a road first established by public use and subsequently laid out and improved by the county before R.S. 2477 was enacted.⁵ The Court held that R.S. 2477 applied retroactively to validate pre-existing roads crossing public domain lands. *Id.* at 227. The Court also held that R.S. 2477 rights-of-way are "controlled by the same general principles" applicable to cases concerning appropriation of water from the public domain under section 9 of the Act of July 26, 1866.⁶ *Id.* at 228. Section 9, in turn, provided that water appropriation issues would be determined under local customs and laws. The Court twice noted that the road was established under state law. *Central Pacific*, 52 S.Ct. at 226, 229. *Central Pacific* thus lends support to the argument that state law controls the scope of an R.S. 2477 right-of-way.

There is one Ninth Circuit decision that indicates the Ninth Circuit may apply federal law to determine the scope of an R.S. 2477 right-of-way. We believe that case is distinguishable. In *U.S. v. Gates of the Mountains Lakeshore Homes, Inc.*, 732 F.2d 1411, 1413 (9th Cir. 1984), the court, construing R.S. 2477, held that the scope of a federal land grant is a question of federal law. The court recognized that federal law sometimes adopts and applies state law to federal land grants, but found that federal statutes passed after R.S. 2477 was enacted dictated a distinctly federal rule applicable to the placement of electric power transmission lines within R.S. 2477 roads. *Id.*

Hodel distinguished the holding of *Gates of the Mountains*, reasoning that it was limited to the issue of placing utilities within R.S. 2477s.⁷ *Hodel*, 848 F.2d at 1081. Unlike the situation in *Gates of the Mountains*, we can find nothing in federal law that controls **other uses** to which an R.S. 2477 may be put or that specifies a width for R.S. 2477 rights-of-way. Federal law is silent on both of these "scope" issues. Thus, because there is no federal law to apply with

respect to the scope issues related to the Klutina Lake road, we believe it likely that the Ninth Circuit would apply state law to resolve these issues.

Although we believe a strong argument can be made that state law controls both the establishment and scope of R.S. 2477 rights-of-way, you should be aware of a recent Tenth Circuit decision that refused to apply state law to determine the **validity** of an R.S. 2477 crossing federal lands. In *South Utah Wilderness Alliance v. BLM*, 147 F.Supp.2d 1130, 1141-43 (D.Utah 2001), the court upheld the BLM interpretation of R.S. 2477 that requires actual road construction to perfect the easement. The court deferred to BLM's interpretation of R.S. 2477 because federal law requires federal courts to "give some deference to the agency interpretation of the statute" and because the court found BLM's "actual construction" interpretation to be reasonable. *Id.* at 1135, 1143.

The holding in *South Utah* would probably not apply to the Klutina Lake road situation. First, *South Utah* is not controlling precedent in the Ninth Circuit. Second, *South Utah* addresses the perfection of an R.S. 2477, not the allowable uses to be made of an R.S. 2477 after it is perfected. Thus, BLM's statutory interpretation of R.S. 2477 as to what actions are sufficient to perfect an R.S. 2477 easement would likely be irrelevant to the issue of the allowable uses of the Klutina Lake road.

On balance, we believe that the Ninth Circuit would apply state law to determine the allowable uses within an R.S. 2477 because there is no federal law to apply. In such circumstances, the federal courts will most likely look to state law. *Hodel*, 848 F.2d at 1083; *Gates of the Mountains*, 732 F.2d at 1413.

(ii) Cases from Alaska and other state courts.

The Alaska Supreme Court has long held that R.S. 2477 grants are to be interpreted in accordance with Alaska law. *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1019 (Alaska 1996); *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221, 1226 (Alaska 1975); *Hamerly v. Denton*, 359 P.2d 121 (Alaska 1961). Other states also hold that state law controls the scope of an R.S. 2477 right-of-way. See, e.g., cases cited in *Hodel*, 848 F.2d at 1082 & n. 13 ("We are not aware of any state that even considered the possibility of a federal rule."); *North Dakota Op. Att'y Gen. 2000-05*, 2000 WL 146636 at *10 ("All state court decisions look to state law.")

b. The uses authorized within an R.S. 2477.

In *Hodel*, the court, applying Utah law, held that the uses authorized within an R.S. 2477 right-of-way are those that are "reasonable and necessary" as measured "in light of traditional uses to which the right-of-way was put." *Hodel*, 848 F.2d at 1083. Moreover,

because the grantor, the federal government, was never required to ratify a use on an R.S. 2477 right-of-way, each new use of the [right-of-way] automatically vested as an incident of the easement. Thus, all uses before October 21, 1976, not terminated or surrendered, are part of an R.S. 2477 right-of-way.

Hodel, 848 F.2d at 1084. The court ruled that the county had authority to improve the road at issue in *Hodel* to the extent reasonably necessary to ensure safe use of the right-of-way consistent with its historical uses. 848 F.2d at 1083. We believe the same conclusion would be reached under Alaska law.

In *Simon v. State*, 996 P.2d 1211 (Alaska 2000), the court was asked to address the scope of an easement set out in a Department of Interior public land order. The court applied the common law of easements and held that, "where the terms of the easement are ambiguous, then the holder of the easement is only entitled to use the property within reason." 996 P.2d at 1214. The court found that a public land order granting an easement "over and across" a parcel of property was ambiguous as to its scope. 996 P.2d at 1215. The language of R.S. 2477 granting a "right of way for the construction of highways ... for public uses" is no less ambiguous than the easement language at issue in *Simon*.

Where the language of an easement is ambiguous, the "easement gives the holder the right to use the land to the extent necessary to serve the purpose of the easement." *Simon*, 996 P.2d at 1215. While *Simon* did not involve an R.S. 2477 right-of-way, it did involve a public right-of-way granted under federal law. Therefore, it is likely that Alaska courts will apply the *Simon* standard to determine the uses to which the Klutina Lake road may be put under R.S. 2477.

The historical uses of the Klutina Lake road include vehicular and pedestrian travel, rest stops, parking for recreational uses of the Klutina River, and overnight camping. The law authorizes the reasonable use of the right-of-way for these purposes.

However, in assisting the public in making these uses convenient, the department should bear the following in mind:

BLM Administrative Determinations on R.S. 2477 Rights-of-Way

Section 8 of the Mining Act of 1866 provided: "and be it further enacted, that the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." The statute was self enacting; rights being established by "construction" of a "highway" on unreserved public lands, without any form of acknowledgement or action by the Federal government. This section of the statute was later re-codified as Revised Statute 2477. R.S. 2477 was repealed by FLPMA on October 21, 1976, with a savings provision for rights established prior.

The BLM does not have the authority to make binding determinations on the validity of R.S. 2477 right-of-way claims. The BLM may, however, make informal, non-binding, administrative determinations for its own land use planning and management purposes. Such determinations must be based in the particular laws of each state in which a claimed right-of-way is situated. In Utah, applicable State code provided for the acceptance of a right-of-way pursuant to R.S. 2477 across public lands not reserved for public purposes when a right-of-way had been used by the public for a continuous 10 year period.

As of February 2009, the BLM has been directed not to process or review any claims under R.S. 2477 pending further review and direction from the Secretary of the Interior.

Revised Statute 2477 (commonly known as "RS 2477") was enacted by the United States Congress in 1866 to encourage the settlement of the Western United States by the development of a system of highways. Its entire text is one sentence: "the right-of-way for the construction of highways across public lands not otherwise reserved for public purposes is hereby granted."

The original grant did not require being recorded, meaning it was self enacting, and in 1866 constructing a road often meant using a trail many times and perhaps filling low places, moving rocks and placing signs.

It granted to counties and states a right-of-way across federal land when a highway was built.

RS 2477 was repealed in 1976 under the Federal Land Policy and Management Act (FLPMA). The repeal was subject to "valid existing rights." The relevant text (Sec. 701. 43 U.S.C. 1701) reads (a) "Nothing

in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act" ^[1].

Controversy

Shared-access advocates claim that neither the BLM, Forest Service nor other federal agencies, nor even private landowners have the authority to close RS 2477 roads. Their interpretation of the statute has brought them into conflict with wilderness advocates, the federal government and private landowners.

Conflicts on Federal Lands

RS 2477 has become an issue for wilderness advocacy groups because of language in the Wilderness Act of 1964. According to Section 2 (c) 3, any area to be considered for wilderness status must contain "a least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition." Section 4 (c) further specifies, "Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act" ^[2]. Thus an RS 2477 "highway" which qualifies as a "road" could disqualify the land it traverses from being recognized by the federal government as a "wilderness" if it reduced the area under consideration beneath the 5,000 acre limit.

Access advocates have sometimes organized to reopen or maintain what they consider to be legitimate RS 2477 roads ^[3]. The Jarbidge Shovel Brigade is the best-known group that was formed for this purpose.

Landowners, environmental organizations, government organizations (federal, state and county) and recreational-use advocates have very different understandings of the law. Conflicts among these groups came to a head when President Bill Clinton declared the Grand Staircase-Escalante, in southern Utah, to be a National Monument. Several Utah counties have been fighting in court to assert RS 2477 claims to roads that cross federal and private property (see *SUWA v BLM*), including across the Grand Staircase-Escalante National Monument.

Interior Secretary Ken Salazar recently authorized interior representatives to negotiate federal recognition of RS 2477 roads for

which there is a clear historical record ^[4]. In August 2010, quiet title of the Skutumpah Road, within the Grand Staircase-Escalante National Monument, (see Kane County, Utah v United States) was granted to Kane County, Utah ^[5].

Conflicts on Private Lands

As western lands become developed into residential subdivisions, motorized recreationists and sportsmen are continuing to claim access rights on privately-constructed, -owned, and -maintained roads that cross private land and gated communities. Because some disputed roads were never recorded by counties, shared-access groups claim that private landowners hold property with an unrecorded public right-of-way. Property rights advocates say that failure to record a right-of-way means that there was no intention to create a public right.

Shared-access groups argue that lack of formal action by counties does not diminish the public's easement/usufruct rights through private lands. They have engaged in threats, trespassing, and vandalism ^[6] to vigorously assert those rights.

Private property activists claim that nobody has access rights without a recorded easement. Shared-access activists claim that virtually all private land that used to be public can legally be traversed by the public. There is little common ground between these interpretations, so lawsuits are being fought in the western United States, and it has fallen to the courts to determine which routes are public and which are not.

Courts have applied state laws, federal laws, and federal land court rulings to resolve RS 2477 claims. Recent examples of failed attempts to assert RS 2477 rights on private property are Galli v. Idaho County (Case Number CV 36692, Second Judicial District of Idaho, 2006) and Ramey v. Boslough (Case Number 02-CV-582, Boulder County District Court, 20th Judicial District of Colorado, 2007).

CS FOR HOUSE JOINT RESOLUTION NO. 40(RES)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE RESOURCES COMMITTEE

Offered: 4/3/12
Referred: Judiciary

Sponsor(s): REPRESENTATIVES KELLER, Tammie Wilson, Pruitt, Thompson, Millett, Costello, Johansen, Muñoz, Peggy Wilson, Feige

A RESOLUTION

1 **Commending the governor and the administration for aggressively working to protect**
2 **the interests of the state in rights-of-way under R.S. 2477; urging the governor and the**
3 **attorney general to develop a working alliance with the governors, attorneys general,**
4 **and legislatures in other western states to protect and enforce the states' interests in**
5 **ensuring access using rights-of-way authorized by R.S. 2477; urging the governor and**
6 **the attorney general to support the interests of the State of Utah and southern counties**
7 **of Utah in R.S. 2477 rights-of-way by actively seeking confirmation of R.S. 2477 rights-**
8 **of-way through various means, including initiating litigation in this state; urging the**
9 **governor and the attorney general to develop a strategy for resolving the dispute over**
10 **the right to continued access using R.S. 2477 rights-of-way in the state, including the**
11 **possibility of bringing lawsuits against the federal government to preserve the state's**
12 **interest in rights-of-way; urging the governor to further strengthen the resources of the**
13 **state for protecting the state's rights by continuing to focus the efforts of the Department**

1 of Law, the Department of Natural Resources, the Department of Fish and Game, and
 2 other departments on defending the state's rights and powers with regard to access and
 3 federalism issues; and urging the United States Congress to enact legislation requiring
 4 federal agencies with land management authority to establish a process to recognize
 5 valid R.S. 2477 rights-of-way claims expeditiously after a notice of intent to claim an
 6 R.S. 2477 right-of-way has been filed without the need to dispute those claims in court
 7 and to participate in good faith in the process.

8 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

9 **WHEREAS**, in 1866, R.S. 2477 granted rights-of-way across unappropriated federal
 10 land to encourage the development of western land; and

11 **WHEREAS** R.S. 2477 rights-of-way were perfected by simple use or development;
 12 and

13 **WHEREAS** R.S. 2477 rights-of-way were established in the state through use or
 14 development until virtually all federal land in the state was withdrawn in 1969; and

15 **WHEREAS**, when R.S. 2477 was repealed in 1976 under the Federal Land Policy
 16 Management Act (43 U.S.C. 1701), valid existing rights under R.S. 2477 were expressly
 17 protected; and

18 **WHEREAS** the Alaska State Legislature has recognized 602 rights-of-way in statute,
 19 and the Department of Natural Resources has identified at least 67 additional valid R.S. 2477
 20 rights-of-way; and

21 **WHEREAS** historic R.S. 2477 rights-of-way represent a key component of the
 22 mandate in art. VIII, sec. 1, of the Constitution of the State of Alaska to encourage the
 23 settlement of the state's land and the development of the state's land and resources; and

24 **WHEREAS** the United States Department of the Interior and the United States Forest
 25 Service refuse to recognize an R.S. 2477 right-of-way unless adjudicated and validated in a
 26 decision by a court of competent jurisdiction; and

27 **WHEREAS** unilateral resistance by the federal government to the existence of the
 28 state's rights-of-way causes great harm to the ability of the state to execute its duty to manage

max: + private interests ?

1 state resources by making them accessible and available for maximum use consistent with the
2 public interest, as required in art. VIII, sec. 1, of the Constitution of the State of Alaska; and

3 **WHEREAS** the State of Utah recently filed notices of intent to sue to enforce its
4 interests in more than 18,000 R.S. 2477 rights-of-way in that state; and

5 **WHEREAS** the State of Alaska and the State of Utah share similar objections to the
6 large withdrawals of Federal Conservation Units that are managed by the United States
7 Department of the Interior and the United States Forest Service, agencies that both
8 unilaterally deny the existence of valid state easements; and

*W/K:
focusing
on
Utah*

9 **WHEREAS** virtually all of the state's natural resource development projects are
10 unnecessarily burdened by numerous federal laws, including the Endangered Species Act, the
11 Clean Water Act, and myriad arbitrary federal regulators and policies implementing and
12 enforcing those and other federal laws;

*how
about:
accessibility
+ to AK's
private?*

13 **BE IT RESOLVED** that the Alaska State Legislature commends the governor and the
14 administration for aggressively working to protect the interests of the state in rights-of-way
15 under R.S. 2477 and urges the governor and the attorney general to develop a working
16 alliance with the governors, attorneys general, and legislatures in other western states to
17 protect and enforce the states' interests in ensuring access using rights-of-way authorized by
18 R.S. 2477; and be it

19 **FURTHER RESOLVED** that the Alaska State Legislature urges the governor and the
20 attorney general to support the interests of the State of Utah and southern counties of Utah in
21 R.S. 2477 rights-of-way by actively seeking confirmation of R.S. 2477 rights-of-way through
22 various means, including initiating litigation in this state; and be it

23 **FURTHER RESOLVED** that the Alaska State Legislature urges the governor and the
24 attorney general to develop a strategy for resolving the dispute over the right to continued
25 access using R.S. 2477 rights-of-way in the state, including the possibility of bringing
26 lawsuits against the federal government to preserve the state's interest in rights-of-way; and be
27 it

28 **FURTHER RESOLVED** that the Alaska State Legislature urges the governor further
29 to strengthen the resources of the state for protecting the state's rights by continuing to focus
30 the efforts of the Department of Law, the Department of Natural Resources, the Department
31 of Fish and Game, and other departments on defending the state's rights and powers with

1 regard to access and federalism issues; and be it

2 **FURTHER RESOLVED** that the Alaska State Legislature urges the United States
3 Congress to enact legislation requiring federal agencies with land management authority to
4 establish a process to recognize valid R.S. 2477 rights-of-way claims expeditiously after a
5 notice of intent to claim an R.S. 2477 right-of-way has been filed without the need to dispute
6 those claims in court and to participate in good faith in the process.

7 **COPIES** of this resolution shall be sent to the Honorable Barack Obama, President of
8 the United States; the Honorable Joseph R. Biden, Jr., Vice-President of the United States and
9 President of the U.S. Senate; the Honorable Ken Salazar, United States Secretary of the
10 Interior; the Honorable John Boehner, Speaker of the U.S. House of Representatives; the
11 Honorable Nancy Pelosi, Minority Leader of the U.S. House of Representatives; the
12 Honorable Harry Reid, Majority Leader of the U.S. Senate; the Honorable Mitch McConnell,
13 Minority Leader of the U.S. Senate; the Honorable Jeff Bingaman, Chair of the Energy and
14 Natural Resources Committee of the U.S. Senate; the Honorable Gary R. Herbert, Governor
15 of Utah; Kathy Davis, Assistant Attorney General, State of Utah, Office of the Attorney
16 General, Division of Public Lands; the Honorable Lisa Murkowski and the Honorable Mark
17 Begich, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the
18 Alaska delegation in Congress; and all other members of the 112th United States Congress.

27-LS1407M
Bullock
3/29/12

CS FOR HOUSE JOINT RESOLUTION NO. 40()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES KELLER, Tammie Wilson, Pruitt, Thompson, Millett, Costello, Johansen, Muñoz

A RESOLUTION

1 **Commending the governor and the administration for aggressively working to protect**
2 **the interests of the state in rights-of-way under R.S. 2477; urging the governor and the**
3 **attorney general to develop a working alliance with the governors, attorneys general,**
4 **and legislatures in other western states to protect and enforce the states' interests in**
5 **ensuring access using rights-of-way authorized by R.S. 2477; urging the governor and**
6 **the attorney general to support the State of Utah and southern counties of Utah in a**
7 **lawsuit to enforce Utah's interests in R.S. 2477 rights-of-way by actively seeking**
8 **confirmation of R.S. 2477 rights-of-way through various means, including initiating**
9 **litigation; urging the governor and the attorney general to develop a strategy for**
10 **resolving the dispute over the right to continued access using R.S. 2477 rights-of-way in**
11 **the state, including the possibility of bringing lawsuits against the federal government to**
12 **preserve the state's interest in rights-of-way; urging the governor to further strengthen**
13 **the resources of the state for protecting the state's rights by continuing to focus the**

1 efforts of the Department of Law, the Department of Natural Resources, the
2 Department of Fish and Game, and other departments on defending the state's rights
3 and powers with regard to access and federalism issues; urging the United States
4 Congress to enact legislation requiring federal agencies with land management authority
5 to establish a process to recognize valid R.S. 2477 rights-of-way claims expeditiously
6 after a notice of intent to claim an R.S. 2477 right-of-way has been filed without the need
7 to dispute those claims in court and to participate in good faith in the process.

8 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

9 **WHEREAS**, in 1866, R.S. 2477 granted rights-of-way across unappropriated federal
10 land to encourage the development of western land; and

11 **WHEREAS** R.S. 2477 rights-of-way were perfected by simple use or development;
12 and

13 **WHEREAS** R.S. 2477 rights-of-way were established in the state through use or
14 development until virtually all federal land in the state was withdrawn in 1969; and

15 **WHEREAS**, when R.S. 2477 was repealed in 1976 under the Federal Land Policy
16 Management Act (43 U.S.C. 1701), valid existing rights under R.S. 2477 were expressly
17 protected; and

18 **WHEREAS** the Alaska State Legislature has recognized 602 rights-of-way in statute,
19 and the Department of Natural Resources has identified at least 67 additional valid R.S. 2477
20 rights-of-way; and

21 **WHEREAS** historic R.S. 2477 rights-of-way represent a key component of the
22 mandate in art. VIII, sec. 1, of the Constitution of the State of Alaska to encourage the
23 settlement of the state's land and the development of the state's land and resources; and

24 **WHEREAS** the United States Department of the Interior and the United States Forest
25 Service refuse to recognize an R.S. 2477 right-of-way unless adjudicated and validated in a
26 decision by a court of competent jurisdiction; and

27 **WHEREAS** unilateral resistance by the federal government to the existence of the
28 state's rights-of-way causes great harm to the ability of the state to execute its duty to manage

1 state resources by making them accessible and available for maximum use consistent with the
2 public interest, as required in art. VIII, sec. 1, of the Constitution of the State of Alaska; and

3 **WHEREAS** the State of Utah recently filed notices of intent to sue to enforce its
4 interests in more than 18,000 R.S. 2477 rights-of-way in that state; and

5 **WHEREAS** the State of Alaska and the State of Utah share similar objections to the
6 large withdrawals of Federal Conservation Units that are managed by the United States
7 Department of the Interior and the United States Forest Service, agencies that both
8 unilaterally deny the existence of valid state easements; and

9 **WHEREAS** virtually all of the state's natural resource development projects are
10 unnecessarily burdened by numerous federal laws, including the Endangered Species Act, the
11 Clean Water Act, and myriad arbitrary federal regulators and policies implementing and
12 enforcing those and other federal laws;

13 **BE IT RESOLVED** that the Alaska State Legislature commends the governor and the
14 administration for aggressively working to protect the interests of the state in rights-of-way
15 under R.S. 2477 and urges the governor and the attorney general to develop a working
16 alliance with the governors, attorneys general, and legislatures in other western states to
17 protect and enforce the states' interests in ensuring access using rights-of-way authorized by
18 R.S. 2477; and be it

19 **FURTHER RESOLVED** that the Alaska State Legislature urges the governor and the
20 attorney general to support the State of Utah and southern counties of Utah in a lawsuit to
21 enforce Utah's interests in R.S. 2477 rights-of-way by actively seeking confirmation of R.S.
22 2477 rights-of-way through various means, including initiating litigation; and be it

23 **FURTHER RESOLVED** that the Alaska State Legislature urges the governor and the
24 attorney general to develop a strategy for resolving the dispute over the right to continued
25 access using R.S. 2477 rights-of-way in the state, including the possibility of bringing
26 lawsuits against the federal government to preserve the state's interest in rights-of-way; and be
27 it

28 **FURTHER RESOLVED** that the Alaska State Legislature urges the governor further
29 to strengthen the resources of the state for protecting the state's rights by continuing to focus
30 the efforts of the Department of Law, the Department of Natural Resources, the Department
31 of Fish and Game, and other departments on defending the state's rights and powers with

1 regard to access and federalism issues; and be it

2 **FURTHER RESOLVED** that the Alaska State Legislature urges the United States
3 Congress to enact legislation requiring federal agencies with land management authority to
4 establish a process to recognize valid R.S. 2477 rights-of-way claims expeditiously after a
5 notice of intent to claim an R.S. 2477 right-of-way has been filed without the need to dispute
6 those claims in court and to participate in good faith in the process.

Melanie Lesh

From: Jim Pound
Sent: Monday, April 02, 2012 2:12 PM
To: Rep. Carl Gatto; Melanie Lesh
Subject: Request for hearing CSHJR 40
Attachments: CSHJR 40 1866 mine bill.pdf; CSHJR 40 AG opin (No Print).pdf; CSHJR 40 BLM determination.pdf; CSHJR 40 DNR Background.pdf; CSHJR 40 GAO Report.pdf; CSHJR 40 Request Jud.pdf; CSHJR 40 RS2477 Resources.pdf; CSHJR 40 Sponsor.pdf; CSHJR 40-B 3-30.pdf; CSHJR 40-M.pdf; HJR040A.PDF

Please consider this as a request, pending referral for you to schedule CSHJR 40 "RS 2477 Right-of-Ways" currently attached as a blank CS Version B for consideration by the House Judiciary Committee. Included with the formal request please find a packet of information and documents in a .pdf format.

CSHJR 40 is an in-house request from the legislature to restart our assertion that Alaska is entitled to seek access to our resources and to commerce opportunities by using transportation corridors. To date there are 670 identified RS 2477s that are being denied by federal government departments that don't want to commit.

Similar problems are being faced in other states and this resolution asks our administration to join with them to resolve the access problems facing many western states.

If you have any questions please feel free to contact my office.

Thanks

Jim Pound

I should pass along two things. The fiscal note has not been published but I am assured it is zero. Second there is a document in the list that says AG Opin (no print). It is 59 pages and will be just as easy for anyone to read electronically if they so choose.

Thanks