S. HRG. 104–439

REVISED STATUTES 2477 RIGHTS-OF-WAY SETTLEMENT ACT

HEARING

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

S. 1425

TO RECOGNIZE THE VALIDITY OF RIGHTS-OF-WAY GRANTED UNDER SECTION 2477 OF THE REVISED STATUTES, AND FOR OTHER PURPOSES

MARCH 14, 1996

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REVISED STATUTES 2477 RIGHTS-OF-WAY SETTLEMENT ACT

THURSDAY, MARCH 14, 1996

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 9:41 a.m., in room SD–366, Dirksen Senate Office Building, Hon. Frank H. Murkowski, chairman, presiding.

OPENING STATEMENT OF HON. FRANK H. MURKOWSKI, U.S. SENATOR FROM ALASKA

The CHAIRMAN. We will call the hearing to order. This is the Senate Committee on Energy and Natural Resources and we are going to take testimony on S. 1425, and we have a distinguished group of witnesses this morning, and I am going to make a short statement until the statement from my friend from Montana arrives from the archives. Is that where yours is coming from?

Senator BURNS. Yes.

[Laughter.]

The CHAIRMAN. The purpose of the hearing is to receive testimony, and the bill is sponsored by a number of Senators, including my colleague Senator Stevens, Senator Hatch, Senator Bennett, and I assume some others that just did not make the typewritten list.

S. 1425 essentially recognizes the validity of rights-of-way granted under section 2477 of the Revised Statutes. Now, this bill and the purpose of it specifically will be: One, uphold established precedent of the application of State law, and we will get into that a little further with some of our witnesses;

Set a reasonable process in place for recording valid R.S. 2477 rights-of-way in the public land records;

And provide Federal officials—this is really what we would like to do—with the documentation necessary to make a determination on the validity of a claim under the law.

Now, what the legislation will not do specifically, it will not place a greater burden on States and cash-strapped counties, the way we feel the Department of the Interior proposed regulations currently do. It will not open the door for routes established after 1976 to be asserted. Let me make that very clear. Routes have to be established prior to that time. And it will not let States change their laws retroactively, so they cannot go back and start the process again.

It will not prevent other means of access, such as title V of FLPMA—that is the Federal Land Planning Management Act—title XI of ANILCA, or 17(b) of ANCSA from being used to grant rights-of-way across public or private and Native-owned lands. It will not prevent those things.

Originally section 8 of the Mining Law of 1866, R.S. 2477 states—and I guess this is where the dispute is between those that are affected and currently the policies promoted by the Department of the Interior. The original section 8 states: "The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

We get into what is meant by "highways," because it means different things to different people depending on what you want it to mean.

This provision stood until its repeal by the Federal Land Policy Management Act of 1976, FLPMA. However, both section 701 and 509 of FLPMA preserved R.S. 2477 rights-of-way, preserved those rights-of-way. The grant operated to convey an irrevocable right-of-way to the public across unreserved Federal lands. Once accepted, these rights-of-way become vested interests in real property belonging to the public at large. Under this authority, highways were established to achieve access across the public domain. It was the primary authority under which many existing State and county highways were constructed and operated over Federal lands in the Western United States.

In my State, Utah, and other States, many of these essential access routes were nothing more than a dogsled trail or a footpath, but nevertheless have provided essential routes from community, from village to village, essential necessary for many of the indigenous people of the area. One only need look at a map portraying Federal land ownership in my State of Alaska to recognize the importance of having access across Federal lands to get from place to place. I am going to ask Brian Malnak to go over to that map and we will try and make our point. For the benefit of those what cannot see it, we will even attempt to turn it around.

But all those colored areas that are in kind of the desert brown and up at the top that are kind of in the gold and the yellow and the brown and the green down at the right in the southeast part, those are all Federal withdrawals. The white area in the middle is State land.

Now, if you are going north through my State of Alaska, which is, what, 365 million acres or thereabouts, and it covers one-fifth the size of the United States, how do you get there from here? Well, pretty hard to go from north to south without running through Federal land. You can see the colors. Show the audience.

We have got a little narrow pipeline that runs through there and a little narrow road, that is all. So what has happened is the Federal withdrawals—if you were in the fishing business you would say you were corked. That is the terminology that is used when you put one net in front of another. The Federal Government has basically corked Alaska from access north and south by Federal withdrawals.

Now, without relief under R.S. 2477 for legitimate access that previously was used across those areas, we would simply have no

access, and that is true in many Western States. If you want to go east and west across Alaska, you see that you are again corked by Federal withdrawals relative to trying to get from, say, the Canadian border over to the coast near Nome—highly mineralized areas, Federal withdrawals. How do you get there if you do not have R.S. 2477? You do not.

Now, that is by some design, obviously. It is not necessarily by accident, but through the process of selection of lands. Unfortunately, in Alaska we were just a little bit behind the curve or we did not quite have the technology to address the best use of the land from the standpoint of the selection of those areas that were highly mineralized and what would be the best areas necessarily for wilderness and permanent withdrawals. It was a kind of a hit and miss process, it was the best we could do, and we are stuck with it.

But I just want to point out the significance of what this means and where you are if you do not have it. You simply cannot get there from here.

Now, both Federal case law and the Department of the Interior's own regulations interpreting the Mining Law of 1866 historically have concluded that as a matter of Federal law State law specifically governs the method of acceptance or establishment of R.S. 2477 rights-of-way. However, regulations recently proposed by the Department of the Interior under anyone's reach of the imagination really attempted to take away these already vested rights.

Interior's new interpretation does not recognize these grants unless there is an affirmative action. An affirmative action on whose part? On the part of the Department of the Interior, not the State.

Until the release of these new proposed regulations, the Department's interpretation has remained virtually unchanged up to now. At least since 1938, the published policy of the Department stated the grant becomes effective—and I think we've got another chart, Brian; we might as well use them, we went to all this work—and this is since 1938, the published policy of the Department, and there it is:

"Rights-of-way over public lands for roads and highways, 244.54. Supervisory authority, grants of rights-of-way for the construction of highways over public lands, not reserved for public uses."

Then: "When grant becomes effective. The grant referred to in the preceding section becomes effective upon the construction or establishing of highways in accordance with the State laws over public lands, not reserved for public uses. No application shall be filed," et cetera, et cetera, et cetera.

So "Upon the construction or the establishment of highways, in accordance with State laws, over public lands not reserved for public use. No application should be filed under the R.S. 2477, as no action on the part of the Federal Government is necessary."

Now, the Department is now trying to reverse itself and retroactively change its policy. It is specifically for this reason that I, along with several of my colleagues, amended the National Highway System Designation Act to prevent these regulations from arbitrarily going into effect prior to September 30, 1996. This will protect over 1,400 previously recognized and 5,000 potential R.S. 2477 rights-of-way in all 18 Western States from having to go

through an Interior validation process. So that is the rationale behind the action.

Now, even the U.S. Federal Court of Appeals has recognized the problems of changing the longstanding precedent of State law application. Is that another chart? You have got this one?

"The adoption of a Federal definition of R.S. 2477 roads would have very little practical value to the Bureau of Land Management. State law has defined R.S. 2477 grants since the statute's inception. A new Federal standard would necessitate the measurement and re-demarcation of thousands of R.S. 2477 rights-of-way across the country—an administrative dust storm that would simply choke the BLM to manage public lands."

So I think it is fair to say that the proposed draft regulations are really nothing more than an attempt to prevent legal access across public lands. At the very least, they are an attempt to put such a tremendous burden on the affected States and counties that the shear frustration will force them not to file claims and simply become landlocked. If that is the case, the Federal Government is simply outsitting you, which they are very adept at.

To be landlocked in this way is like waking up one morning to find that the Federal Government has declared your yard a national park and refused you access across your driveway.

Let me state here that I find it reprehensible, some of the rhetoric coming out of the Department of the Interior about this legislation. Statements about the creation of, I think the figure was, 984,000 miles of new highways in my State of Alaska are at best disingenuous and at worst shows an alarming misunderstanding of the topography, the history, and the economy of Alaska.

We have a section map. Conceivably, if you could traverse each section, why, you might come up with such an outlandish figure. But you cannot. You know the mountains, you know the ranges. The fact is, if an R.S. 2477 was not in existence in accordance with State laws on October 20, 1976, it will not and cannot by definition be created after that.

With that, I look forward to hearing from our witnesses. I want to call on my colleagues, and let me just make one more point. I grew up in Ketchikan, Alaska, and I can recall the story—and that's down in the southeastern, in the green area. In fact, the whole of southeastern Alaska and all the people that live there live in the forest, a rather unusual set of circumstances, but nevertheless a reality, because that is all there is, the Tongass National Forest.

Pa went down and came to town, bought a car and got a job, and decided it rained too much. And after about 2 or 3 weeks, he decided the best thing he could do is leave town. He packed all his gear up, got in his car, drove 12 miles to the end of the road. He said: What is this? That is the best he could do. The other way, north, there was about 22 miles of road.

So these outlandish extensions of examples, that some suggest that Alaska is going to be covered by road, is simply unrealistic.

The States affected by this, including Utah and Alaska, are Arizona, California, Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah—I mentioned Utah—Washington and Wyoming. And we will

provide for the record the acreage and the recognized claims and the pending claims of each of these States under R.S. 2477.

Senator Burns, I think your statement arrived from the archives.

[The prepared statements of Senators Bennett and Hatch follow:]

PREPARED STATEMENT OF HON. ROBERT F. BENNETT, U.S. SENATOR FROM UTAH

Mr. Chairman, I am pleased to come before the committee today to testify in behalf of S. 1425. It is good to be with you again. While this issue of RS-2477 may seem arcane to those of my colleagues east of the Mississippi, it has long lasting repercussions for my state. The controversy surrounding Revised Statute 2477 has plagued Utah counties with unnecessary litigation for years. It has diverted limited funding in the Department of the Interior from people and resource issues and it has cost the rural counties thousands of dollars in litigation. I believe S. 1425 will put an end to this ongoing controversy which has nearly paralyzed some of the counties in my state.

Revised Statute 2477 (RS-2477) or Section 8 of the Mining Act of 1866 stated ". . . that the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." In most western states, including Utah, RS-2477 rights-of-way formed the basis for county and state road systems. Several well-known Utah roads such as Scenic Highway 12 and the Burr Trail from Boulder to Bullfrog are examples of an RS-2477 right of way. When the Federal Land Policy and Management Act (FLPMA) was passed, it repealed RS-2477. Although follow-up regulations provided a mechanism for asserting grandfathered rights, the federal government did not require that a listing of existing rights-of-way be filed.

Unfortunately, RS-2477 failed to define what a highway was and we now see a need for an inventory for rights-of-way to determine where these rights are located and what exactly is the responsibility of those who claim these rights-of-way. This committee is well aware of the problems with the Department of the Interior's proposed rule and it's failure to recognize already recognized rights-of-way, so I will not delve into this issue. I would like to make a few points as the RS-2477 issue relates to my state.

Access to and over public lands is critical for the development and infrastructure of rural counties in the west and for multiple use management by the Federal government. When the Secretary of the Interior published proposed regulations regarding RS-2477 Rights-of-Way in the Federal Register August 1, 1994, Utah had asserted almost 3,900 claims for RS-2477 rights-of-way. These claims would have been dramatically affected by the proposed rule. As the committee members know, instead of resolving the issue, the Secretary's proposal would have simply implemented another unwieldy, potentially litigious and bureaucratic process. Thus, the need for a comprehensive and concise legislative fix. This bill accomplishes that.

Special interest groups have suggested that the heart of the RS-2477 issue is an attempt to remove lands from wilderness consideration. RS-2477 and wilderness are two separate issues which like most resource issues, tend to overlap. I firmly believe that RS-2477 rights are established, valid property rights and have been for almost 130 years. I also believe that if the federal government and the states share an understanding of the RS-2477 issue, the two can be compatible.

The federal government certainly is not the only entity which understands how to properly manage public lands. The counties and state agencies in Utah have also shown themselves to be responsible stewards. Were this not the case, there wouldn't be the dispute over millions of acres of BLM wilderness we are engaged in today, because the rural communities would have exploited these areas long ago. I believe the fact that we are in dispute over six million acres of public lands illustrate the point that the citizens of rural Utah have proven themselves responsible in their stewardship of the public lands.

Mr. Chairman, I am concerned that failure to address the RS-2477 issue legislatively will cause the rural counties of my state to become the "whipping posts" for the federal government, as it seeks to justify its encroachment in many areas of state's rights. This was made apparent in Utah as Garfield County's RS-2477 right on the Burr Trail was again challenged by the Department of the Interior just a few weeks ago.

In good faith and with public safety in mind, Garfield County engineers' attempted to fix a hazardous section of the road just inside the east boundary of Capital Reef National Park. Although the National Park Service is powerless to contest the County's rights on the road, it has used NEPA to successfully prevent needed work from occurring and has repeatedly threatened the county with adversarial action. Garfield County representatives, acting on this demand by the Park Service,

scheduled what they thought would be an open, mutually respectful discussion. Instead, they were met with a demand that the County sign a document that would prove the validity of a Finding Of No Significant Impact (FONSI) from the latest in a string of expensive NEPA documents.

This heavy-handed, arbitrary behavior on the part of the Park Service has undermined the confidence and understanding between the county and the federal government. I believe the federal government has used this opportunity to send a strong message to others who might cross the wishes of the Department of the Interior with regards to the RS-2477 issue. Unfortunately, the Park Service has expended a great deal of its employee's time and very limited resources going after a dispute over a few feet of dirt rather than addressing much larger issues within its boundaries which we are all very much aware of.

Mr. Chairman, I believe this is a good bill. It will bring both sides to the table while placing the burden of proof where it belongs. I believe it will permit us to take the steps necessary to finally resolve what really should be a non-issue. S. 1425 will prevent roads in my state from deteriorating and will preserve the ability of the citizens of my state to access the public lands and in many cases, private lands to hunt, fish, camp, hike, view wildlife and enjoy the natural beauty of our state. I encourage my colleagues to support this legislation and I look forward to assisting the committee in any way possible to move it quickly to the floor.

PREPARED STATEMENT OF HON. ORRIN G. HATCH, U.S. SENATOR FROM UTAH

Mr. Chairman and members of the committee, I welcome the opportunity to submit these comments in support of S. 1425, the "R.S. 2477 Rights-of-Way Settlement Act of 1996," of which I am an original cosponsor. I want to recognize the leadership of Senator Murkowski on this issue and his efforts to resolve this issue in a fair and workable manner. For public lands states in the West, like Utah, the settlement of R.S. 2477 is critical to the viability of many rural communities.

I am pleased that the Committee will hear from Ms. Barbara Hjelle, a recognized expert on the issue of R.S. 2477 rights-of-way, who just happens to be from Utah. She has provided guidance to state and local officials throughout the West, and she is primarily responsible for the development of the case law related to R.S. 2477 through her participation in the Burr Trail matter. Since there are over 10,000 R.S. 2477 rights-of-way claims in Utah alone, you can see why her expertise is in much demand. I strongly commend her comments and testimony to you.

Allow me to reiterate why R.S. 2477 is so important for those of us in the West. R.S. 2477 rights-of-way form the primary transportation system and infrastructure of rural cities and towns. They are found in the form of dirt roads, cart paths, small log bridges over streams or ravines, and other thoroughfares and ways whose development and use was originally authorized in 1866 during the homesteading activities that led to the establishment of western communities. They have been created over time and by necessity. In many cases, these roads are the only routes to farms and ranches; they provide necessary access for school buses, emergency vehicles, and mail delivery. These highways—and we are obviously not using the term "highway" in the modern sense—traverse federal lands, which in Utah comprises nearly 70 percent of Utah's total acreage, and they have been an integral part of the rural American landscape for over a hundred years. Congress created these rights-of-way in 1866.

Since 1976, when Congress repealed R.S. 2477 with passage of the Federal Land Policy and Management Act (FLPMA), state and local governments have had to wage constant battle with the federal government as to what constitutes a valid R.S. 2477 claim as well as what the scope of that claim is once it is determined valid under this statute.

In Utah, the controversial and highly publicized Burr Trail case in Garfield County, Utah, which has been litigated over the past decade, has brought this issue to the forefront. Nearly every county in Utah, as well as many others in the West, has identified numerous R.S. 2477 rights-of-way claims. These local governments are justifiably concerned that the validation process of each claim numbering in the thousands may require enduring the same financial and legal burdens as the Burt Trail case.

So if these rights-of-way have existed for a hundred years, why is our bill necessary?

In August 1994, the Clinton Administration and Secretary Babbitt jumped into the fray by proposing regulations to settle this issue. However, in my view, these regulations are not the answer. Fortunately, Congress has wisely adopted several

provisions that delay their implementation, thus allowing consideration of this legislation.

The solution put forward by the Administration would simply result in the abandonment of highways and roads by Utah's counties, because elected officials would lack the resources and abilities to meet the impossible standards contained in the regulations. I am hoping this was not the intent behind the Administration's proposal, which would be unfortunate.

The regulations establish a lengthy, frustrating, and time-consuming application process that places the burden on local governments to justify the right-of-way, not the federal government. This burdensome process will only lead to the elimination of R.S. 2477 rights-of-way, thus greatly injuring the people of the state of Utah. These regulations are evidence that the task of achieving a solution that protects the intent and scope of the original statute while preserving the infrastructure of rural communities MUST involve Congress.

We are beyond a regulatory "fix" on this subject, particularly in light of the unfortunate regulatory proposal put forward by the Clinton Administration.

Mr. Chairman, S. 1425 proposes a method of relief that many of us in the West have been advocating for several years. It is the same course that most of our state legislatures have traveled in passing state laws on this subject. For example, in 1993, Utah Governor Mike Leavitt signed into law legislation intended to strengthen Utah's claim over thousands of miles of rural roads that are critical to our state. In taking this action, Utah joined other western states which have enacted similar state laws. R.S. 2477 claims should continue to be governed by state law, and that is what this bill does.

It is clear that there are many opinions as to what constitutes a "highway" under the R.S. 2477 statute. The import of this definition varies from state to state based on state law and the historic uses of such highways by local communities. No change to R.S. 2477 should be contemplated that does not take into consideration both the current uses and future needs of these rights-of-way.

Furthermore, Mr. Chairman, the process for submitting claims under R.S. 2477 should be as simple as possible consistent with legal requirements. A system for determining the validity of such claims should be designed to promptly resolve outstanding R.S. 2477 claims. I fail to see how a federal system could be better in this regard than state law. In fact, I find it very easy to envision a federal system under which resolutions of such claims get tremendously bogged down.

These are local thoroughfares whose validity should be determined at the local level, not by Congress, the Department of the Interior, or the Department of Transportation.

S. 1425 ensures that the intent and scope behind the original statute are consistent with the intent and scope underlying congressional passage of FLPMA; that congressional intent regarding the interpretation of R.S. 2477 in accordance with state law is preserved; that the large body of settled, well-established, and well-documented federal and state case law and agency regulatory determinations is adhered to; and that trust and respect for state and local governments, which hold these rights and are entitled to exercise their powers within the sphere of their authority without federal intervention, are restored.

The Interior Department regulations would significantly confound transportation in the western states, jeopardizing the livelihoods of many citizens and possibly their health and safety as well. Mr. Chairman, passage of this bill will lead to a good final disposition of this R.S. 2477 rights-of-way issue in Utah and other western states.

Some claim that R.S. 2477 rights-of-ways are nothing more than dirt tracks in the wilderness with no meaningful history, whose only value to rural counties arises from the hope of stopping the creation of wilderness areas. Nothing could be further from the truth. Mr. Chairman, no one is suggesting that we turn these rights-of-way into six-lane lighted highways with filling stations, billboards, and fast food restaurants. Yet, these rights-of-ways constitute an important part of the infrastructure of the western states.

Think of it this way: Let's say your front yard belonged to someone else—the federal government, for example—and the gravel driveway was the only way to get to your house from the street. The proposed Interior Department regulations would have the effect of denying you the use of your driveway. You would have to haul your groceries to your front door from the street.

A simple illustration, perhaps, but one that shows the importance of these R.S. 2477 rights-of-way to the people in the West.

The proper solution to resolve this issue and bring settlement once and for all to all affected western communities is to adopt S. 1425. I urge the Committee to support this bill.

STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

Senator BURNS. I have arrived from the archives. I took one look at this and maybe we should go back to the archives. I am not real sure.

With the proposed rulemaking down there, I am seeing that one of my favorite agencies is still maintaining the persona that Washington, D.C., is known for. It is unreal.

I have a statement I want to put in the record, but I am very supportive of this. And I do not know if anybody really realizes. You are going to hear from, I would hope, from some county commissioners today that maintain these roads. They have been accepted as county roads. Some of them have been accepted as just roads.

But nonetheless, I do not care if they are just a trail going through there. They have been maintained for a reason, and now it seems that we want to make the decision of what is a road and what is not a road and where it can go and where it cannot go, make that decision here in Washington, D.C., with no regard on how it impacts people in our specific States. I just find that very, very, very, very disappointing on my part, and especially of this agency.

The word we hear in Montana and I assume across the rest of the country deals with the burdensome nature of the regulations for local counties and communities. The imposition of regulation creates such an additional workload that these governments tell me that they will be unable to meet the requirements that is going to be made of them in time, because there is a time line on this.

Under previously established statute, the right-of-way was granted to the holder of the right-of-way. The fact that the Secretary of the Interior now wants to adjudicate these holdings does not override the fact that these rights exist and there needs to be compensation if they are going to be taken away, and it cannot be done through simple administrative process.

We just do not do things in this country just because some king of a fiefdom decides to change the rules in the middle of the stream here, and without any consultation with the people who represent the constituency in those areas. I find this very disappointing and very troubling as we move in this. But then again, I should not be surprised by that.

So Mr. Chairman, I have got to go over on the floor. We have a little timber salvage thing over there, again another public lands issue that we thought we had solved at one time. Now they want to change the rules on that again here in the middle.

So I would just ask that my full statement be in the record, and I am very supportive of S. 1425. And I thank the witnesses. I am sorry I am not going to be here to hear your testimony.

[The prepared statement of Senator Burns follows:]

PREPARED STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

Thank you, Mr. Chairman, for calling this hearing to address an issue that has come to the forefront in the last couple of years. This is an issue that is of great concern to me and a great number of citizens of my state of Montana. For Montana was a portion of the land that was opened up during the time that the federal government was promoting the settlement of the western lands.

The rules and regulations, which have been promulgated as a result of the Department of the Interior's review of Revised Statute 2477, has created quite an outcry from the population of the states in the west. As the historical review of this measure will show, the purpose of this legislation was to assist in the development of the west, and to grant right-of way privileges to state and local government for the construction of roads. This provided for the future movement of people throughout the region and for the claiming of lands for future development. However, as Congress so often does, a law now known as FLPMA created a nightmare for the state and local governments.

The word that we hear in Montana, and I assume across the rest of the country, deals with the burdensome nature of the regulations for the local counties and communities. The imposition of the regulations creates such an additional work load for these governments that they feel that they will be unable to meet the needs of the public.

Under the previously established statute, the right-of-way was granted to the holder of that right-of-way. The fact that the Secretary of the Interior now wants to adjudicate these holdings does not over ride the fact that these rights exist and there needs to be compensation, and cannot be done through a simple administrative process. On a one on one basis the work required by the imposition of the new regulations does not seem overwhelming to the federal government, but each and every state or government entity may find it necessary to file numerous claims at a cost of thousands of dollars that are no longer available. Not only is the federal government finding it hard to balance a budget, but many states and local governments do not have access to the funding this action will require. As a former County Commissioner, I realize the real impact this action will require for a county.

Mr. Chairman, I am aware that the state of Montana may not be feeling the impact that your state of Alaska does, or that of the state of Utah, but we will and do feel the effect of this process. As we all seek to find a means to provide for the people in our states, and assist for the future generations we must find a way to do so without over regulations that cost more and more for the local government to implement or use.

I look forward to hearing from our panels today and our colleagues on this matter. The input of the local government is and will continue to be extremely important to this committee and this Senator. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Burns.

Senator Craig.

STATEMENT OF HON. LARRY E. CRAIG, U.S. SENATOR FROM IDAHO

Senator CRAIG. Thank you, Mr. Chairman. I too will be headed to the floor in a moment to deal with the salvage issue.

Mr. Chairman, let me thank you for holding this hearing and for introducing S. 1425 on the R.S. 2477 rights-of-way. What we are talking about here is legal access across our public lands. I guess I am not surprised, but very disappointed, that this administration in its zealot attitude toward controlling people's access toward their lands would use this kind of approach. And I say that very bluntly because that is how Idahoans view it.

These are legal rights-of-way. They ought to be recognized as such. But the kind of bureaucracy that is being proposed to thread counties and States access through is just unacceptable.

If you were locked up on a public lands State, unable to get access across Federal lands, you might feel different. But somehow we know what the attitude is here. It is called command and control from the top down: We will tell Idahoans just exactly how they can perform and how they will perform on those lands even if up through 1976 it was viewed to be a legal right-of-way.

That is wrong, bluntly wrong. This Congress will make every effort, through this legislation or any other effort, to stop this administration from doing that. They ought to be working cooperatively

with the counties and the States instead of providing a process that is nearly impossible to go through. And more importantly, to challenge now something that for a very long time, since the beginning of the Federal domain, the power of the Federal domain, has been viewed as something where we wanted to accommodate our States in reasonable access, not unlimited access but reasonable and designated access by way of the R.S. 2477.

But once again, because of this administration's effort, this has become a cause celebre when it simply should not have been. It is the right of counties and local units of government to have reasonable and responsible jurisdiction, and private parties who have used these rights-of-way for a long time.

So Mr. Chairman, I thank you for the effort. We will work hard to see if we cannot make S. 1425 law, and I would hope that the administration would attempt to be a cooperating partner with local units of government and State governments in our predominantly public lands States, instead of an obstacle. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Craig.

I am pleased to see my good friend from New Jersey here, Senator Bradley.

STATEMENT OF HON. BILL BRADLEY, U.S. SENATOR FROM NEW JERSEY

Senator BRADLEY. Thank you very much.

The CHAIRMAN. If you are looking for New Jersey on that list——

Senator BRADLEY. It says "one Eastern State."

The CHAIRMAN. No. It's a block of Eastern States and it includes New Jersey.

Senator BRADLEY. The Delaware Water Gap.

The CHAIRMAN. I just wanted to make you aware that we had not forgotten you. We just threw you in with a bunch of Eastern States as having R.S. 2477 interests. But we are going to get a letter out to your constituents to broaden the extent of the interest in that. We hear that there is some Federal land that you love to cross.

Please proceed.

Senator BRADLEY. Well, there are a few places that that might be true.

The CHAIRMAN. Good.

Senator BRADLEY. But I am here to learn and that is really why I am here.

The CHAIRMAN. Then I will give you a copy of my opening statement.

Senator BRADLEY. I think we should have a balance between the needs of transportation corridors, especially in the Western States, with the needs of protection of natural resources. That is really what I think this legislation should seek.

I think Federal land managers who know these lands are in the best position to protect them, and I would be troubled by any system that would shift the burden onto land managers of proving that R.S. 2477 does not apply. I think a look at the legislative history of the Federal Land Management Policy Act of 1976 shows

that in repealing R.S. 2477 Congress was trying to preserve roads which were really very similar to public roads by 1976.

I have a colloquy that took place between Senators Haskell and Stevens which I think clarifies the intent to cover the roads for which States have accepted a maintenance obligation, exercised police authority, such as posting speed limits, or taken other actions that would normally be taken by a State in furtherance of the normal highway program.

So I am here to learn and I would like to proceed with the hearing, Mr. Chairman.

The CHAIRMAN. Thank you very much. I am ready to go with the witnesses. We have three Senators that may show up: Senator Bennett, Senator Stevens, and Senator Hatch. So we will assume that they can join us for a brief statement when and if they show up. I know they have all got hearings this morning, so they assured me that they intend to try to drop by, although I think Senator Bennett is traveling with Senator Dole today, so he probably will not be here.

We, as usual, always welcome our good friend John Leshy, Solicitor of the U.S. Department of the Interior, and would ask that you proceed.

STATEMENT OF JOHN D. LESHY, SOLICITOR, DEPARTMENT OF THE INTERIOR

Mr. LESHY. Thank you very much, Mr. Chairman. I of course have a statement for the record.

The CHAIRMAN. It will be entered into the record.

Mr. LESHY. Thank you very much. I will just summarize with a few basic points.

We strongly oppose this legislation. The first and most important thing to note about it is that it is not simply about preserving and protecting old claims asserted under an old law that Congress repealed 20 years ago. As written, it amounts to new right-of-way legislation that goes significantly beyond what Congress enacted in 1866.

If it should become law we are going to be talking in the future, not about R.S. 2477 rights-of-way as some quaint relic of the past, but about S. 1425 rights-of-way created by the 104th Congress.

Let me illustrate the revolutionary character of this law with three examples. This legislation squarely and unambiguously places the burden of proof on the Department of the Interior on "all issues that may be litigated." This is, as far as I know, unprecedented in public land law. Neither the Executive nor the Judicial nor the Legislative Branches has ever in the 130 years since R.S. 2477 was enacted handled the burden of proof that way. The rule has been precisely the opposite.

Second, this legislation would have State law control all questions. This is a result the Department has never countenanced. In what I think was the first time the Department of the Interior ever addressed R.S. 2477 and what it might mean, in an 1898 decision that has stood ever since the Secretary of the Interior wrote that "State law cannot contradict the plain words of the statute" and that it "certainly was not intended to grant a right-of-way over public lands in advance of an apparent necessity therefore, or on

the mere suggestion that at some future time such roads may be needed."

Third, this legislation forbids the Secretary from taking any management actions that could interfere with the use of an R.S. 2477 right-of-way. A very long line of court decisions has held to the contrary, upholding the right of the Secretary to regulate the use of such rights-of-way to protect Federal land and resources.

S. 1425 so stacks the deck against Federal land managers that its practical implications are not merely mischievous, they are staggering. Alaska, as has been mentioned here this morning, has a section line law and it purports to claim rights-of-way on a one-mile grid north, south, east, and west across the entire State. We read S. 1425 effectively as ratifying and re-enacting that law as a matter of Federal law.

It would create almost one million miles of highways in the State, 300,000 miles crossing national wildlife refuges, 160,000 miles crossing national parks, and 137,000 miles crossing lands selected by Alaska Natives.

Another way to think about the Alaska law is that these easements under State law are 66 to 100 feet wide, and if you calculate that out you find that this legislation puts rights-of-way directly on top of 8 to 12 million acres of Federal land in Alaska. The entire State of Maryland, by the way, has about 6 million acres of land. That is the implication just of validating the State's section line law.

Consider also that the State has selected or identified several hundred other R.S. 2477 claims in the State outside of section lines. We asked our Federal land managers in Alaska recently to evaluate the potential impacts of these claims on specific parks and refuges. I have just received their reports. I would like to supply them for the record. I do not have sufficient copies here today.

The CHAIRMAN. It will be entered in the record.

Mr. LESHY. But I will supply them either later today or tomorrow.

Let me just briefly summarize from a couple. The Togiak Refuge: The State has identified 140 miles of R.S. 2477 "highways" within the boundaries of Togiak. 44 miles cross Fish and Wildlife Service lands, 101 miles cross lands selected by Alaska Natives. These highways, so-called highways or claims, pass over 12 drainages identified as key habitat for refuge fisheries. The Togiak refuge fishery is world-renowned and vitally important for subsistence purposes. And the highways would impact the habitat of caribou, bald eagles, as well as subsistence uses, cultural resources, et cetera.

The same is true for Yukon Flats and several other refuges in Alaska. The superintendent of Wrangell-St. Elias National Park points out that the State has identified 94 possible R.S. 2477 rights-of-way within that park, with a total length of 1,612 miles. That is in addition to the 41,000 miles of section lines that would be considered rights-of-way under this law. It includes 72 miles of the Mallard Trail that crosses the entire Front Range of Mount Drum, the prime calving grounds for the Mentasta caribou herd, 80 miles through designated wilderness south of the Chechina River,

120 miles forming a loop through designated wilderness near McCarthy, et cetera.

S. 1425 is indiscriminate in its application. Among other things, it would blanket military bases and other national defense and security installations with rights-of-way. For this reason, the Defense Department has said the legislation could adversely affect military activities.

Finally, let me emphasize that the perniciousness of this bill is not limited to lands currently in Federal ownership. When R.S. 2477 was enacted into law in 1866, nearly all of the land in the West was Federal. Much of it has since passed out of Federal ownership, but it is still possible to claim R.S. 2477 rights-of-way across those lands.

S. 1425 would strengthen and dramatically broaden those claims and directly threatens private property rights and the rights of Indians and Alaska Natives. It is for this reason that the Natives and Indians have said, among other things, that the legislation would create an absolute land management nightmare.

It is ironic in today's climate of sensitivity to property rights, legislation that so directly threatens private property without compensation would be considered.

Mr. Chairman, I realize this is a topic of seemingly unfathomable obscurity. When you talk about R.S. 2477, the eyes glaze over. But the bottom line is clear and I think the bottom line is alarming: S. 1425 is a major assault on Federal lands and the nationally significant resources they contain, and it is a major assault on private, Indian, and Native lands and on property rights and on the national interest. We strongly oppose this legislation. The Secretary would recommend the President veto it in its current form.

Thank you for the opportunity to testify. I would be happy to answer questions.

[The prepared statement of Mr. Leshy follows:]

PREPARED STATEMENT OF JOHN D. LESHY, SOLICITOR, DEPARTMENT OF THE INTERIOR

I am pleased to have the opportunity to testify here today on S. 1425, regarding R.S. 2477 rights-of-way. The bill poses a grave threat to the lands of Indians and Alaska Natives and other private property owners as well as to national parks, wildlife refuges, military bases, and other sensitive federal lands. The potential harm to wildlife, fisheries, cultural resources, park and wilderness values and subsistence resources is profound. Therefore, the Secretary would recommend that the President veto S. 1425 in its current form.

We agree with S. 1425's sponsor and the Chairman of this Committee that the uncertainty associated with this arcane provision of public land law dealing with access across federal lands, passed in 1866 and repealed in 1976, should be settled finally and fairly. We welcome the opportunity to work with the Committee to find an acceptable way to do this. In our view, S. 1425 is not a step in that direction. Instead, for the reasons explained below, it is a large step backward.

As you know, the provision later known as R.S. 2477 was passed as part of the Mining Law of 1866 and provided simply: "The right-of-way for the construction of highways across public lands, not reserved for public uses, is hereby granted." This law was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), but FLPMA did not terminate valid rights-of-way existing on the date of its enactment. Section 706(a); Section 701(a), 43 U.S.C. § 1701(a). Controversy and confusion have arisen over the existence and extent of these rights. The Department of the Interior published proposed regulations in August of 1994 to provide clarity and a process for recognizing valid claims. During a one-year long comment period, the Department received over 3,200 public comments. Congress attached a measure to the National Highway System Designation Act to prevent the Department from finalizing these regulations this fiscal year.

While we agree that the questions surrounding the existence of pre-existing claims under R.S. 2477 should be resolved, we do not believe that this ancient, long-repealed statute should be effectively revived and expanded. Laws now in effect are generally adequate to provide access to and across federal lands. Since R.S. 2477 was repealed in 1976, the Department has issued about 12,000 right-of-way permits under Title V of FLPMA alone, including approximately 1,000 a year for each of the last several years. Hundreds more have been issued under other statutory provisions.

S. 1425 not only breathes new life into a statute Congress repealed twenty years ago; it actually liberalizes it. It reverses the burden of proof that has for many decades applied to public land law, by putting it on the government on "all questions," and by requiring the government to institute a lawsuit each and every time it determines that an R.S. 2477 claim does not meet applicable legal standards. It allows state law to control all questions, even when that law is fundamentally inconsistent with R.S. 2477, as some state laws are, and even when a state law was passed after the repeal of R.S. 2477, as some state laws were. Some state laws claim rights-of-way where no construction has occurred, contradicting the plain words of the statute. In short, this bill does not discriminate; it adopts even state laws that purport to accept more than was offered by R.S. 2477 before its repeal; and even state laws passed after its repeal.

In sum, the bill goes far beyond interpreting R.S. 2477 or the savings provisions of FLPMA. It attempts to reopen a long-closed window of opportunity for making new claims. It effectively reenacts R.S. 2477 two decades after its repeal, on terms more generous than Congress required when it first enacted the statute in 1866. It would authorize the creation of new "highways" where none currently exist. It effectively renders the federal government powerless to prevent the conversion of footpaths, dog sled trails, jeep tracks, ice roads, and other primitive transportation routes into paved highways. The result is fundamentally inconsistent with modern statutes that provide access to and across federal lands, and would fatally undermine the principles these laws embody, such as public land retention, comprehensive land planning, public involvement in land use decisions, compliance with environmental laws, and mitigation of negative environmental impacts.

The practical implications of this bill, and particularly its blanket adoption of state law, are not merely mischievous; they are staggering. Under a provision of Alaska state law first adopted in 1923 and now codified in Alaska Statutes 19.10.010, as interpreted and upheld by the Alaska Supreme Court, *Girves* v. *Kenai Peninsula Borough*, 536 P.2d 1221 (Alaska 1975), the state purports to claim a highway easement, either 66 or 100 feet wide, across each section line in the state; that is, on a grid one mile apart, both horizontally and vertically. This state law purports to create over 984,000 miles—almost one million miles—of "highways" in the State of Alaska, roughly 300,000 miles of which cross National Wildlife Refuges, 160,000 miles of which cross National Parks, and 137,500 miles of which cross conveyed lands of Native Alaskans (once those lands are conveyed). Since Section 2(b)(1) of the bill closely tracks the language of this Alaska case, 536 P.2d at 1226, S. 1425 is likely to validate such interpretations, even though the Department has denied the validity of section line laws for nearly a century. See 26 I.D. 446 (1898). The bill would then encumber between 7,879,235 and 11,938,235 acres of federal land in Alaska with R.S. 2477 rights of way.

S. 1425's blanket incorporation of state law could also authorize the opening or expansion of new "highways" across federal lands (including parks and wilderness), tribal lands, and private lands in Utah. A 1993 Utah State law, Utah Code Ann. § 27-16-101 et. seq., defines "highway" to include, among other things: "pedestrian trails, horse paths, livestock trails, wagon roads [and] jeep trails." This Utah law purports to restrict the ability of the federal land manager or private property owner to refuse to accept or to mitigate the negative impacts caused by expanding these "highways" into real highways. At the same time the state law attempts to disclaim responsibility and liability for maintaining these "highways." The 1993 Utah law, enacted seventeen years after the repeal of R.S. 2477, purports to waive two requirements of pre-existing state law—one from 1963 that required county commissioners to record all roads and highways within its jurisdiction (27-12-26) and one from 1978 that required counties to prepare maps showing all roads within their boundaries in existence prior to October 21, 1976 (27-15-3). Thus, its plain intent is to provide an additional window of opportunity to file new R.S. 2477 claims that were not documented in accordance with Utah state law at the time the R.S. 2477 offer was still open. Yet, S. 1425 seems to validate the 1993 Utah state law.

S. 1425 would, in other words, effectively reenact and expand R.S. 2477, long after its repeal. These results could not have been conceived of, much less intended, by

Congress either in 1866 or in 1976. We strongly urge that they not be supported by Congress in 1996.

The Department believes that state law has a role to play in federal determinations about the existence and extent of R.S. 2477 rights, so long as the state law was in effect prior to the 1976 repeal of R.S. 2477 and is consistent with the terms of R.S. 2477 (that is, so long as it requires the actual construction of a genuine highway over unreserved public land). But state law should not now be permitted to accept a right-of-way that failed to meet the required conditions of the federal offer before the offer was revoked. Similarly, state law should not be applied to accept more than was offered by R.S. 2477 before it was repealed.

We emphasize that the mischief of this bill is not limited to lands currently in federal ownership. Instead, it also could impact and impair private property rights and the rights of American Indians and Alaska Natives. This is because R.S. 2477 rights-of-way can be claimed across land that has long since passed out of federal ownership. In this connection, the bill does not provide due process—in fact, it provides no process at all—for private property owners whose lands could be encumbered, and in some contexts, taken in violation of the Fourteenth Amendment, by previously unrecorded, unknown, or greatly expanded public "highway" use.

S. 1425's complete embrace of state law can readily impact on private property. For example, the 1993 Utah law previously mentioned specifically applies to private land: "An R.S. 2477 right-of-way continues even if the servient estate is transferred out of the public domain." Utah Code Ann. § 27-16-106. The section line law in Alaska clearly would impact private lands, and those held by Native Alaskans, because it purports to have created rights-of-way along all section lines in 1923, regardless of who then owned or now owns the underlying land. Approximately 137,500 miles of section lines cross Native lands in Alaska.

While to date, R.S. 2477 has been a problem primarily in Alaska and Utah, S. 1425, by providing new and expanded opportunities to make R.S. 2477 claims, has the potential to spread controversy across many states by upsetting settled property law and expectations.

Finally, we have similarly serious concerns about the process S. 1425 would establish to catalog all R.S. 2477 claims within a date certain. The bill opens a new five-year window for claims to be made. It also makes it very difficult for the federal government to contest new or frivolous claims, and validates by default all of those the government has not challenged in court within a two to four year time period. This would create an unworkable, litigation-intensive process that provides maximum advantage to right-of-way claimants and stacks the deck heavily against the current owners of former public domain land that may be subject to right-of-way claims, federal land managers and other landowners who could be adversely affected. The bill provides neither workable standards nor a workable process to weed out frivolous claims or completely new claims; instead, it encourages such claims to be filed. Similarly, the bill expressly refuses to extinguish claims not filed under even these liberal standards and the new five-year window.

Some members of the Congress have expressed interest in finding a way to readily validate obviously valid claims. We endorse the idea, and would be happy to work with the Committee towards this goal. At the same time, it is important to find a way to quickly eliminate obviously invalid claims as well.

We believe it is possible to fashion a workable process to inventory and make determinations about the validity of these right-of-way claims. We stand ready to work with the Committee to develop a process that is fair and workable. As currently written, however, S. 1425 would force the United States to bear the burden of proof on all issues, even when only the claimant has the information necessary to prove or disprove a claim. Similarly, the United States would bear the burden of contesting all claims. This system is one-sided, subject to abuse, and seems designed to validate hundreds or thousands of rights-of-way by default across the western states.

In sum, we are strongly opposed to this proposal. We stand ready to work with this Committee to develop legislation that would validate legitimate R.S. 2477 right-of-way claims fairly and with finality.

The CHAIRMAN. Thank you very much, John. We appreciate your statement.

I noted in your comments that, your written presentation, that this legislation potentially could create some 984,000 miles of new highway in Alaska. Do you really believe that it would be possible?

Somebody put a pencil to that figure. Based on the average cost per mile of building a highway in Alaska, that would equate to

about $6 million per mile, and if you put that figure on 984,000 miles I am told you would get 5.9—I have not used this figure before, so I am not sure how to pronounce it, but it is allegedly—quadrillion dollars. We have not even reached that in the national debt.

I think that is an absurd comparison. You are suggesting by that figure that every section could result in a road. Do you have any idea how many miles of road we have in Alaska?

Mr. LESHY. No, but I——

The CHAIRMAN. You should know.

Mr. LESHY. Could I respond to the question?

The CHAIRMAN. Because you are generating a hypothetical application. I will tell you what it is. It is 13,000 miles. Arkansas has 77,000 miles. Alaska is one-fifth the size of the United States.

Senator BUMPERS. We are a very progressive State.

The CHAIRMAN. You have been at it a lot longer, and fortunately you folks own your State and the Department of the Interior owns ours. So that is a substantial difference.

In any event, I think it would be appropriate to put those charts up, Brian, because when we use those kind of examples it excites a lot of people because they assume that somebody is going to build 984,000 miles of new highway in Alaska. We have not had a new highway in Alaska since the Haul Road was built, and that was built in about, oh, the early seventies, thereabouts.

So there you have Alaska's highway system today, and the reason that it is no more than that is that there is no rationale for any more highway, outside of a dispute of whether the Cordova ought to be hooked to the rest.

There is a map of Arkansas, and it just so happened I picked Arkansas because I started with the A's. I figured Alaska and Arkansas.

Senator BRADLEY. You could have picked New Jersey. It would be a better example.

The CHAIRMAN. I could have, but I did not get down that far.

Senator BUMPERS. It used to be a wonderful, tranquil place before Whitewater.

The CHAIRMAN. Those highways are full now.

The point I want to make is our 13,000 miles of highway include the marine highway system, you know, the ferries. So I would encourage the Department of the Interior as it attempts to use superlatives to keep them in a realistic framework and recognize that, if you wanted to build highways in Alaska, the topography would simply not allow it—how are you going to build? Are you going to pave a road over the top of Mount McKinley? How are you going to get over the Brooks Range?

I mean, these are absurd. I would like you to explain to me how enactment of this legislation is going to dramatically alter anything that has been occurring in Alaska for, say, the last 130 years, and where possibly Alaska would even get the money to create a highway system that you might suggest? You know, it has been suggested by one member who is with us today that somebody is going to build 4,000 miles of road in Denali Park, another absurd reflection.

Mr. LESHY. Mr. Chairman, when in my written statement I say that State law purports to create nearly a million miles of "highways" in quotes——

The CHAIRMAN. That is an irresponsible statement, and you know it and the Secretary of the Interior knows it and we know it.

Mr. LESHY. May I explain?

The CHAIRMAN. Sure, go ahead. We would like to hear that.

Mr. LESHY. "Highways" is in quotes because the statute that you are purporting to amend, which is behind that map, refers to "highways." What we are talking about here is the transfer of property rights. Alaska has had a law on the books since 1923 that claims up to a 100-foot right-of-way on every section line in the State.

S. 1425 says the Secretary "shall recognize any right-of-way that was accepted or established in accordance with the law of the State where the right-of-way is located." It says: "The United States shall bear the burden of proof on all issues, including proving that the right-of-way was not accepted or established in accordance with the law of the State."

It says: "In general, nothing in this act limits the application of State law, and in any proceeding to determine the validity of such a right-of-way the law of the State shall determine the attributes of the right-of-way."

Thus, in several different places I have just quoted, this legislation incorporates and ratifies State section line law.

The CHAIRMAN. Has the State ever asserted a right-of-way across a section line?

Mr. LESHY. I believe it has.

The CHAIRMAN. Well, would you provide that for us if you have that information, because we do not believe it has.

Mr. LESHY. Sure.

The State law itself asserts it, and it has been on the books since 1923.

The CHAIRMAN. Well, have you ever had an application?

Mr. LESHY. We do not normally accept applications for R.S. 2477 rights-of-way. That was one of the purposes of the regulations, to create a process for that.

The CHAIRMAN. But you did not have to.

Well, you stated that the Department has long since looked to State law for guidance, but has never used them as a guiding principle. However, people accepted these rights-of-way as directed by your own regulations in effect since, I think, what, mid-1930's or thereabouts. And there was a reference there that the grant referred to in the preceding section of R.S. 2477 "becomes effective upon the construction or establishment of new highways in accordance with State laws over public lands not reserved for public uses. No application should be filed under said R.S. 2477, as no action on the part of the Federal Government is necessary."

Now, my question specifically was, was this not the policy of the Department and the policy under which people were expected to operate? And now how do you think that rule of law applies to the Department if it can just suddenly rewrite court decisions and reverse its longstanding policy through what amounts to an administrative process?

Mr. LESHY. Mr. Chairman, the Department has always looked to State law for guidance in applying R.S. 2477. But the Department has never said that State law controls when it contradicts the plain words of the statute. You cannot create imaginary highways under State law and have them qualify as highways under R.S. 2477.

The Secretary of the Interior made that clear in 1898, as I quoted in my opening statement. The regulations that you referred to in 1938 talk about establishing rights-of-way in accordance with State law, but they do not say that State law controls when it violates the Federal statute. The 1938 regulations do not overrule the 1898 opinion of the Secretary of the Interior. That opinion has stood since 1898.

So what we have a situation where we look to State law for influencing these determinations and guiding these determinations, but they cannot contradict federal law, they cannot create highways where none exist. They cannot create construction where construction does not exist.

The CHAIRMAN. When you say "where none exist," the whole concept here is the recognition that these had to exist prior to 1976 or they had no basis. And then the question is what is valid relative to a claim from the standpoint of traditional use, trails, access, dogsled routes, snow machines, you name it. That is basically the issue here.

So there is clearly a preemption relative to the right if you can justify use prior to a date. We seem to lose that in the dialogue, which I find extremely frustrating, and the Secretary seems to just kind of ignore that. And that is law.

Now, under the provision of the Paperwork Reduction Act the Department of the Interior submitted to OMB in defense of your regulations that it thought the State's/counties would file one single application for all claims in the State or county and that this would take them approximately 24 hours to do. You also testified that my State of Alaska, there were some 1,500 potential claims, thereby from your estimates Alaska can validate these claims by simply spending less than 1 minute per R.S. 2477 claim.

Now, the question is, is it still the position of the Department, as stated in its claim to the Office of Management and Budget, that it will take less than 1 minute per claim to gather this information, fill out the appropriate paperwork? And if the State and county can do it this quickly, why is it the landlord, namely your Department, why can you not do it if we are requiring claimants to provide you with the appropriate material?

Mr. LESHY. That was our best estimate at the time. It has been a while since we made it. We would have to—we would be happy to go back and look at that again.

The point here is, though, the legislation that is on the table in this hearing says look to State law, and if the intent of the committee is to have this legislation apply only some State laws that refer to actual highways and not to State section line law, then it should say that. The legislation does not say that. It says look to all State law, which includes the State section line law.

I should also add that the legislation does not clearly say it is talking only about pre-1976 State law. It says specifically in any proceeding to determine the validity of a right-of-way the law of

the State where the right-of-way is located shall determine the attributes. I read that as saying that State law today, State law passed in 1978, or State law passed in the future, would be used to determine the attributes.

That is why I say, this is legislation that does not go back and try to clean up an old problem. It is legislation that creates entirely new problems.

The CHAIRMAN. I have a short question. Senator Stevens has joined us. I just have one other question relative to the statement of the Department that they believe the vast majority of these claims would be asserted by State and local governments. You have already indicated your trust in State government, but in your formal statement you reference thousands of frivolous claims.

Now, are you saying that you do not trust the States and the counties even to believe that they are going to file in good faith, or are you saying you lack any confidence in the Department of the Interior that you will not be able to disprove those claims that you suggest are frivolous?

How many of those frivolous claims has the Department approved in, say, what, the last 130 years?

I am sure you recognize that R.S. 2477 rights could only be created across Federal land. Yet you suggest that there is a threat to private property. You cannot have it both ways. Is it not true that they could only exist across private property if they were established before the Government patented the land? If the land was patented subject to preexisting rights, recognition of that right-of-way on adjacent Federal land would not constitute a taking.

Mr. LESHY. Mr. Chairman, two points. No. 1, under this legislation and the Alaska section line law, if I owned private property in Alaska that was patented after 1923, after that law went into effect, I would be very, very nervous under this legislation if a section line crossed my property, because I think I would have a 66 to 100-foot right-of-way across it without receiving any compensation.

The CHAIRMAN. But you are ignoring the relationship between the State and the applicant and the reasonableness of it, and the fact that State was divided in section lines just happened to be a fact, but to interpret that into the possibility you could have 948,000 miles of highway at risk through Federal land, as I indicated earlier, is absolutely ridiculous.

I am going to call on Senator Stevens to make an opening statement because he has to go back. You can stay right there, John, and I am going to call on my colleagues for questioning of Solicitor Leshy. There is lots of room at the table, and I know Ted wants to get close to you.

Senator BRADLEY. Mr. Chairman.

The CHAIRMAN. Yes.

Senator BRADLEY. If I could, I have to go to the floor on the Murray amendment, so I would like to be able to submit some questions if I could.

The CHAIRMAN. You are always welcome.

Senator BRADLEY. Thanks.

The CHAIRMAN. What we have is a map on one side of the highways in the State of Alaska, and just by coincidence we have a map

on the other side that shows the highways in the State of Arkansas. I think there is 77,000 over there and 13,000 over there, and that includes the whole highway system, including the marine highway system.

STATEMENT OF HON. TED STEVENS, U.S. SENATOR FROM ALASKA

Senator STEVENS. I do think you are going to see a map which shows how this map could change to that with a great deal of conservative impact as far as our State is concerned. A later witness will show that to you.

Mr. Chairman, I appreciate you and your colleagues taking the time to listen to me, and I would ask that my full statement appear in your record.

The CHAIRMAN. It will be entered in the record as if read.

Senator STEVENS. I will proceed as quickly as I can. I am, my friends, chairing a hearing on Postal Service reform in the Governmental Affairs Committee and I have been relieved just for the time to come over and make some comments to you.

I do think it is important that I have this opportunity because I think I can provide some comfort to those who might oppose our bill. Our bill does not alter existing rights or create any new property rights. The bill in my judgment is in accord with 110 years of existing legal precedent. I spent 5 years with the Interior Department and was the solicitor during the last year that I was there.

Parenthetically, I would tell you that I was subject to what is going on in a lot of places right now. My confirmation was held up for the election period and we did lose that election, so I did not ever become a confirmed solicitor. But I do recall and value my experience there.

This bill will resolve, I think, uncertainty regarding existing property rights and I strongly support the bill along with you, Senator. The question of the validity of existing Revised Statute 2477 rights-of-way, as they are called, should not be the issue here. I think that issue is well settled. It has been well settled for over 110 years in the case law of our Nation's courts and the preservation of R.S. 2477 property rights has been explicitly provided in Federal legislation.

I am sure as you are aware, the original grant of the right-of-way over public land was contained in section 8 of the Mining Act of 1866. The language was simple, stating in its entirety: "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."

That became section 2477 of the Revised Statutes. The grant was later recodified as section 932 of title 43 of the U.S. Code.

In 1976, Congress enacted the Federal Land Policy Act, FLPMA as we called it then, and section 706(a) repealed that statute that I have just read. However, section 701 of FLPMA provided explicitly: "Nothing in this act or in any amendment made by this act shall be construed as terminating any valid lease, permit, patent, rights-of-way, or other land use right or authorization existing on the date of approval of this act."

And I emphasize that clearly because I have just heard my successor here indicate that he believes that a subsequent law of ei-

ther the State or Federal Government could change that right. We preserved the right as it existed on the date of the approval of the act, period. That is protected by Federal law. It is not subject to change by State law or by a subsequent Federal law unless it is very specifically done, and it has not been done during the time I have been here. I would oppose it just wholeheartedly.

Any valid existing right-of-way as it existed on October 21, 1976, is unaffected by the repeal of R.S. 2477. I made sure of that, and I would ask that you put in the record of your hearing the two debates that I had in 1974 and 1976. I went to the Senate floor to be sure that the assurance given to our State of Alaska and other Western States would not be affected by the repeal of R.S. 2477 which the bills in both years contemplated.

I had extensive colloquies in both 1974 and 1976 with Senator Haskell of Colorado, who supported and managed both of these bills. I expressed my concern that the repeal of Revised Statute 2477 would adversely affect the Western States if explicit language protecting valid existing rights was not included and addressed the fact that we believed that, even in 1974, that Alaska would eventually have wildlife refuges and Federally protected areas of many millions of acres. And I reminded Senator Haskell and my other colleagues then that the roads and foot trails and dogsled trails are equally important access concepts in Alaska to the roads of other States, and pointed out there is often no mapping of rights-of-way in Alaska, but that did not diminish the validity of the rights-of-way.

R.S. 2477 continues to be extremely important to our State and I think many other Western States. We are still relatively young and undeveloped and without a sophisticated and well developed transportation system. I am just chairing this hearing on postal reform because it is obviously important to us to maintain the postal system in view of the lack of roads that we have in our transportation system.

We have more than 225 communities widely scattered over an area that is one-fifth the size of the United States. Very few of them are connected by road, but just about every community is or has been connected by trails or other means of access, and that is what the map that you are going to see will show.

I think that one is over there. Would you mind putting that one up for me.

We have been comprised of Federally owned land since the inception of our days as a territory or as a State. Alaska still is 68 percent owned by the Federal Government. We have 13 national parks, 16 national wildlife refuges, 25 wild and scenic rivers, 4 national forests that were created or changed by the act of Congress in 1980.

None of those acts affected this bill. The basic R.S. 2477 rights were protected then and they are protected now. Access to the inholdings that are within and beyond these Federal set-asides is critical.

I think if you will look at that map you will see what the existence of these trails means. We have had a connection on the ground to every community in Alaska. My first senior partner in Fairbanks, Frank, had walked from Nome to Fairbanks when he

came to Fairbanks. He came on a very familiar trail that had been established by the miners over a period of 20 years. Now, that trail is today protected by Revised Statute 2477 because it was still used by people at the time that this bill repealing R.S. 2477 was enacted, because that repealer protected valid existing rights valid as of that date.

In our State there is 14,000 linear miles of road that cover 591,000 square miles. That is less than one mile of road for every 45 square miles. In Connecticut, which has 5,108 square miles, it has 20,280 linear miles of road. In other words, they have one linear mile of roadway for every quarter of a mile in Connecticut and, as I said, we have one linear mile of road for every 45 square miles.

Obviously, you can see the point: We still have to develop our connection system on the land.

Again going back to the hearing I am conducting, should the Postal Service decide not to continue to subsidize airmail in Alaska we are going to have to build roads. We are going to have to improve these road systems. We are going to have to use something. It may be our air cushion vehicles that we are trying out in a portion of Alaska now. But we have to have a fallback, and the fallback is in the protection of our Revised Statute 2477 rights, which were preserved in perpetuity and protected by Federal law.

I take the position neither the State nor the Federal Government has the right in any way to try to change those rights without compensation. They are protected rights. They are the rights of our State. They are very valid to our continued existence.

We have identified many of these 2477 routes and we have continued to use them as we did in the past. They are used, as I said, for access to private inholdings. They are used for subsistence hunting, for rural access by rural citizens, predominantly Native.

Many of them may never be developed, that is true. But they are there for our use as long as we protected them, and we did protect them by the amendment that Senator Haskell agreed to insert in 1976 when we finally had the agreement on this bill.

We had a colloquy. There is no question about the colloquy. He said, and I am quoting from page 451 of the 1976 debate: "Mr. President, I feel very strongly we should make a clear legislation history we are not attempting to take away any preexisting legal right. I hesitate to make the statement the Senator from Alaska wants me to make because perhaps by virtue of making that statement I may be redefining what is a valid existing right."

But he did agree and he put into the statute at that time the statute was subject to valid existing rights. We made that clear in two portions of the statute in 1976.

Now, I think that there is no question that at that time we all knew what we were doing. I talked to the Senate about the fact that many of these had not been mapped, that they were not—we were not talking about section lines, by the way. Section lines was never part of our debate in 1976. I see no reason why it should be part of the debate here.

[The prepared statement of Senator Stevens follows:]

PREPARED STATEMENT OF HON. TED STEVENS, U.S. SENATOR FROM ALASKA

Mr. Chairman, I am pleased to be here today. It is always a pleasure to participate in the proceedings of the Committee on Energy and Natural Resources under the command of my distinguished colleague and brother from Alaska.

I apologize that my remarks are brief, and that I will be unable to stay to listen to the remarks of others, but I am, at this moment, chairing my own hearing on Postal Service reform in the Governmental Affairs Committee.

Let me preface my remarks with the comment that will hopefully provide some comfort to those who would oppose this bill: this bill does not alter existing rights or create new property rights. The bill is in accord with 110 years of existing legal precedent.

S. 1425 will resolve uncertainty regarding existing property rights. I strongly support this bill—I am an original sponsor—and I urge this committee to report it out for full Senate consideration.

In fact, I believe that the question of the validity of existing "RS 2477 rights-of-way," as they are called, should not be an issue. As I just mentioned, this issue has been well-settled for over 110 years in the case law out of our nation's courts. The preservation of RS 2477 property rights has been explicitly provided in federal legislation.

As the members of this committee are aware, the original grant of a right-of-way over public lands was contained in section 8 of the Mining Act of 1866. The language was simple, stating in its entirety: "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 provision became section 2477 of the revised statutes. The grant later was recodified as section 932 of title 43 of the United States Code.

In 1976, the Congress enacted the Federal Land Policy Management Act, "FLPMA." Section 706(a) of FLPMA repealed 43 U.S.C. 932. However, section 701 of FLPMA provided explicitly that "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." The date of approval of the act was October 21, 1976.

Thus, any valid existing right-of-way as of October 21, 1976 is unaffected by the repeal of RS 2477. I personally made sure of this during the debate of FLPMA and the predecessor bill in the preceding Congress.

During the debates in 1974 and 1976, I came to the Senate floor to focus on assurances given to me that my State of Alaska, and the other Western States, would not be adversely affected by the repeal of RS 2477—which both bills contemplated. I engaged in colloquies in 1974 and 1976 with Senator Haskell of Colorado, who supported both bills.

In both 1974 and 1976, I expressed my concerns that the repeal of RS 2477 would adversely affect the Western States if explicit language protecting valid existing rights was not included.

I addressed the fact that we believed even in 1974 that Alaska would eventually have wildlife refuges and federally-protected areas of many millions of acres.

I reminded Senator Haskell and my other colleagues that roads and foot trails and dogsled trails are equally important access in Alaska. I pointed out that there is often no mapping of the rights-of-way in Alaska, but it doesn't diminish their validity.

RS 2477 continues to be extremely important to Alaska. Unlike other States, Alaska is still relatively young and undeveloped. Alaska is without a sophisticated and well-developed transportation system.

Alaska has more than 225 communities, which are widely scattered over vast, unpopulated areas of land. Only a few of these communities are connected by road. But just about every community is, or has been, connected with another by trails. Access is vital to those communities.

Also, from its territorial origins to today, Alaska has been comprised mainly of federally-owned land. Alaska is 68 percent federal land. Alaska has 13 national parks, 16 national wildlife refuges, 25 wild and scenic rivers, and 4 national forests created by the Alaska National Interest Lands Conservation Act in 1980. Access to inholdings within and beyond these federal set-asides is critical.

In Alaska, many RS 2477 trails and roads were originally pioneered by mail carriers, dog mushers, miners, traders and trappers, and some—but not all—have become Alaska's existing transportation network.

But even today, in Alaska, there are fewer than 14,000 linear miles of road covering 591,000 square miles. That is less than 1 linear mile of road for every 45 square miles.

By comparison, Connecticut covers 5,108 square miles and has 20,280 linear miles of road connecting its communities. That equates to about 1 linear mile of roadway for every quarter of a square mile of Connecticut.

Alaska has 1 mile of road for every 45 square miles, and Connecticut has almost a mile of road for every quarter of a square mile.

Alaska needs to have its property right protected to insure its access across federal lands not otherwise reserved.

The State of Alaska has identified approximately 1,000 to 1,400 historic trails which are valid existing RS 2477 rights-of-way. All of the routes selected provide at least one of the following: access to resources and State land, to communities, or to federal lands not otherwise accessible.

Of these, the State has determined that 536 routes qualify as valid RS 2477 routes. The State has already determined that another 30 or so do not qualify. About 250 routes need further research.

In reality, most of Alaska's identified RS 2477 routes will continue to be used as they have been in the past—for seasonal access to private inholdings or for subsistence hunting by Alaska's rural citizens. Some will never be developed. Old mail routes have been replaced by air delivery to the most rural communities. Mines have closed.

Nevertheless, in Alaska where much of the land is still remote to any road and 68 percent of the land is federally-controlled, a right-of-way established pursuant to RS 2477 still provides the principal access to the land. RS 2477 routes are important to Alaska not because we need roads everywhere across Alaska, but because the right-of-way is an access tool that may preserve Alaska's options into the future.

Last year, Congress imposed a moratorium on federal action to implement or enforce any rule or regulation with respect to RS 2477 rights-of-way until September 1, 1996. Congress took this action because the Department of the Interior was getting ready to implement rules which would severely limit, or in some cases, extinguish valid existing RS 2477 rights-of-way. Congress has previously said that valid existing rights are to be protected. This law will resolve any confusion as to that fact.

Mr. Chairman, I support S. 1425. I commend the committee staff who have crafted this bill. I urge the committee to report S. 1425 out.

Thank you.

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*** ACTIVITY REPORT ***
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ST TIME	CONNECTION TEL/ID	SENDER NAME	NO.	MODE	PGS.	RESULT
03/11 17:55	313015480149		0805	TRANSMIT ECM	5	OK 01'53
03/11 18:01	315480149		0804	TRANSMIT	0	NG 00'00
						0 #018
03/11 18:33	602 650 0398		5981	AUTO RX ECM	10	OK 03'55
03/11 18:40	602 650 0398		5982	AUTO RX ECM	11	OK 04'27
03/11 19:49	18016286600		5983	AUTO RX ECM	3	OK 02'41
03/12 11:07	93015480149		0806	TRANSMIT ECM	2	OK 01'21
03/12 13:03			5984	AUTO RX ECM	2	OK 00'49
03/12 16:14	318016345758		0807	TRANSMIT ECM	4	OK 03'27
03/12 17:06	SEN MURKOWSKI		5985	AUTO RX ECM	3	OK 01'28
	907 276 4081					
03/12 17:09	94344766		0808	TRANSMIT ECM	3	OK 01'12
03/13 11:17	94344716		0809	TRANSMIT	0	NG 00'00
						0 #018
03/13 11:25	94344766		0810	TRANSMIT ECM	11	OK 04'38
03/13 11:36	84662		0811	TRANSMIT ECM	11	OK 04'05
03/13 12:07			5986	AUTO RX ECM	1	NG 04'00
						1
03/13 12:14			5987	AUTO RX ECM	10	OK 03'49
03/13 12:19			5988	AUTO RX ECM	10	OK 05'28
03/13 13:42	AFN		5989	AUTO RX ECM	3	OK 01'51
	9072748246					
03/13 13:45			5990	AUTO RX G3	5	OK 02'12
03/13 13:56			5991	AUTO RX G3	5	OK 02'41
03/13 14:06	610 975 4336		5992	AUTO RX ECM	2	OK 00'50
03/13 14:18			5993	AUTO RX ECM	8	OK 03'15
03/13 14:39	2024344766		5994	AUTO RX ECM	2	OK 01'47
03/13 14:56	94344766		0812	TRANSMIT ECM	2	OK 01'20
03/13 14:57	84662		0813	TRANSMIT ECM	10	OK 05'39
03/13 15:09			5995	AUTO RX G3	2	OK 01'21
03/13 18:26	97375773		0815	TRANSMIT ECM	11	OK 04'08
03/13 18:30	319072787997		0814	TRANSMIT G3	8	OK 05'42
03/14 07:22	97375773		0816	TRANSMIT ECM	14	OK 04'59
03/14 09:46	41235		0817	TRANSMIT ECM	2	OK 00'36
03/14 09:48	98638773		0818	TRANSMIT ECM	2	OK 00'44
03/14 10:25	93385950		0819	TRANSMIT	0	NG 00'00
						0 #018
03/14 12:51	93385950		0820	TRANSMIT ECM	8	OK 02'21
03/14 13:00	913012146614		0821	TRANSMIT G3	1	OK 00'53
03/14 13:38	202 484 0888		5996	AUTO RX G3	3	OK 02'51
03/14 14:14	98638773		0822	TRANSMIT ECM	7	OK 01'59
03/14 16:45	202 408 5059		5997	AUTO RX ECM	11	OK 03'29
03/14 17:03			5998	AUTO RX ECM	2	OK 00'45
03/15 09:28			5999	AUTO RX ECM	3	OK 01'24
03/15 10:26	96245857		0823	TRANSMIT G3	3	OK 02'05
03/15 11:45			6000	AUTO RX ECM	5	OK 03'37

The CHAIRMAN. Let me ask you on that, because it was brought up by the Solicitor, Senator Stevens, and that is the Solicitor's claim that a section line law in Alaska exposes some 984,000 miles of potential highway, and the concern about someone having a holding and the exposure of that section line resulting in a road.

Now, perhaps your memory would give us a little background on why the section line concept was initiated. Perhaps it was the only alternative. But the reality here is that we are hearing a threat because of this application that applied to Alaska that there is a potential for 984,000 miles of highway.

Senator STEVENS. Well, my memory is that was also repealed. But as a practical matter, we used the section line, as they did in the Midwest, where we had development, but we never pursued the section lines within any Federal area that I know of. I do not know of any section line roads that were built over Federal lands.

We are talking about rights-of-way over Federal lands. The section line rights were primarily used over the homestead lands, where people had homesteads where the title was being taken out of the Federal Government and being deeded over to individual citizens and rights-of-way had not been established across those during the days of Federal ownership. As a consequence, we used the Federal section line concept.

But to my knowledge—I could be corrected—I do not ever remember a section line concept being established over Federal lands. In the first place, they were not surveyed out. They are not surveyed out today. It will be almost the year 2050, as I understand it, before Alaska is surveyed even on the lands that were granted to the State and the Natives. We are never going to survey the Federal lands, to my knowledge.

The CHAIRMAN. How would you respond to the Solicitor's claim that there is a danger in Alaska, as a consequence of the section line law, that they could be exposed?

Senator BUMPERS. What is the date of the section line law, Mr. Chairman?

The CHAIRMAN. I could find the date for you. We have got it right here.

Senator STEVENS. Let me say this. I do not think it is important, Senator Bumpers, because our bill protected only valid existing rights, and someone would have had to pursue and develop a section line right-of-way by 1971 across Federal lands to be protected by the law that we wrote in 1976. Now, we protected only R.S. 2477 rights that had been established as valid existing rights by 1971.

There are no new rights after 1971 under R.S. 2477. There are other ways you can get rights across Federal lands, but not pursuant to R.S. 2477 concepts after 1971. And as a consequence, the section line concept is immaterial here. It does not apply. To my knowledge it never applied to Federal lands when they were still in Federal ownership. They only applied to lands that came out of Federal ownership under homesteads, trade and manufacturing sites, various types of land grants that were made.

For instance, the Federal Government made a substantial gift of lands to the University of Alaska for mental health lands. I do re-

member that there was a section line road put in somewhere in Fairbanks on that land once it went to the State of Alaska.

But I do not believe that the concept of the section line rights-of-way has anything to do here, unless they were protected by 1971. If they were, then they were in use.

Senator BUMPERS. 1971 or 1976?

Senator STEVENS. 1976, pardon me. 1976.

The CHAIRMAN. The section line law went in in 1923.

Senator STEVENS. I used the wrong date. It is 1976.

Senator BUMPERS. Senator, you are saying——

Senator STEVENS. I was thinking about the Land Claims Act.

Senator BUMPERS [continuing]. That anybody who had not perfected a section line claim prior to 1976 is out?

Senator STEVENS. I am saying the section line right-of-way—we are talking about rights-of-way across Federal lands now, and it is important now, and the area of those Federal lands, that are retained by the Federal Government.

Senator BUMPERS. Let me ask you two questions, Senator Stevens. Is it your understanding that the 1923 section line law only applied to homesteads and State or private lands and not Federal lands?

Senator STEVENS. No, it did apply to some Federal lands, as I said.

Senator BUMPERS. The second question is——

Senator STEVENS. But I do not remember any assertion of section line rights-of-way based upon the R.S. 2477 concept.

Senator BUMPERS. Well, the second question is: Is it your belief that if a claim had not been filed, a claimant would be barred after 1976?

Senator STEVENS. No, I do not think the 1976 law had any—it only repealed R.S. 2477. It did not repeal the section line concept. That was done later, is my memory.

Mr. LESHY. I believe that is still in effect, Senator.

Senator STEVENS. I am talking about the State of Alaska repealed it.

Senator BUMPERS. I am asking this question because this bill validates everything the State has done since 1976, even though it flies in the face of the fact that the law was repealed in 1976.

Senator STEVENS. The repealer of 1976 could not have repealed anything we are trying to protect with this bill, because those were valid existing rights. We are just still trying to protect the valid existing rights that were specifically debated and specifically protected by the Congress by virtue of the amendment that Senator Haskell accepted.

As a matter of fact, he rewrote it on the floor, if you want to look at this debate. He took a portion of the amendment that I offered and said they would agree to that. There was no question that valid existing rights developed under Revised Statute 2477 were protected. We did not debate the section line concept. That repealer in 1976 had nothing to do with the section line rights-of-way.

The CHAIRMAN. I think that is evident. We checked the records, Senator Bumpers, and we have, with the exception of potentially the University of Alaska withdrawal, no evidence that any section

line road was built across Federal lands, no application having been made. So it is really not relevant.

Senator STEVENS. You have got to remember, I was U.S. Attorney and I helped condemn the lands. At that time, in territorial days, the Federal Government was condemning the lands for rights-of-way and even condemned some of its own lands for the extension of the highway system.

We took the lands based upon surveys and those were based, not on R.S. 2477, by the way; they were based upon the development of rights-of-way for military purposes during World War II. Most of our roads came out of the military utilization in World War II.

But we are talking now about the protection for the future. I urge you to take a look at this outline Senator Leman is going to bring to you from the State. Those are historic access routes. They show you how the fishermen got into their villages and out of them by land. They show you how the miners got out of their areas by land. They did not have airplanes and, contrary to—at least they could not afford them, most of those people. And contrary to popular belief, they walked out, and they did establish rights-of-way. And those have been used by local people.

It is true there are not many people walking from Nome to Fairbanks any more, but they are walking on those trails from village to village and town to town still today. And we want to protect those because that is our future for developing a road system. This bill is absolutely necessary because now the Interior Department is deciding that Federal law will determine whether or not those rights-of-way were valid in 1976.

We knew that they were developed under State law. They were perfected under State law, and those that were valid in 1976 are protected today and the Federal Government has no right to come in and impose Federal law on top of State law by regulation, except by an act of Congress that we would have something to do with.

Now, this is not the way to deal with this, in my opinion, and it certainly is a taking. What the Department of the Interior is suggesting is a taking of rights that we protected in 1976.

Senator BUMPERS. Are you saying that any claim that had not been perfected by 1976 would be invalid and out?

The CHAIRMAN. In effect, yes.

Senator STEVENS. They had to be valid existing rights. They had to be used by the public for access by 1976 under Revised Statute 2477 concepts, which was public access across Federal lands, which was guaranteed up until that time.

The CHAIRMAN. Well, it has to have been used before 1976. It has to have that kind of a history and documentation.

Senator BUMPERS. I know, but that includes any motorcycle path.

The CHAIRMAN. We did not have any motorcycles then, okay, and you do not motorcycle across Alaska.

Senator BUMPERS. Well, a deer trail, anything.

The CHAIRMAN. No, no. It has to be used for commerce of some kind, either traversing across for access of people involved in fishing, livelihood.

Senator STEVENS. The State has been very chary in the development of this. As a matter of fact, if you are going to listen to Senator Leman, the State has looked at this and not every rabbit trail

has been protected. What the State has tried to do is say, these rights-of-way that were used, that were public use, have a role in the future of Alaska, and the Congress protected them in 1976 and we want to protect them now pursuant to the law that existed in the State of Alaska in 1976.

They were valid under State law and Congress protected them to the extent they were valid under that law. That law cannot be changed by the Department of the Interior now.

Senator BUMPERS. Did you have some system in Alaska for perfecting those claims before 1976? How were those claims asserted prior to 1976? Was there a filing at the courthouse?

Senator STEVENS. Well, they were asserted when the State, the territory, came along and decided to make them ripen into total public use. They had been used locally by people and as they started to connect them that was when the State started, and territory, started to recognize them, and under 2477 that is what we used basically for that purpose.

We are basically talking about the rights that the State will in the future decide to improve into the road system. There are some that are local in nature that the State will not improve, that the local borough or the local city does. I remember, take a look at the road from Nome to Teller. There is a good example. The road from Nome to Teller was developed in the first instance just by one lone commercial operation out in Teller. It now is a paved highway that goes from Nome to Teller, and it was paved across the road that was used by that family in developing their commercial business up in Teller.

Now, that road was protected when they were using it. It has now been improved and it is protected because the State has committed it to public use.

We are adamant about the fact that—I have got to tell you, the West could have stopped that repealer in 1976 and would have done so had it not been for this assurance that we got. Wait until you hear from the people from Utah and other areas. This is not an Alaskan issue, either. It predominantly affects Alaska because we are the last State to really ever use these rights that were protected in 1976.

Senator BUMPERS. Would you like to see this bill amended to incorporate the statement you made a moment ago that the State laws of 1976 should be used?

The CHAIRMAN. We were not a State—well, we were, too. Go ahead, excuse me.

Senator BUMPERS. Well, you said that State law, whatever it was in 1976, ought to be used.

Senator STEVENS. The law that existed in recognizing those, that is correct.

Senator BUMPERS. Well, this bill would have to be amended to accomplish that.

Senator STEVENS. Why?

Senator BUMPERS. Because it does not limit it. There are States who have done all kinds of things since 1976 that this bill would incorporate.

Senator STEVENS. No, I do not think that is right.

The CHAIRMAN. I do not think that is correct. It is used prior to 1976.

Senator BUMPERS. That is the way I interpreted it.

Senator STEVENS. What we are saying is that—well, since 1976 the State has passed laws how it is going to use the valid existing rights that were there in 1976, that is true. But we have not changed the manner in which we determine whether those were in fact 2477 rights that were protected by the clause that I have referred to.

Senator BUMPERS. Let me ask you one other question, Mr. Chairman, if I may.

The CHAIRMAN. We have got a long hearing here, so I want to remind you of that.

Senator BUMPERS. Yes.

The CHAIRMAN. I want to make sure you understand, though, the implication.

Senator BUMPERS. Alaska and Utah are the two States most affected here. In Alaska how were claims filed both on Federal lands, and under the claim law which said that these claims can be perfected?

Senator STEVENS. We had no——

Senator BUMPERS. No filing system?

Senator STEVENS [continuing]. Filing system. They were protected by the traditional use. And the State was asked in 1974 to identify these rights-of-way. We did send, the State Department of Transportation—and I mentioned it in my prepared statement—sent approximately 1,400 trails and rights-of-way that it designated as being valid, possibly valid existing Revised Statute 2477 rights.

They continue to examine those. They are very specific in identifying them as to whether or not they qualify. Basically—now, remember, basically all of these are going to go into the State road system eventually. That is why, again, I would urge you to look at Senator Leman over here, look at this thing that he has got.

These are the trails coming out of Nome, walking around, all the way around coming to Fairbanks. Now, each one of those is made up by these lines that you see. That is how you would go walking from place to place, identifiable communities. Part of this was established by people walking between there and there, these people walking there and there.

They were connected through and they still are today. They are the passable rights for human beings to get from place to place on the ground. The State wants to protect those because our future road to Nome has got to follow that. We know we will never get any other of that land, but we have preserved those R.S. 2477 rights for the State's use.

Some of them go through areas that are now reserved for other purposes by the 1980 act.

Senator BUMPERS. Would you expect to pay the people who established those claims if Alaska wanted to build a highway across those trails you just pointed out?

Senator STEVENS. No. Only those that would be on the private sector now, because the lands have been taken out of Federal ownership and gone into private ownership.

Senator BUMPERS. But a lot of those are held by individuals, are they not?

The CHAIRMAN. No, very few.

Senator STEVENS. Not very many, not very many. We are talking about rights-of-way primarily across Federal lands.

The CHAIRMAN. It is Federal land. There is no private land there. We only have 2 percent of the State in that area in private lands.

Senator STEVENS. We are basically talking about protecting our rights across the lands that were set aside for other uses.

The CHAIRMAN. There is another map behind you, Ted, that we used in my opening statement, that shows all the Federal withdrawals in color.

Senator STEVENS. But you have to put this one—and I tried to do that, but I could not get it done. I was trying to take this infrastructure out and put it on something like this. It is in there in blue, by the way. You see the shading. Some of those are in there.

But as a practical matter, the primary problem is to go across the Federal lands that are not going to be made available to us. We preserved those rights-of-way for our future use.

Now, it is true that we can have people say that they are going to try to find a way to deny access and we have to battle for each one of them, but I do not think we have to pay anybody for them. Those were valid under Revised Statute 2477 that were transferred out to the public and the public gets title to them under one of the acts passed by Congress. Those valid existing rights were preserved under the patent they received. Those patents are subject to valid existing rights.

Senator BUMPERS. It is your contention that none of those are owned by individuals?

The CHAIRMAN. Federal and State lands.

Senator BUMPERS. I know it is Federal and State lands, but we are talking about the rights-of-way.

Senator STEVENS. There are very few privately held lands on that trail.

The CHAIRMAN. There is no population out there. There is nobody there.

Senator BUMPERS. I am talking about those trails. Some of them were established by miners or mining companies or somebody other than the State of Alaska.

Senator STEVENS. That is right.

Senator BUMPERS. Well, what are you going to do with those people if they say, look, that is my right-of-way, you cannot build a highway?

Senator STEVENS. No, no. They were established for public use in order to be eligible for Revised Statute 2477.

Senator BUMPERS. So they could only be established for public use?

Senator STEVENS. No, not totally, because they were originally established for your own private use in order to get into your homestead, but somebody going on beyond came across your road and as they came across your road they had the right-of-way, they had the right to use that right-of-way. It became more of a public road as you went.

The CHAIRMAN. Title is vested in the State of Alaska, for the most part, and the State has the obligation——

Senator STEVENS. When they are developed—until they are developed, they are not. They are just inchoate.

Senator BUMPERS. In the inventory that you did in 1974, do you have any idea how many of those were public and how many were private?

Senator STEVENS. I can tell you very few of them were public in the sense, because the State has never got into that road system yet. They are still private today in the sense if you own the private lands, you own the lands subject to the rights-of-way that were created under Revised Statute 2477.

I hope you will take a look at the debate we had.

The CHAIRMAN. Let me respond to a question. In 1971 the Commissioner of Transportation—you remember this, Bruce Campbell did not have to, but he initiated a filing for claims, and 1,700 were submitted by the State of Alaska.

Senator STEVENS. 1,417.

The CHAIRMAN. 1,700, Ted. And as a consequence, the Department of the Interior responded to the State by saying: We simply need more information. They did not respond to the State's submission, but the State—and I have the summary here of the circumstances surrounding that, if the Senator is interested.

Senator STEVENS. What I am trying to tell the gentleman is, the way it has developed is, as the State has gotten road funds, either through its own money or through the Federal system, and could extend the road system, it has utilized the Revised Statute 2477 rights-of-way to do so. That was what they were intended to be for and that is what they have been used for.

To my knowledge, we have not had any argument about the State's right to use those rights-of-way. They have been improved for public use. We have preserved them for local public use under the 1976 rider that preserved valid existing rights. But they ripen into the State road system when the State utilizes them.

Senator BUMPERS. This would not apply to Alaska so much, but what happens to land that used to be public lands that has been transferred to private ownership, where some of these claims exist? How do you deal with the private owner? What is his right?

Senator STEVENS. Well, it depends, I think, on whether or not that land that is the subject of the Federal right-of-way—whether that right-of-way has been obliterated by private use. And it may be that if the State has to use the right-of-way, it cannot use anything else, it might have to compensate for the improvements and other uses that the private owners put in.

The CHAIRMAN. Yes, but in many cases those are preexisting claims, like a utility corridor or something.

Senator STEVENS. Thank you for your patience in spending the time with me.

My apologies to you, Mr. Leshy. No professional disrespect in that. But I hope you will look at State law.

The CHAIRMAN. Let me, for the record and for the benefit of Senator Bumpers, indicate that the State's testimony will show that over the 2-year period they have spent $1.2 million researching

what was originally 1,900 claims for right-of-way. They came up with 1,200, but 700 were found to be on State land.

The result of the research found that there were about 560 routes that appear to qualify under R.S. 2477, 15 routes do not qualify, 120 routes already have existing right-of-ways, 260 routes were inconclusive, and 400 routes were deferred. So for those that suggest that we are on some kind of a rampage here, I think it is unrealistic.

Do you have any further questions for the Solicitor?

Senator BUMPERS. Just one or two questions for Mr. Leshy.

Mr. Leshy, how many claims that you know of are on file now? How many claims are you going to have to adjudicate, that are considered to be valid existing claims?

Mr. LESHY. We do not currently have a system that collects all the claims. It is voluntary for people to come to us and seek validation of the claims. Under this legislation the problem would be absolutely horrendous.

Mr. Chairman, the question you raised before Senator Stevens came was, do we trust the States and local governments to make legitimate claims here? In general we certainly do, but I point out that this legislation allows any person to file such a claim. If you look on page 2 of the legislation, it says "Any State or any person who uses or could use such a right-of-way across public lands shall file a claim" if they want to.

Then this legislation would go on to require us to file a separate lawsuit every time we want to contest any claim filed by any person. I cannot imagine a more horrendous system than that.

Senator BUMPERS. Mr. Chairman, may I have your attention a moment?

The CHAIRMAN. You got it.

Senator BUMPERS. The very section that Mr. Leshy alludes, refers to, says: "Any State, political subdivision of a State, or other holder of a right-of-way across public lands that was granted under section 2477 of the Revised Statutes before October 21, 1976, or any person who uses or could use such a right-of-way for passage across public lands shall file."

So that means right up until, what is today, March 14, 1996, anybody who qualifies as a person who could use such a right-of-way shall file. So we are still in the filing process from people who just come out of the woodwork.

Mr. LESHY. Read on. It says you have 5 years from the date of enactment to make such a filing.

Senator BUMPERS. Yes.

Mr. LESHY. And there is something later on that says if you do not make a filing you still can take us to court. So this legislation would end nothing.

The CHAIRMAN. To your question, Senator Bumpers, I would ask the Solicitor, the Department of the Interior did not specify who could initiate a claim under their regulations, whether it was a State or an individual; is that not correct?

Mr. LESHY. I think our proposed regulation said that we expect and hope that States and local governments file the claims.

The CHAIRMAN. Yes, but there was no distinction made.

Mr. LESHY. There is some scattered case law, I believe, that suggests that private people can perfect R.S. 2477 rights-of-way. That has actually been rather unclear.

The CHAIRMAN. Well, a private person is not going to build a highway, obviously.

Mr. LESHY. A private person under this legislation as we read it can claim a right-of-way. He does not have to build a highway. A major problem with this legislation, is you do not——

The CHAIRMAN. Well, I know, but there is also a process of reviewing the claims, just as the State has done and will testify, and I hope you can stay for that testimony, because if you want to start pointing the finger back to the 1971 time frame when the State did submit 1,700 identifiable claims for the Department of the Interior to act on, and the Department of the Interior dismissed it with no action.

Now, what the State is attempting to do is, through its review, justify the legitimacy of the claims that it is presenting. And I do not know why we have to carry this to a presumptive point where there is suggestions that we are going to run amok across Alaska.

We have the case of Schultz across Fort Wainwright in Fairbanks, which has already gone to the Ninth Circuit. Would you suggest we prevent a Mr. Schultz, which is an individual, from filing on behalf of himself? There is a legitimate case that has gone to court, the court has upheld.

This was an individual who had some land adjacent to Fort Wainwright in Fairbanks and he had been traversing through to get to his land, because it was the only way he could go there. There was absolutely no other way other than to walk through the Federal withdrawal for a military base. And the military shut him off one day.

He took it to court, went to the Ninth Circuit. They said: You have a valid existing right because you were using that before the military withdrawal. They upheld it.

Now, why should that individual who was harmed be prevented from filing on behalf of himself? Would you care to respond to that, Mr. Leshy?

Mr. LESHY. Yes. It is an interesting story and it is one that I might say has the military quite concerned about the prospect of having——

The CHAIRMAN. It has the individual quite concerned, too. He cannot get there from here.

Mr. LESHY. The military was willing and offered Mr. Schultz a permit to pass through the base any time he wanted to. He wanted much more than that. He did not want to subject himself to a permit pass system. He brought an action that claimed an R.S. 2477 right-of-way across the military base on basically any route he chose. He did not specify a particular route he would follow.

The CHAIRMAN. Well, there is only one route and we both know it, and that is the road through the military base, unless you want to walk overland through the trees and the swamps. When you extend these examples you are really misleading reality as it exists in Alaska, and I wish you would confine yourself to the area that you really know and understand.

Mr. LESHY. Mr. Schultz essentially wanted to use R.S. 2477 to escape any military regulation when he crossed a military base. The military naturally resisted, for good reason. That case is still in the courts. The Ninth Circuit initially ruled that Mr. Schultz had a valid right-of-way. They then decided to rehear the case and they have had reargument in the case. They vacated their old opinion upholding Mr. Schultz. They have not yet issued a new opinion. We are waiting on that and that will tell us something about these old rights-of-way.

The CHAIRMAN. I think it addresses the question of the legitimacy of an individual having a case in point, because Mr. Schultz would still be wandering around if he could not get through the base.

Mr. LESHY. Well, the military has only claimed——

The CHAIRMAN. That permit is subject to the pleasure of the military and we both know it, and he claimed that he had a right and he had access before the military was there and he was simply claiming his access.

Mr. LESHY. And the military claims the right to regulate that access.

The CHAIRMAN. Well, who was there first, and it is the whole question of whether these rights are any good or not. In his case it appeared to have an application. Otherwise the Ninth Circuit would have not ruled. But as you say, it is still up for further appeal.

Do you have any further questions of the witness?

Senator BUMPERS. No.

The CHAIRMAN. I have got just a couple. I would like to know, John, if you have had any subsequent discussions with the State of Alaska about the assertion of rights-of-way over section lines, and if these rights-of-way can be asserted under current law why have not these discussions occurred if in fact they have not?

Mr. LESHY. First of all, while there was some confusion, I think, when Senator Stevens testified, my folks tell me the Alaska State section line law is still in effect today. It was clearly in effect in 1976. It was in effect from 1923 to 1976. There was an Alaska Supreme Court decision that upheld it, I think, in 1975. It says: "A tract 100 feet wide on each section on all sections in the State is dedicated for use as public highways."

Now, I have had discussions with the State of Alaska. I have pointed out to people who have been involved in promoting this legislation that this legislation validates and reinforces and incorporates that section line law into Federal law, and I have said that is a huge problem. And the people that I have talked with have said, we are not going to fix that problem as a matter of Federal law; instead, we will trust the Alaska legislature to modify that law if it goes too far, but we are going to promote that law into Federal law as part of this legislation.

So I think the intent is clear. This proposed legislation is replete with references to incorporating and validating State law, and I think it incorporates the section line law. That is why there would be under this legislation up to 100 foot wide rights-of-way on a million miles of land in Alaska.

The CHAIRMAN. You can argue the theory. Clearly the practical aspects do not relate to it. If the State worked something out in vacating on section lines, would you support this legislation?

Mr. LESHY. It has other problems. That is clearly the most notorious problem.

The CHAIRMAN. It has other problems as well?

Mr. LESHY. Well, sure. The burden of proof, for example, puts us in an impossible position. The requirement to file a Federal court lawsuit to contest each and every claim made by any person in the United States for such claims is an impossible burden. There are other problems as well.

Senator Bumpers suggested amending the legislation to make it clear, as it does not now make it clear, that it applied only to State laws in existence in 1976. The legislature of the State of Utah, for example, passed, as you probably know, a law in 1993 that purports to bolster and strengthen and expand its R.S. 2477 rights-of-way. I believe this law would validate that 1993 law, enacted 17 years after R.S. 2477 was repealed.

It would certainly be a step forward to amend this legislation to say it validates only those State laws in effect as of 1976. But I suspect you would get opposition from the State of Utah if you tried to do that, because they want to validate post-1976 laws.

The CHAIRMAN. You made a reference in your statement relative to the attitude of Alaska's Native people with regard to this bill, but the testimony of the Alaska Federation of Natives submitted today does not oppose the bill before us, because we have worked closely with them to protect their interests through the 17(b) ANCSA easement process.

Now, you seem to have come to a conclusion to the contrary.

Mr. LESHY. I have not seen the Alaska Federation of Natives' testimony. I know AFN submitted a strong statement in opposition to the House bill, which is nearly identical to this. There is nothing in this bill, as I see it, that would protect private or Native or Indian property owners whose lands could be threatened by these rights.

The CHAIRMAN. And the ANCSA 17(b) easement does not give you comfort?

Mr. LESHY. Well, this is a separate piece of legislation that I assume, being subsequent to 17(b), would pose a threat to non-Federal lands. In other words, the easier it is and the broader the rights-of-way that are created over Federal land by this legislation, the more likely it is that those rights-of-way do not stop with the boundaries of Federal land. They will cross in almost all cases State, private, Indian, and Native land that is found outside Federal land borders. So when you have expansive rights-of-way across Federal lands, they are pointing loaded guns at the non-Federal lands.

The CHAIRMAN. Let me ask you just one more question. I have been around here for 16 years and we have previously been able to work with the Department of the Interior on the R.S. 2477 claims relative to the interests of the State in legitimizing those claims so that the State could have reasonable access and look forward to defining the ultimate disposition of what kind of an Alaska we are going to out of necessity have to have. That includes, obvi-

ously, binding the State together through some kind of a transportation system, recognizing we have a vast area and we have an unusually harsh topography which dictates certain limitations.

Under your, the administration currently and that of the Secretary, we seem to have a divergence of interests than we previously had in working with other Department of the Interiors and other Secretaries. It seems to be an adversarial relationship, particular on this issue. I am wondering if you could explain why. Who do you really represent in the R.S. 2477 issue?

Mr. LESHY. Well, Mr. Chairman, I must admit this has been a source of some frustration for us as well. We represent, in our concern about this legislation and a very expansive interpretation of R.S. 2477 rights-of-way, the American people, who have an interest in the Federal lands that in our judgment are seriously threatened by this legislation.

The CHAIRMAN. The right that we received under the Statehood Act and the covenants are not a responsibility of the Department in ensuring that those are fulfilled?

Mr. LESHY. Of course they are.

The CHAIRMAN. But there is a higher cause, relatively speaking, and that is the interest of the general public that own Alaska.

Mr. LESHY. Of course the rights of the Statehood Act should be honored and protected. I do not think they have anything to do with R.S. 2477 or this legislation as far as I can tell.

It has been a source of frustration because we have offered to work with the Congress, both the House and the Senate, on this issue. When I testified before the House Public Lands Subcommittee on nearly identical legislation a year ago, we offered to sit down and identify in more detail our problems and suggest ways to improve our regulations. The House staff told us they would get back to us. We have heard nothing in a year.

We have made similar offers on the Senate side. It is just a problem. We are happy to sit down and explore ways to work through these issues. We have had extensive discussions with the State of Alaska, making similar offers. At least, we would be happy to work out an orderly way to litigate some of these claims and clarify the law. We could certainly do that without this legislation, and I would hope such discussions would go forward.

The CHAIRMAN. Thank you for being with us, John. I guess we have got substantial differences of opinion relative to the responsibility of the Department of the Interior as stewards for the land in Alaska relative to the rights assured the State of Alaska under the Statehood Act that we would indeed have access across Federal lands, and that is the issue before us and the constraints that the Department of the Interior is placing relative to that process is unacceptable to the people of Alaska and certainly the delegation.

I think it is fair to say that it goes beyond Alaska and it addresses the interests of the other States that are affected as well. And if we cannot get cooperation under the existing policies and administrative authorities, why, the other alternative is what we have attempted to do in this legislation.

So we are willing to meet with you from the standpoint of the Senate professional staff and the delegation in the Senate, as well as the Alaska delegation, in cooperation with the Governor and his

folks, at any time. But we seem to be at a stalemate at this time, and that is disappointing, but obviously the door remains open.

So I wish you a good day and I look forward to the next opportunity when we will meet. Thank you.

Mr. LESHY. Thank you very much, Mr. Chairman.

The CHAIRMAN. We are going to call panel one and two together because—one, two, and three, because it is getting later than I thought. But I think we have had pretty good discussion, a pretty good airing of the issue, and it is only appropriate that the administrative agency for the land be heard to the extent that we have heard them.

I am going to ask Elizabeth Barry, who represents the Governor, Assistant Attorney General of the State of Alaska, followed by Barbara—and maybe you can help me on this pronunciation.

Ms. HJELLE. "YELL-ie."

The CHAIRMAN. "YELL-ie," that is pretty close. Office of Special Counsel, Environment and Public Lands, from Washington County, Utah. Nice to have you with us. Loren Leman, chairman of the Senate Resources Committee, from the State of Alaska, Alaska State Legislature, accompanied by our good friend Chip Dennerlein, regional director of the National Parks and Conservation Association, followed by Scott Groene, staff attorney for the Southern Utah Wilderness Alliance.

And I believe Senator Leman has a guest to introduce, that came at great expense to accompany him and to hear his testimony, among others. Do you care to introduce?

Mr. LEMAN. Mr. Chairman, I would be happy to do so. I do not get to see my wife very often when we are in session except for on weekends, and I asked her if she would like to join me for 2 days of riding on the airplane to and from Washington, D.C. She graciously accepted my offer, and my wife Caroline, one of your constituents, is with us today.

The CHAIRMAN. Caroline, it is nice to have you with us. Thank you for coming. I am glad to see you are in here and not helping out the economy at some of the shops in Washington, D.C., which is sometimes the case.

Mr. LEMAN. She tried that yesterday.

The CHAIRMAN. Is there any order of preference? Anybody have to run out of here?

[No response.]

The CHAIRMAN. If not, we will ask Elizabeth Barry to begin. I would like you to limit your testimony in a summary form and submit the entire statement for the record, if you feel comfortable. Otherwise, if you talk too long I may remind you that I would like to have it summarized.

STATEMENT OF ELIZABETH J. BARRY, ASSISTANT ATTORNEY GENERAL, STATE OF ALASKA

Ms. BARRY. I will be as brief as I can.

The CHAIRMAN. Thank you. I will be right back. Please proceed.

Ms. BARRY. Mr. Chairman, members of the committee: I am Elizabeth Barry, an assistant attorney general for the State of Alaska. I am speaking today on behalf of the State on the general principles which in our opinion should govern R.S. 2477 decisionmak-

ing. I thank the committee for the opportunity to express our views.

I would first like to place this testimony within a context of five principles which provide part of the basis for the policy regarding R.S. 2477. These are: One, that Federal law does not preempt State law regarding how R.S. 2477 rights-of-way are asserted, accepted, and managed;

Two, there must be an orderly process with a finite end point for claiming R.S. 2477's;

Three, assertion and management of R.S. 2477's are to be considered within a larger transportation plan for the State, of which public review is an integral part;

Four, if access across Native-owned and other private land is determined necessary through a process involving public review, right-of-way authority other than R.S. 2477 will be utilized if available;

And five, the State will be sensitive to the needs and purposes of Federal conservation system units in its management of R.S. 2477's which cross such lands.

As I am sure you are already aware, few issues raise the concern of Alaskans like access. Alaska is a young State and has only recently completed selection of its Statehood Act lands. With more than 60 percent of the State in Federal ownership, it is easy to understand that some routes traverse properties managed by the Federal Government.

In these situations, access sometimes depends on R.S. 2477's. It is the State's position that R.S. 2477's were a self-executing grant that transferred a property right to the State under State law standards. This was created when acts constituting acceptance of the grant occurred. Because Congress ended the grant process in 1976, these acts all occurred within 2 to 12 decades ago. The State's position on this is supported by over 100 years of case law.

Because no formal act of Federal acceptance was required and because of the vastness and remoteness of Alaska, we understand the location of some of these routes may not be delineated on Federal status plats. The lands across which rights were first granted may have since become national conservation units or may have been transferred to State, local, or private hands.

We recognize that today rights-of-way are created by new and different statutory authorities. However, these considerations should not cause us to overlook the important role R.S. 2477's have and continue to play.

Other Federal right-of-way regimes, such as title XI of ANILCA, were written to augment existing means of access. Experience has demonstrated that title XI is an inadequate substitute in many cases for rights-of-way previously created under R.S. 2477. However, the State recognizes that in managing R.S. 2477's it should take cognizance of current concerns and thinking which have led to the enactment of Federal right-of-way statutes since 1976.

The State recognizes the extent to which the Department of the Interior has studied the question of what constitutes an R.S. 2477. We differ with the Department, however, on the course taken by the proposed rulemaking. Alaska believes the proposed regulations would impinge on rights that have already been transferred.

In recognition of the need to research potential R.S. 2477's, the State undertook an extensive identification and documentation project. We examined more than 1,000 possible routes and identified a number of them for further study.

The State is presently developing policies regarding how rights-of-way asserted under R.S. 2477 will be managed. In Alaska, with vast lands that are roadless, it is important to maintain a rational approach to transportation planning. R.S. 2477's must be part of a sound transportation plan which includes a well-maintained national highway system, roads that serve community needs, including economic development and pedestrian safety, and trails for Alaskans and visitors. This planning process will determine what is appropriate access, recognizing the legitimate concerns of landowners and managers. Integrated into the planning will be a straightforward public process which allows citizens to be actively involved and will avoid policies of the past that allowed for roads to nowhere.

The planning process is guided by three principles: sound science that guides but not dictate policy; a prudent management that ensures sustainability and conservation; and a public process that strives to make decisions through consensus.

The State recognizes concerns expressed by the Native community and by conservationists. The State is aware that inappropriate right-of-way use could have detrimental economic and subsistence impacts on Native landholders and rural communities. In conservation system units there is concern about the potential for unmanaged access and resource conflicts. Various parties have raised questions about impacts on wilderness areas, parks, and additional conservation units that are magnets for tourism and other outdoor activities.

With these thoughts in mind, the State seeks to work cooperatively with Congress, the Federal administration, Native landholders, developers, conservationists and others to develop an approach which provides an orderly process for resolving conflicts while confirming and managing R.S. 2477 rights-of-way under State law. This approach will serve to prevent R.S. 2477 issues from ending up in court.

Alaska Attorney General Bruce Botelho, Commissioner John Shively of the Department of Natural Resources, and John Katz, director of State-Federal Relations, are the key players for the State on this issue.

Thank you again for the opportunity to testify today.

Mr. MALNAK. Ms. Hjelle.

STATEMENT OF BARBARA HJELLE, OFFICE OF SPECIAL COUNSEL, ENVIRONMENTAL AND PUBLIC LANDS ISSUES, WASHINGTON COUNTY, UT

Ms. HJELLE. Thank you, Mr. Chairman and members of the committee, for this opportunity to speak here today. I represent all the counties in Utah here today. I have submitted written comments, as well as comments submitted by the Utah Association of Counties to the Department of the Interior* regarding its proposed regula-

*Retained in committee files.

tions, and a letter that we wrote to the Office of Management and Budget* about the Department's disclosure regarding those regulations. I think that letter is instructive and I would ask that all those be included in the record of this hearing.

R.S. 2477 rights-of-way are very important in Utah and I believe to all of the public lands States, if properly understood. Most roads and other access routes traditionally relied on to go about the normal activities of daily life were established under R.S. 2477, and in Utah today the rural transportation infrastructure is still based on the authority of R.S. 2477.

These routes are not just used by the general public and by State and local law enforcement, search and rescue agencies and the like, but they are also used by Federal officials to go about their land management duties. Counties routinely get requests from these agencies asking them to go out and do work on the roads so that that access can be maintained for their use.

They have been built and maintained primarily by the efforts of the people who live and work in these communities, and I do not think very many Americans would have access today to these public lands if it were not for those efforts.

I think it is safe to say that only someone who does not live and work in these areas would support and propose the regulations now under consideration by the Department of the Interior. Those regulations essentially operate as a wholesale reversal of longstanding law and precedent, and that is why the legislation you have before you is so important now, because it really stands to protect the status quo.

I think that is made clear by the regulation promulgated in 1938 that Senator Murkowski read earlier today, and I have attached some other quotations to my testimony that I think make it very clear that State law has always been the guiding precedent.* Frankly, other than the 1898 Interior Department decision referred to by Mr. Leshy, I have never heard of any decision or opinion that ever questioned the application of State law, and even that decision needs to be read as a whole to be properly understood.

I keep wondering, what is the problem with continuing to honor these rights-of-way? They had to have been perfected prior to October 21, 1976. And unlike some of the alarmist claims that are thrown around, improvements to these rights-of-way have to be made consistent with legal principles that do protect the underlying Federal estate. We are not talking about turning footpaths into paved highways on a wholesale basis.

In my experience in Utah, what we are really talking about is an unprecedented interference with normal maintenance activity and an unwarranted opposition to necessary safety improvements. We have to keep in mind that visitorship to the public lands in Utah, for example, is increasing at a rapid rate and the necessity for keeping these rights-of-way safe is very important. But yet the counties and local governments in Utah are being hampered in their ability to do so by the policies of this administration which are reflected in these proposed regulations.

*Retained in committee files.

We have had a lot of experience on that with what is known as the Burr Trail Road in Garfield County in southern Utah, built by the sweat and blood of the Utah pioneers, maintained and improved responsibly for decades by Garfield County, and now every inch of soil that is touched out there is subject to an objection by the Federal agencies. The county is completely hamstrung in carrying out its activities it has been doing responsibly for a long, long time.

The management of these local transportation systems has traditionally been left to the State and local governments, who are properly responsible for doing this. And I can tell you from my direct experience that to federalize these rights-of-way, as the Department of the Interior now proposes to do, would be a big mistake.

I would like to conclude by quoting to you the words of the U.S. Supreme Court from a 1932 case that addressed R.S. 2477: "These roads in the fullest sense of the words were necessary aids to the development and disposition of the public lands. They facilitated communication between settlements already made and encouraged the making of new ones, increased the demand for additional lands, and enhanced their value. Governmental concurrence in and assent to the establishment of these roads are so apparent and their maintenance so clearly in the furtherance of the general policies of the United States that the moral obligation to protect them against destruction and impairment as a result of subsequent grants follows as a rational consequence."

Thank you very much.

[The prepared statement of Ms. Hjelle follows:]

PREPARED STATEMENT OF BARBARA HJELLE, OFFICE OF SPECIAL COUNSEL, ENVIRONMENTAL AND PUBLIC LANDS ISSUES, WASHINGTON COUNTY, UT

These comments set forth my understanding regarding the conceptual framework of the Revised Statutes 2477 (R.S. 2477) Rights-of-Way Settlement Act (the "Act"). My comments are based on actual experience dealing with R.S. 2477 issues. As an attorney, I have represented Southern Utah counties on R.S. 2477 issues over the past 10 years. Among other matters, I have been involved in litigation over Garfield County's Boulder-to-Bullfrog Road, commonly known as the "Burr Trail" Road, since 1987. This litigation has been a focal point in the R.S. 2477 debate. In these and many other situations I have observed, it has become apparent that local governments are being seriously impacted in their efforts to carry out normal governmental functions when dealing with public highways which cross federally owned lands.

I have observed the problems which have arisen in recent years as federal land managing agencies have attempted to assert greater and greater control over the actions of the counties who have traditionally built, maintained and improved these rights-of-way. Thousands of public dollars have been wasted in complying with the demands of federal employees who have no expertise in road management or construction. For example, on the Boulder-to-Bullfrog Road, Garfield County was forced to move a box culvert, not once, but twice, costing tens of thousands of dollars, because the federal agency in charge continually changed its mind regarding where it thought the culvert should go. No objective standards were used to make these decisions. The ultimate location turned out to be aesthetically distasteful, reduced the quality of the road and provided no environmental or other benefit to the public lands. Like many situations involving R.S. 2477 decisions, the County's decisions were constrained by the knowledge that, no matter how unreasonable the requests of the agency, if the County were to stand up for its rights, it would be faced with costly litigation in a federal court where the deck is likely to be stacked against the County and in favor of the administrative agency.

I have observed a whole group of federal employees, none of whom were engineers, debate the propriety of work on the Boulder-to-Bullfrog Road based on potential impacts on just a few inches of soil, even though the area contained no sensitive

plants, animals or other resources. The cost to the taxpayer, not to mention the interference with legitimate activities of local governments, is uncalled for. But because of hostility to these rights-of-way and unjustified distrust of the local governments who manage them, these costs are escalating, with no concomitant benefit to anyone.

Recently, Garfield County has once again run up against a hostile Department of the Interior on the Boulder-to-Bullfrog Road where it runs through Capitol Reef National Park. Keep in mind that the Road was in existence in this location long before the Park was created, having been built and maintained by the hard work and perseverance of the people of Garfield County over many decades. Americans have access to see this Park because of these efforts by Garfield County's residents. Keep in mind, also, that the legislation creating the Park protects this valid pre-existing right. Nevertheless, the DOI has asserted that Garfield County must obtain its approval for each and every inch of soil which is touched, even if the activity is located within areas previously maintained by the County. In this instance, Garfield County was performing maintenance work on the Road within Capitol Reef National Park typical of work commonly performed by the County throughout its jurisdiction. The maintenance was critically necessary because the Road within the Park had deteriorated over time due to delays caused, in part, by pressure from federal agencies. Finally, the County had moved forward with its work to repair deteriorating wash crossings and drainage as well as a disintegrating road surface conditions which were unsafe for the travelling public. DOI has decided that the County's actions taken to correct critical safety problems were unacceptable.

DOI does not approach its differences with the County with any respect for or acknowledgement of the R.S. 2477 right-of-way, even though it has repeatedly recognized that the right-of-way is valid. Instead, the Department sends federal employees from Washington, D.C., to sit across the table from the Garfield County commissioners and tell them, in essence, that they have no rights other than what the DOI decides to let them exercise and to demand that the County, on the spot, concede in writing its right to any meaningful management authority over its right-of-way or face an aggressive action through the courts.

Now, Garfield County contains about 93% federally-owned lands. The private taxable land base in the County is about 2% of all the lands within its jurisdiction. And because Garfield County contains lands of unparalleled beauty, it receives many visitors from all over the world, most coming to see National Parks, Recreation Areas and other federally owned lands. With almost no budget, Garfield County provides services to all of these visitors. And, rest assured, the federal agencies who manage these lands are not shy about expecting Garfield County to provide services to them. When people get in trouble on federal lands, Garfield County provides the search and rescue. Recently, the County budget has been decimated by the necessity of pursuing criminal prosecution involving actions which took place almost solely on federally-managed lands. In all of these cases, the County has no ability to control its risk; that ability resides with the federal government. But it pays the price, out of its meager budget, for federal decisions regarding land management. So when Garfield County is faced with a threat of litigation from the DOI, it is a significant problem. How will the County pay to defend its rights, which are also the rights of every American to have free and safe access to the public lands which its R.S. 2477 rights-of-way provide? This kind of intimidation is very powerful and it is this kind of intimidation which the legislation before you is designed to limit.

As these examples show, the ability of local governments to maintain their public road across federal lands is becoming increasingly impaired because of the hostility of federal land managing agencies. The policies of these federal agencies do not give more than superficial consideration to the importance of providing safety to the traveling public which has always been the touchstone of R.S. 2477 rights under the common law that has been historically recognized in Utah and in most other Western states as well. Without clear action by Congress to defend the rule of law, federal agencies will continue to prevent needed maintenance and construction projects.

If Congress does not act, these rights-of-way will be effectively revoked. Interior's proposed regulations refuse to honor the most basic tenets of R.S. 2477 precedent. Interior's current actions refuse to allow state and local governments to keep these roads safe. Counties simply do not have the financial resources to respond to this broad-scale attack on these vested property rights. If Congress does not take measures to protect these rights-of-way, counties will be forced to abandon the exercise of their basic sovereign responsibilities with regard to rights-of-way within their jurisdictions. If state and local governments are prohibited from providing this essential service, who will? I question whether the federal government is truly prepared

to take on the added costs and burdens of maintaining hundreds of rights-of-way in rural areas which have been traditionally managed by local governments.

You may hear a far different story from others who speak to you today, a story which suggests that the state and local governments who now ask you to pass legislation to protect their traditional sovereign rights and duties are willing to run roughshod over the federal lands, disregarding federal resource protection and sensitive environmental considerations. I have not encountered a situation where those accusations are borne out by a fair investigation of the facts, taking into account the historically honored scope of these rights. Before you vote to deny these historical rights, granted by Congress, I would encourage you to visit these areas, talk to the commissioners and other public officials who are struggling with this issue. I believe that you will agree that the proposed legislation is necessary to ensure continued reasonable application of traditional principles of law necessary for an orderly society.

I have given you just a slice of the myriad concerns which call for action by Congress to protect vested R.S. 2477 rights-of-way. Each of these examples, if presented in more detail, would amplify the problem of excessive federal agency interference with the exercise of valid existing rights. Now I would like to address the background information regarding R.S. 2477, followed by a fairly detailed analysis of the Act.

I. BACKGROUND

R.S. 2477 was enacted as section 8 of the Act of July 26, 1866, 14 Stat. 253, formerly section 2477 of the Revised Statutes of the United States. R.S. 2477 states, in its entirety:

> Sec. 8. 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.

From 1866 until its repeal, R.S. 2477 granted rights-of-way "effective upon the construction or establishing of highways, in accordance with the State laws." 43 C.F.R. § 244.55 (1939). No application to, or approval by, the federal government was necessary to accept the grant. See, 43 C.F.R. § 2822.1-1 (1979); 43 C.F.R. § 244.55 (1939). As the regulations cited in this paragraph make clear, these principles were codified by the Department of the Interior in its published regulations for almost 40 years prior to the repeal of R.S. 2477. Regulations promulgated after the repeal likewise honored these principles, which were honored by the federal land managing agencies until this administration began its effort to rewrite the law of R.S. 2477.

Virtually all of the existing highways and roads in the West were originally established as R.S. 2477 rights-of-way. Much of the transportation system in the West is still based on R.S. 2477 rights. Although no new R.S. 2477 right-of-way can now be created, existing R.S. 2477 roads continue to make possible a variety of activities, such as delivery of goods to market, transportation between communities, tourism and recreational opportunities, provision of access routes for emergency vehicles, mail delivery, law enforcement and access to lands for business and industrial purposes. Congress authorized these rights-of-way because of necessity. That necessity has not diminished over time.

I am submitting to you photographs of a few roads in Garfield County that rely upon R.S. 2477 as authority for their construction, use, and maintenance. While these photographs show paved roads, R.S. 2477 rights-of-way also include more primitive access routes. In the rural West, these access routes often operate just like the tollroads and paved streets in the more populated areas of this country for the myriad of activities routinely carried out in a free society which honors the constitutionally protected fundamental right to travel.

The prospective offer of R.S. 2477 was repealed in 1976 by the Federal Lands Policy and Management Act ("FLPMA"), Pub. L. No. 94-579, 90 Stat. 2793, 43 U.S.C. § 1701 et seq. However, FLPMA specifically protected R.S. 2477 rights-of-way in existence on the date of FLPMA's passage. See, FLPMA §§ 509(a) ("Nothing in this title shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted or permitted."), 701(a) ("Nothing in this Act, or in any amendments 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."), and 701(h) ("All actions by the Secretary concerned under this Act shall be subject to valid existing rights."), codified respectively at 43 U.S.C. §§ 1769(a) and 1701, Savings Provisions (a) and (h). Such pre-existing rights-of-way are property rights vested in the holder. These provisions made ample sense, since

once the R.S. 2477 rights had vested, they were no longer part of the federal domain and, undoubtedly, Congress did not desire to pay to regain ownership of these easements.

Interior has suggested that invalidation of R.S. 2477 rights is insignificant, since FLPMA rights-of-way can be obtained in their place. This statement indicates Interior's recognition that the regulation will lead to invalidation of R.S. 2477 rights-of-way. Furthermore, this line of reasoning illustrates Interior's apparent misunderstanding regarding the nature of R.S. 2477 rights as vested property rights. Trading an R.S. 2477 right-of-way for a FLPMA right-of-way would be a great "deal" for the federal land manager, but it would be a losing proposition for the holder of the right. That is why Congress explicitly forbade Interior from forcing such an exchange. (See, 43 U.S.C. § 1769.) First, FLPMA rights-of-way are issued according to the discretion of the federal land manager; it might or might not be issued. (In the past 16 years, according to the Bureau of Land Management, only 36 miles of road right-of-way have been issued on public land in Washington County, Utah, which contains 1,550,000 acres, of which about 70% is federally owned. Washington County holds title to approximately 800 R.S. 2417 rights-of-way. Given the difficulties associated with obtaining FLPMA rights-of-way, it would take decades to regain even a portion of these public roads through FLPMA procedures.) But R.S. 2477 rights-of-way are already vested in the holder, are capable of being utilized immediately, and are subject to constitutional protections. Second, permissible uses of FLPMA rights-of-way may, in some cases, be more limited than are uses of R.S. 2477 rights-of-way, because these rights pre-exist subsequent withdrawals. (The right to perform safety improvements on an existing road adjacent to a wilderness study area or traversing a national park is of critical importance to the public which relies upon these rights-of-way for safe travel across the federal domain.) Third, FLPMA permits are more in the nature of a license; they are not perpetual as are R.S. 2477 rights-of-way. And, lastly, FLPMA rights-of-way must be purchased, whereas R.S. 2477 rights-of-way are already owned.

The question of protection of vested rights-of-way in the Western states was carefully addressed in Congress in discussions about the repeal of R.S. 2477. The proponents of FLPMA in the Senate assured the western Senators, on the record, that there was no intent in FLPMA to abrogate these rights, nor did Congress intend to limit the application of state law in interpreting the grant. See 120 Cong. Rec. 22280, 22283-4 (1974). That position was honored until recently when the current administration proposed new regulations that would, if effective, reverse decades of precedent to defeat established rights-of-way.

II. PURPOSE OF THIS ACT

The Act will resolve uncertainty regarding existing R.S. 2477 property rights fairly, taking into account the legal and historical realities which apply to these rights-of-way. The Act does not alter existing rights or create new property rights. Rather, the Act provides a method for administrative recognition for rights-of-way that were properly established prior to the repeal of R.S. 2477. The Act does not purport to diminish valid existing property rights which have been honored by Congress until now, nor does it supplant a party's ability to pursue a quiet title action in the courts of the United States or, for that matter, any other action regarding R.S. 2477 rights-of-way. It does, however, clarify the proper role for federal administrative agencies in dealing with these vested property rights.

The Act comports with existing legal precedent. And it honors interpretations of the grant made by the government during the grant's operative life. Based on my experience with R.S. 2477, I believe that the Act provides a fair and efficient manner to administratively recognize rights-of-way that have been accepted pursuant to R.S. 2477. Other proposals, including specifically the draft regulations currently under consideration by the Department of the Interior, do not fairly account for long-standing administrative policies and court precedent, nor do they accurately address significant burdens on the federal taxpayer (not to mention local tax burdens) from elaborate schemes which would impose significant demands on the agencies and the holders of these rights-of-way. This Act provides a proper balance between the interests of the administrative agencies in understanding the lands they manage and the vested legal rights of local governments.

III. SECTION-BY-SECTION ANALYSIS

A. Section 1

This section requires no explanation.

B. Section 2

Subsection 2(a) establishes that federal agencies are to be notified of the existence of R.S. 2477 rights-of-way across lands managed by such agencies. Keep in mind that neither Congress nor any administrative agency has ever established a notice requirement in the past. Therefore, this legislation creates a new burden on right-of-way holders. Nevertheless, if the notice provision is properly limited, it can serve the legitimate interests of land management agencies without placing an impermissible burden on the right-of-way holder.

Notice for a particular right-of-way will be filed with the agency that possesses jurisdiction over the servient estate across which the right-of-way crosses. By way of example, notice for rights-of-way that traverse lands managed by the Bureau of Land Management or within the boundaries of a National Park will be sent to the Secretary of the Interior. Notice involving National Forest lands will be sent to the Secretary of Agriculture.

Notice may be filed by governmental entities, namely a state or a subdivision thereunder. This allows the governmental entities, as representatives of the public, to claim rights-of-way used by the public. In the event that local governmental entities do not claim such rights-of-way, the Act alternatively provides that notice may be filed by a private party that relies upon an R.S. 2477 right-of-way to access real property in which the party has an interest. This provision allows private parties to participate in the administrative settlement provisions of this Act only to the degree that the party has a specific property interest relating to the particular right-of-way at issue. Because these rights-of-way form a significant element in access and commerce in the public lands states, it is important that those who would be impacted by the loss of access have the opportunity to protect their interests.

Notice would apprise the federal land manager of the location of the right-of-way by showing the right-of-way on a map. Unlike the administration's proposed regulations, this provision does not impose the onerous burden of a survey, which would place impossible demands on the budgets of rural counties. In addition to the map, the notice would include a verbal description of the route and its end points. The notice would also include a statement of the width of the right-of-way. Finally, the state and local governmental entities possessing general jurisdiction over lands in the area would be identified, since they are most likely to be the holders of the rights-of-way on behalf of the public.

While the notice provisions may appear to be simple, the burden on those giving notice will be substantial. Because the statute, in order to accomplish its goal, must address each and every R.S. 2477 right-of-way, no matter how well established, notice must be provided for hundreds of R.S. 2477 rights-of-way by all states and counties containing federally owned lands. In other words, each public lands state and its political subdivisions is being asked to comply with this provision. However burdensome this provision may be, it constitutes only a fraction of the burden which would be imposed by the administration's proposed regulations.

In many cases, these rights-of-way have been established and used for over one hundred years, but, in part because of the long-standing federal regulations cited above, no documentation has been maintained. Most of the transportation infrastructure in many rural counties is made up of R.S. 2477 rights-of-way which may never have been mapped in the fashion now requested. Furthermore, determinations regarding scope may never have been systematically undertaken for vast numbers of rights-of-way, placing additional burdens on those filing notice. Thus, the information required in the notice will place significant burdens on those choosing to give notice.

These notice provisions accomplish an important initial step of defining for the federal land managers the universe of rights-of-way that will be settled pursuant to the Act. The notice enables the land managers to locate all of the rights-of-way at issue. The only other method by which the land manager can be required to recognize the existence of a valid R.S. 2477 right-of-way is through court action.

The five-year time period is apparently intended to allow time to inventory existing rights-of-way and compile the data required by the provisions of this section. Five years may not be enough in some instances, given the requirements of documentation set forth by the Act, coupled with the former federal policy discouraging documentation and the fact that many of these roads are situated in the remote stretches of the West. Keeping in mind the financial and staffing constraints of many local governmental entities, especially rural governments, five years would be the shortest possible deadline. Governmental entities possessing resources that would allow for more expeditious submission of information are allowed to do so under the Act.

Section 2(b)(1) specifies that, from the time notice is filed, the land manager has two years to notify the party submitting such notice whether the Secretary recog-

nizes the right-of-way or objects to the validity of any portion of the right-of-way. Two years is a reasonable time period, in light of the fact that the federal land manager is in possession of relevant maps and expertise regarding the lands managed. In most cases, the federal employees who have been managing the lands will be aware of the existence of the R.S. 2477 rights-of-way listed in the notices. In Utah, local federal land managers have indicated that they are well aware of the validity of the R.S. 2477 rights-of-way held by counties. Thus, there is not much dispute at the local level.

To determine whether the grant was accepted, the land manager is directed to look to the laws of the state where the right-of-way is located. Judicial and administrative precedent makes clear that state law determines whether the grant was accepted. See e.g., *Sierra Club* v. *Hodel*, 848 F.2d 1068 (10th Cir. 1988) ("State law has defined R.S. 2477 grants since the statute's inception."); *Central Pac. R. Co.* v. *Alameda County*, 52 S.Ct. 225 (1932) (road was established "under and in accordance with state law."); Homer D. Meeds, 26 IBLA 292 (1976) ("[I]n order that a road become a public highway, [it is necessary] that it be established in accordance with the law of the state in which it is located."). I am submitting to you in writing a small sampling of the numerous federal and state decisions which have confirmed the central role of state law in interpreting R.S. 2477 and would request that they be attached to my comments in the record. These requirements are consistent with the regulations which have applied to R.S. 2477:

> No application should be filed under R.S. 2477, as no action on the part of the Government is necessary. (43 C.F.R. §2822.1-1(1972 & 74) & 43 C.F.R. §244.58(a) (1963); see also 43 C.F.R. §244.55 (1939).) . . . Grants of rights-of-way referred to in the preceding section become effective upon the construction or establishment of highways, in accordance with the State laws, over public lands, not reserved for public uses. (43 C.F.R. §2822.2-1 (1972 & 74) & 43 C.F.R. §244.58(a) (1963); see also 43 C.F.R. §244.55 (1939).)

It would be unjust to now choose to dishonor those regulations, as the Department of the Interior now attempts to do.

Section 2(b)(2) provides that the Secretary shall specify the factual and legal basis for an objection to a right-of-way. Because federal land managers are generally familiar with the rights-of-way which traverse the lands they manage and because the main repository of information regarding many rights-of-way will be the records of the land managing agencies, most rights-of-way should be addressed with minimal effort on the part of the agency. In many instances, specification of the grounds for the Secretary's objection should serve to expedite the resolution process. If the agency possesses information unknown to the party filing notice which implicates validity of the right-of-way, it would always be possible to withdraw that right-of-way from the notice. Alternatively, the party filing notice might spot ways to readily resolve the Secretary's concerns, in which case the objection could be withdrawn. In any event, because the current administration has exhibited unbridled hostility to these rights, in the absence of such a requirement, this administration would likely object to virtually every right-of-way included in the notice, in the hope that the burdens imposed by having to respond to such objections would preclude effective protection of the rights.

Section 2(b)(3) provides that a right-of-way will be deemed valid as claimed if the Secretary fails to object to notice of a right-of-way within two years. This provision is necessary to ensure that the settlement process moves along. Without such a provision, the purpose of the Act would be defeated. The Secretary would be allowed to indefinitely delay resolution of rights-of-way. Given the current policies of the Department of the Interior refusing to acknowledge any R.S. 2477 right-of-way, regardless of prior recognition or other undisputed basis for its validity, the closure provided by this provision is essential.

C. Section 3

Section 3 addresses judicial review of objections to a right-of-way. With respect to any right-of-way objected to by the Secretary, the burden for quieting title rests with the Secretary.

Section 3(a) gives the Secretary two years to bring an action to quiet title after objecting to the right-of-way. As section 3(c) specifies, failure to bring such an action within two years results in a legal determination that the right-of-way is valid as claimed. As explained above, imposition of a time period is necessary to move the process along and ensure that the goals of the Act are accomplished. The two-year time period is ample time to bring a suit to quiet title. The factual and legal basis for such suit should have been assembled previously when objecting to the right-

of-way. Thus, in practical effect, the Secretary has four years to prepare a quiet title action from the time notice is first submitted.

Section 3(b) provides that the Secretary bears the burden of proof on all issues regarding objection to a right-of-way. This is proper where the Secretary is acting to change the status quo, namely eliminating rights-of-way used by the American public. Also, the federal land manager will possess most of the documents that would be germane to validity. Furthermore, because the federal government specifically discouraged creation of records regarding acceptance of the grant, it would now be unfair to place the burden of proof on parties who relied on such regulations.

D. Section 4

Section 4 requires the Secretary to honor these valid existing rights. Validity must be appropriately recorded on land records and maps. Proper recordation will prevent many of the problems of uncertainty that have necessitated this Act.

Section 4 also specifies that the Secretary is not to promulgate regulations that would contravene the purposes of this Act. For example, the Act would supersede efforts by the Department of the Interior to rewrite this precedent in an effort to eliminate valid existing rights which have vested in the American public.

E. Section 5

Section 5(a) specifies that the administrative remedies provided by this Act do not affect existing judicial quiet title remedies. This Act merely provides an alternative manner of quieting title to R.S. 2477 rights-of-way.

Section 5(b) ratifies consistent and long-standing judicial precedent and the prior regulations specifying that state law controls R.S. 2477.

Section 5(c) specifies that the National Environmental Policy Act does not apply to actions taken pursuant to this Act. The Act does not constitute action by any party. All relevant actions were taken prior to the repeal of R.S. 2477. The Act merely establishes a method for recognizing the legal significance of past actions and thus cannot result in action significantly affecting the quality of the human environment.

III. WHAT THE ACT DOES NOT DO

Access opponents combat R.S. 2477 issues with an onslaught of misinformation. To aid this committee's interpretation of this Act, I would like to address some of the common misinformation sound bites.

Access opponents attempt to minimize the continued importance of these rights-of-way by disparaging Congress's original Act. They describe R.S. 2477 in terms such as archaic, cryptic, out-dated, and moldy. True, the Act was created over a century ago. But if age creates grounds to revoke rights, the legal underpinnings of our society are in grave danger. If anything, the age of the grant should suggest deference to an established tenet of our society.

As Congress envisioned, R.S. 2477 rights-of-way played a prominent role in the settlement of the West. As the United States Supreme Court noted:

> These roads, in the fullest sense of the words, were necessary aides to the development and disposition of the public lands. . . . They facilitated communication between settlements already made, and encouraged the making of new ones; increased the demand for additional lands, and enhanced their value. Governmental concurrence in and assent to the establishment of these roads are so apparent, and their maintenance so clearly in furtherance of the general policies of the United States, that the moral obligation to protect them against destruction and impairment as a result of subsequent grants follows as a rational consequence.

Central Pac. Ry. Co. v. *Alameda County,* 284 U.S. 463, 473 (1932).

The West grew up around this "arcane, cryptic, out-dated, moldy" grant. These rights-of-way made it possible for one settlement to communicate and trade with another. They made it possible for citizens to legally traverse the broad expanse of public lands in order to interact with the rest of the forming nation. It is no wonder, then, that courts have commented that revocation of R.S. 2477 rights would make Congress's original act "a delusion and a cruel and empty vision." *United States* v. *9,947.71 Acres of Land,* 220 F. Supp. 328, 331 (D. Nev. 1963).

A. The act will not imperil national parks, native American lands, and private property

First off, the Act applies only to federally owned lands. Therefore, the status of rights-of-way across privately owned lands is not affected by this act. In any event, where rights-of-way vested prior to patenting of lands into private ownership, rec-

ognition of those established rights cannot constitute a taking under the constitution.

Secondly, valid R.S. 2477 rights-of-way must have been established prior to withdrawal of the public lands for public uses. Therefore, regarding National Parks and Wilderness Areas, any valid 2477 right-of-way would have been created and vested prior to withdrawal of the Park or Wilderness Area. The subsequent designation would have been established subject to the prior existing property rights.

Continued recognition of these property rights will not lead to environmental calamity. The Act merely confirms the status quo. Furthermore, right-of-way holders are bound to the extent the statutes governing protection of cultural sites, wetlands, endangered plants and animals, and other environmental resources apply to them. The assertion that recognition of R.S. 2477 rights-of-way will defeat the protections of current environmental laws is misleading.

These rights-of-way have been in existence since at least 1976. No wholesale construction has occurred in the past two decades. The state and local governments which manage these rights-of-way generally cannot afford to do more than address pressing safety concerns, conduct normal maintenance activities and initiate improvements where increased traffic so demands.

Although the holder of an R.S. 2477 right-of-way possesses a property right which is protected under the rule of law, the federal government, as the holder of the underlying estate, also has rights. The alarmist threats of those who would like to see these vested rights wiped out are not based upon a realistic assessment of the interplay between the federal owner of the lands and the holder of the R.S. 2477 right-of-way. This legislation would merely protect an appropriate balance of rights and duties as between the United States and state and local governments.

B. The act will not allow "new" R.S. 2477 rights-of-way to be created

Critics of the Act repeatedly allege that the Act will resurrect, revive, and reopen R.S. 2477 and allow new rights-of-way to be established. This is absolutely misleading and false. R.S. 2477 rights-of-way had to be established prior to withdrawal of the public lands or passage of FLPMA. If the evidence shows that this did not occur, the right-of-way would not be valid.

C. The act does not place an unfair or unrealistic burden on the United States

The burdens created by this Act certainly do not rest entirely on the United States. The notice provisions require a great deal of work on the part of the right-of-way holder, as noted above. Nevertheless, the burdens imposed would be only a fraction of those proposed by the administration's proposed regulations.

The burden of creating a record, where none was previously required, however, should not be placed upon the state and local governments which hold these rights-of-way. Because the federal government specifically discouraged creation of records regarding acceptance of the grant, it would now be unfair to place the burden of proof on parties who relied on such regulations. If the federal land managing agency desires to defeat a public access right claimed by a state or its political subdivision, the agency should bear the burden of showing that the right-of-way is invalid. These situations should not arise very often. In the past, most R.S. 2477 right-of-way issues have been resolved through communication and agreement. Under the scheme currently proposed by the administration, based upon hostility to the rights, no such resolution would be possible.

Interior asserts in its disclosures to the Office of Management and Budget that only 420 "respondents" would claim R.S. 2477 rights-of-way during the two-year period that the process would be open. Since each county is treated as one of the 420 respondents in Interior's submittal to OMB, giving 24 hours to each county, Interior's allocation allows less than one and a half minutes per road for the 10 counties in southern Utah to compile and file all of the information outlined in the regulation. Interior allocated 8 hours per county for federal review, which sorts out to less than 30 seconds per road for these 10 counties. There can be no question that Interior failed to give any realistic consideration to the true burden of the requirements imposed by these regulations.

Also, the federal land manager will possess most of the documents that would be germane to validity. These agencies are currently compiling computerized records which would include information relevant to right-of-way status.

D. The act would not allow State laws that were created after the repeal of FLPMA to determine the rights-of-way

State laws which codify court decisions in effect prior to the repeal of R.S. 2477 or which are otherwise consistent with such pre-existing law, would not be invalid, but no state is authorized to create new law applicable to R.S. 2477 rights-of-way

any more than the Department of the Interior is entitled to do so through its regulatory scheme.

IV. CONCLUSION

The Act establishes a system for honoring the commitments made by Congress to the American public, recognizing valid rights-of-way created by R.S. 2477 and providing a proper basis for land management actions. The Act honors precedent established by numerous judicial and administrative interpretations of R.S. 2477. The Act supersedes efforts by the Department of the Interior to rewrite this precedent in an effort to eliminate valid existing rights which have vested in the American public.

The citizens of rural areas and the local governments who represent them have created these public access routes over time, often through great labor and hardship under challenging conditions. These rights-of-way exist because they are important to the people who created them. Current policies and actions of the Department of the Interior have created unnecessary burdens on the exercise of these rights which do not truly benefit the American people, the environment or the federal agency in question. These policies have resulted in excessive intermeddling by federal agents in the day to day management of public rights-of-way in the rural West. These public rights-of-way should be managed by the state and local governments which have traditionally exercised jurisdiction over them. This Act would maintain the appropriate status of these R.S. 2477 rights-of-way to the benefit of the American people.

The CHAIRMAN. Thank you very much, Barbara.

Elizabeth, I want to apologize to you for having to step out of the room, and I have had a brief of your statement I hopefully in the questions will give us both an opportunity to revisit some of the highlights of your statement.

Senator Leman.

STATEMENT OF LOREN LEMAN, CHAIRMAN, SENATE RESOURCES COMMITTEE, ALASKA STATE LEGISLATURE

Mr. LEMAN. Thank you, Chairman Murkowski. I appreciate the opportunity to testify today on this important legislation.

I am State Senator Loren Leman, as you have noted earlier. I chair the Resources Committee in our Senate, which is your counterpart, and I am testifying here today on behalf of the majorities in the Alaska Legislature. I too, as the others have indicated, I have prepared written remarks as well as extended testimony and I ask that that may be included as part of the record.*

As you know so well and have stated in this hearing, there is a unique character to getting from one point to another in Alaska. Our R.S. 2477 routes embody that character and most are very unlike the well developed road systems that serve travelers across most of the rest of this country. Alaskan routes are often just a well trodden footpath or long-traveled dogsled trail leading from one village to another, or from a village to historic hunting, fishing, mining, and gathering grounds.

Most of your committee members are likely to have not heard of many of these routes. Some were used 100 years ago by my great-grandfather Joe Cooper and grandfather Joe Leman, both miners and fishermen, who understood the word "corking off," as they provided for our family in Alaska.

I just note parenthetically that my grandfather Joe Leman hiked the Chilcoot Trail, mined in the areas around Seward and Nome, walked from Seward to what was then known as Susitna Station, which we believe was very close to the Port of Anchorage. And my great-grandfather Joe Cooper mined in the area now known as

*Retained in committee files.

Cooper Landing, on many of these trails that Senator Stevens identified in the map that we had before you, that are on the map.

The CHAIRMAN. Why did he not get a patent?

Mr. LEMAN. Well, I can talk about that, because I think it was Senator Bumpers asked about it.

The CHAIRMAN. He did not figure he needed one.

Mr. LEMAN. Maybe not on those lands. But the Solicitor said that those who have private property may be concerned about some of these rights running across their property. I do own—my grandfather homesteaded and I have that property now, property that is adjacent to a section line, and of course that is subject to the section line easement.

Anyway, back to my testimony. Others are better known, others of these routes are better known, because they are parts of the route being used right now by those competing in the Iditarod dogsled race. And I note that the winner of that race, Jeff King, crossed the line on Tuesday, but there are others still in the race who will be completing that race over the next several days.

These routes, footpath or road, well known or not, offer Alaskans lines of access across unforgiving geography. They are often the only land routes available and are often irreplaceable because of subsequent changes in the status or ownership of surrounding property. Their importance to Alaskans is why I am here today.

The legislature supports S. 1425 because it protects longstanding vested property rights. The bill does not create new rights-of-way, nor should it. We only desire a reasonable process for resolution of disputes concerning property rights granted under law between 20 and 130 years ago.

The need for this legislation, as you know, was created by legal revisionism embodied in the R.S. 2477 regulations proposed by the Department of the Interior. This legislation rebukes the Department's attempt to invalidate rights by restrictively and retroactively redefining key statutory terms. The result of the regulations would be that rights-of-way grants supported by Congressional intent and longstanding judicial interpretation would be rescinded by unauthorized agency action.

An important point that this bill reaffirms is the role of State law in the acceptance of an R.S. 2477 grant. Cases from the U.S. Court of Appeals, various State Supreme Courts, and even past regulations of the Department of the Interior, all provide that State law defines the existence and scope of an R.S. 2477 grant.

In other words, as Congress intended and as case law upholds, State law defines what acts constitute acceptance of the R.S. 2477 offer. The Department itself from 1938 to the repeal of the statute interpreted an R.S. 2477 grant as becoming "effective upon the construction or establishing of highways in accordance with the State laws over public lands not reserved for public uses," as you saw in the chart earlier.

In 1986, this view was reaffirmed when the Department agreed in Federal district court that R.S. 2477 "is applied by reference to State law to determine when the offer of grant has been accepted by the construction of highways."

There has been discussion of Alaskan section line easements and R.S. 2477's, fairly extensive discussion about that. Under a decision

of the Alaska Supreme Court, the State statute creating section line easements was held to be an acceptance of the R.S. 2477 grant. However, for dramatic effect the Department of the Interior profoundly exaggerates the utility of such routes, even if they do exist, and I commend you for drawing that to our attention.

First, there is a real question whether an unsurveyed section line can be an R.S. 2477 route since it is not yet fixed to an exact location on the ground. Further, reasonable people know that, because of foreboding terrain and very low population density, only a small percentage of these section lines in Alaska could be useful or effectively developed as roads.

Also keep in mind that most development is prohibitively expensive anyway and any development would be subject to extensive contemporary environmental standards. In addition, the State of Alaska retains the power to restrict and regulate the use of R.S. 2477 rights-of-way. The State has the authority to prohibit all use of the section line easements that may exist or to agree with the Federal Government on what section lines should and should not be used.

In terms of the time period for filing the notice, I suggest that this should be lengthened from the existing 5 years that is in the bill right now to 10 years. The State knows through its own extensive process of evaluating claimed routes that a great deal of time and expense is necessary to prove up what was never before required to be documented.

Commencing in 1992, the legislature funded a $1.2 million project to research nearly 1,900 potential routes. We have determined that 560 routes appear to qualify and these are the ones that are on the chart that was over here earlier. 260 require more research and 322 have not yet been studied. The remaining 750 either do not meet legal criteria or duplicate other routes.

The documentation of this research appears in this document, in this database document, as well as in maps that the committee has had before it.

The CHAIRMAN. I would ask you to kind of summarize.

Mr. LEMAN. These results were the product of an extensive process, including public notice and input, a process that should not be shortchanged for the sake of expedience. I assure you that the process clearly rejects unsubstantiated claims. The routes that receive the State certification are bona fide claims.

From our experience, we know that to do this in a reasonable, responsible, and fiscally realistic manner will require more than 5 years. Especially for the sake of private landowners in Alaska, I emphasize that the process in this bill applies only to rights on lands now owned by the Federal Government. Appropriately, this bill does not affect whatsoever laws applicable to the adjudication of underlying rights on what is now private and other non-Federal property.

And I do have a closing summary in my statement, but I will conclude my remarks and be happy to answer questions.

The CHAIRMAN. Thank you very much, Senator Leman.

Our next witness will be Mr. Chip Dennerlein. Mr. Dennerlein is regional director of the National Parks and Conservation Association. Please proceed.

STATEMENT OF CHIP DENNERLEIN, ALASKA REGIONAL DIRECTOR, NATIONAL PARKS AND CONSERVATION ASSOCIATION

Mr. DENNERLEIN. Thank you, Mr. Chairman. I submitted written testimony and I think you are aware of National Parks and Conservation Association's opposition to the bill, so I will not waste, try not to waste anyone's time and maybe get right to some of the issues, questions you raised.

I would like to talk about Alaska as an example of this bill and maybe clear up some things. First, at the outset I do want to say that I will assume goodwill on the part of everybody. I do not think State and local governments are bad managers. Maybe I was a bad manager, but I was an executive manager in Anchorage responsible for transportation and I was a State park director, so it would be pretty disingenuous to accuse my colleagues of being bad managers.

I think they are interested—I will assume the people are really interested in solving transportation problems. So I am going to talk about what are the problems, the issues, the needs in Alaska, but I would also just like to say, for those who do not know me, I am not against access. I just do not need another work, but I reluctantly agreed to sit on a board which is going to oversee $20 million of expenditures to improve, a new initiative called TRAC, Trails and Recreational Access for Alaskans, to create opportunities as part of our highway projects. And I developed lots of trails as a State park director.

So let us turn to the questions. You asked the question why is everybody hysterical? Highways really will not be built on all of these lands. I agree with you, Senator, the highways will not be built. Alaska has some very real constraints and, like all States, it has a mixed relationship with the Federal Government. For one thing, it will not be built because we have the second lowest gas tax in the Nation, one-half cent off the fiftieth State. We are forty-ninth in the lowest gas tax.

The second it will not be built is because for every dollar we put into the Federal highway funds we get $7 back. It is the highest revenue of every State. Mr. Bradley's folks build the highways in Alaska. And we just do not have that kind of money. We are wrestling right now with a $25 million maintenance deficit in the Department of Transportation.

So I think you are absolutely right for the most part. Major highways will not be built. In fact, the Transportation Department in Alaska is focusing on no new roads, let us get the existing highway system in shape. The Glenn Highway, as you know, is—our major projects are on the Glenn Highway. So I think that that is not what this is about. So let us talk about transportation, goodwill, and it is not that there are going to be large developed highways everywhere.

What the bill is, not what it is intended but what it is—and I assume good intent—it is a major new land grant in the State of Alaska. It grants up to 12 million acres of property rights in the State of Alaska. I will tell you why.

Why? Because while the lands can only be applied for as highway rights-of-way, once they are granted they are lands pure and

simple. Section lines—you could pull this up now, Senator. I just pulled up this morning off my little laptop. We can plug into the State law library and it says that a tract 100 foot wide between each section of land owned by the State and a tract four rods wide between all other sections in the State is dedicated.

So that is the answer. There is no more debate on section lines. If this bill passes, no one has to claim them. They exist, unless Mr. Leman and his colleagues or the State administration gives up that right. But this bill conveys up to 12 million acres of property, a new land grant to the State of Alaska.

There is some question—I can answer this, too. There is some question with respect to do they have to be surveyed, and the State has some question on that. Mr. Botelho, the Attorney General, and I had a conversation the other day. He does not know the answer to this. So there is an unknown result here. It could be 6 million acres you could convey, it could be a million acres.

The second thing is that the bill, not that you intend to, but in fact it will amend ANILCA. Why? I will answer that by your legitimate question which you said earlier: If you do not have an R.S. 2477, how do you get from east to west without this? You do not.

Well, you do. You use FLPMA, you use title XI, you use 17(b) of ANCSA. There are several systems for the granting of rights-of-way. What we fear is exactly why you said: You will not get there with any of those; you will use R.S. 2477. So if it does not amend ANILCA, it supplants it in practice.

I think it is a taking. Why do I say that? I think this is just an oversight, Senator, but that map is not a map of Alaska, because it shows Federal lands. There is something missing on this map and that is Alaska Native lands. The road which Senator Stevens described from Nome to Fairbanks does not just go through Federal lands. The practical route goes through many Native lands, for a very simple factual reason: The Natives have a land grant of 44 million acres—not 44 million acres, 44 million riparian acres along coast lines, river valleys, and mountain passes. Why? They were granted lands where they live, they lived a subsistence lifestyle, they lived in the valleys, as we do today.

So that map is part of the story, but in fact there would be a large expansion. Why do I say it is an expansion? Because 17(b) easements are very prescribed tightly. They were given for a purpose. The State has already encountered this. The State has a case, *Alaska* v. *Fowler,* in the sixties. The court said: Well, the right-of-way for Farmers Loop Road and Palmer is only 30 feet, that is all you need. The legislature went back and said the next year: Nope, all rights-of-way are 100 feet.

So in fact you could go to a 17(b) easement, decide that you had 50 feet, but really now you want this highway to Nome and now you will use 100 feet. So it can very well be—I am not saying for sure, but I think is very likely—that this bill lays a new acquisition of property rights from Native Alaskans on top of the 17(b) easement process.

I am sorry AFN is not here today. I have talked with them about this. They are very concerned about that as well.

Finally, I am just going to say you asked the best question: What would change in Alaska, really? I mean, this is all theory, so why

are we concerned about the sideboards on this legislation? What would change in over 130 years? First of all, a huge amount of new use in all areas, in many areas in the State, that could impact subsistence.

Let me give you just a real example. I was the State park director. Unfortunately, Senator Stevens was not correct, we do have motorcycles in Alaska. A neighborhood group tried to stop motorcyclists from riding all over Chugach State Park right behind Anchorage.

The CHAIRMAN. I think the time frame that he was referring to was back in 1976.

Mr. DENNERLEIN. Okay.

The CHAIRMAN. And we did have a few motorcycles.

Mr. DENNERLEIN. Well, I agree. I am just saying that the problem was that the State would not take that case, Senator, because it was a section line. What we ended up doing was vacating the section lines, and that can be done. But the State today, what I am just offering you is that the State does not have an abandonment statute. They would have to affirmatively vacate section lines, as we did.

We had jeeps in Chugach State Park. We had people making mischief. I did not go looking for them in the night. The neighborhood community groups did, and we could not stop it until we vacated the section lines. We got that corrected. But that is what could happen, could happen on a million miles.

Secondly what could happen: Airstrips without planning. I mean, you do not have to use a million miles. 100 feet—you and I have landed planes. 100 feet is fine. If the airplane is the taxi of Alaska, then the R.S. 2477 could be the airport, I suppose, certainly under State law. So in a million miles I could find hundreds of airports.

Not that we should not have air access, but this would not be planned. This is just on a section line, on an arbitrary grid.

Secondly, here is a big one: What would change? Transmission lines. In your neck of the woods, Senator, there is a case, *Fisher* v. *Golden Valley Electric,* and the Supreme Court said it was R.S. 2477, but now it is property and Golden Valley Electric can run a transmission line. Remember this was granted without NEPA. This bill exempts NEPA and you could grant a million miles—and I am not going to be hyperbolic here because you and I know the Snettisham Power Line. You could never build roads along those mountains in southeast, but there is a power line there. You could not build a road along the Intertie. There is a power line there. You could not build one along Bradley Lake. There is a power line there.

Huge controversial issues with the communities. This would grant those without NEPA.

I said that there could be major takings and expansions on Native rights and whatever. I think that would change.

Finally, what would change is this, and here is our conservation concern—many of these are just Alaskan concerns. My conservation concern is, let us say that there was—I am doing a little story telling here and then I will close. Let us say that Babbitt was the Governor of Arizona and he had an R.S. 2477. He is not Secretary. Environmentalists are supposed to like Bruce Babbitt——

The CHAIRMAN. We are going to have to—I have got a roll call at noon, so I would like you to summarize. We have got your entire statement.

Mr. DENNERLEIN. Then I will just summarize by saying that whether Bruce Babbitt was Governor of Arizona or Secretary, even if he had a public process, if he had a trail in the Grand Canyon and decided now he wanted a highway, I should get to talk about that. You should, too, Senator. That is how, as Mr. Burns said, we do business in America.

This bill would give a trail in Denali, in Wrangell, somewhere. And even if the State had a good public process and had a hearing in Healy or somewhere else, half of my relatives who live in Alaska might get to talk about it. Many others do not, and many other people around the country do not. And that is what I do not think Congress intended, and I think that is the substantial change.

This is new land law, a land grant with many, many serious questions. I think it could address transportation, but it is not structured to do that right now.

Thank you.

[The prepared statement of Mr. Dennerlein follows:]

PREPARED STATEMENT OF CHIP DENNERLEIN, ALASKA REGIONAL DIRECTOR, NATIONAL PARKS AND CONSERVATION ASSOCIATION

Mr. Chairman and members of the committee, my name is Chip Dennerlein and I am Alaska Regional Director for the National Parks and Conservation Association (NPCA). NPCA is America's only private nonprofit citizen organization dedicated solely to protecting, preserving, and enhancing the U.S. National Park System. NPCA has a long-standing interest in the issues surrounding R.S. 2477, and I welcome the opportunity to testify before you today.

NPCA strongly opposes S. 1425. The "Revised Statutes 2477 Rights-of-Way Settlement Act" reflects a complete lack of concern for the preservation and management of our National Park System. This bill would grant rights-of-way across national parks, which are set aside for the benefit of current and future generations, to virtually any person who merely asserts a claim for a right-of-way, without regard for the potential harm it could cause. This bill would sacrifice national parks, an asset that belongs to all the citizens of the United States and a legacy for our children, for the benefit of a few.

This bill would not only affect lands managed by the National Park Service but also lands managed by the Bureau of Land Management, the Fish and Wildlife Service, the Forest Service, and the Department of Defense, as well as lands owned by Native Americans and private individuals and businesses. S. 1425 does not take into consideration whether the lands through which the right-of-way passes are national parks, national monuments, wild and scenic rivers, wilderness areas or proposed wilderness areas, wildlife refuges, army bases, or private ranches.

The title of the bill—"The Revised Statutes 2477 Rights-of-Way Settlement Act"—implies that this bill merely facilitates the settlement of existing claims and rights. If enacted, however, the bill would greatly expand entitlements to rights-of-way across public and private lands. This bill creates new land law and entitlements. The bill is inconsistent with the National Park Service Organic Act, the Federal Land Policy and Management Act (FLPMA), the Alaska National Interest Lands Conservation Act, the Alaska Native Claims Settlement Act, and the Wilderness Act.

R.S. 2477, a one-sentence provision in the Lode Mining Act of 1866, states, "The right-of-way for construction of highways over public lands, not reserved for public uses, is hereby granted." R.S. 2477 was repealed by FLPMA in 1976. There is no legislative history accompanying R.S. 2477, but the plain language of the statute would require the construction of a highway before 1976, when R.S. 2477 was repealed. The scope of the right-of-way would be what existed in 1976 or on the date when the land was reserved. Yet, S. 1425 would validate rights-of-way without a showing of construction or an existing highway, as those terms are commonly understood. The bill allows state law to determine the scope of the right-of-way.

While NPCA recognizes that there are valid rights-of-way under R.S. 2477, we also believe that certain standards of proof should be required before giving away valuable taxpayer property or damaging national parks and wilderness areas. This bill has no meaningful standards of proof requirements for the alleged holders of rights-of-way. The bill simply requires the recognition of the right-of-way upon the filing of a notice by an applicant which contains a map, a general description of the route, termini, scope of the right-of-way and the identification of the state or political subdivision through which the asserted right-of-way passes.

After the applicant has made this minimal showing, the entire process is skewed toward recognition of the right-of-way:

The Secretary has two years to make any objections to the right-of-way; any objection must be accompanied by factual and legal justifications; if the Secretary fails to object, the right-of-way is deemed valid.

If the Secretary objects, the Secretary has two years to bring a quiet title action; in the quiet title action, the Secretary will bear the burden of proof on all issues; if the Secretary fails to bring the quiet title action within two years, the right-of-way is deemed valid.

The recurring theme of these provisions is that the R.S. 2477 claims will either be valid or be deemed valid unless the Secretary takes extraordinary measures to defeat the claim. The beneficiary of the right-of-way merely files an application; then the whole burden shifts to the federal government, and the taxpayers who support it.

I can think of no other scheme where the burden lies so heavily upon the federal government except in a criminal trial. Social security disability applicants have to provide much more evidence of eligibility than an R.S. 2477 claimant. If social security benefits are denied, the burden of proof still rests on the applicant on appeal.

The bill also seeks to preclude public involvement in any processes associated with the determination of the validity of the asserted right-of-way across public lands. Standing to challenge a secretary's action in court under the bill would be limited to parties with a property interest in the right-of-way or lands served by it.

Further, S. 1425 exempts any actions to carry out its provisions from the requirements of the National Environmental Policy Act (NEPA). Wholesale exemptions from NEPA, which is designed to integrate the consideration of environmental consequences of an agency's action into the decision-making process, are not in the public interest. The NEPA exemption is another of the bill's facets designed to short-circuit the process and grant any asserted right-of-way regardless of the environmental consequences.

The bill seeks to expand the scope of valid R.S. 2477 rights-of-way by requiring state law to determine the scope. This provision appears to mean that a trail constructed through a national park could become a paved road if that would be the right-of-way's scope under state law. The public does not expect its national parks to be managed in this way.

The impacts on other land managers and owners could also be significant if this bill passes. For example, many private property owners who acquired their land from the public domain will be subject to claims for R.S. 2477 rights-of-way. Indeed, many state law cases interpreting R.S. 2477 involve claims brought by local government entities to impose R.S. 2477 rights-of-way on privately held lands over the objection of their owners.

The Department of the Interior has an ongoing rule-making proceeding that could result in reasonable regulations governing claims under R.S. 2477. The Department has received extensive public comment on its proposed rules and is in the process of considering the comments. This effort should not be short-circuited by legislation.

Claimants deserve careful consideration of their claims. Likewise the public deserves to have its interests fairly represented and protected. S. 1425 would shortchange the public for the benefit of a few claimants. The public deserves better treatment from those elected to represent them.

For a few moments, Mr. Chairman, I would like to focus on the potential effects of S. 1425 on my home state of Alaska, and the magnificent national parks located there.

The implications of this bill for the National Park System are serious. For example, the State of Alaska contends that it has asserted R.S. 2477 claims for 1,700 roads and trails based on a state-produced atlas of trails. This atlas includes 200 claims in 13 of 15 national park units located in Alaska, including:

- 110 trails in Wrangell-St. Elias National Park and Preserve;
- 30 trails in Denali National Park and Preserve;
- 15 trails in Bering Land Bridge National Preserve;
- 10 trails in Yukon-Charley Rivers National Preserve;
- 7 trails in Gates of the Arctic National Park and Preserve;

• 6 trails in Glacier Bay National Park and Preserve.

The National Park Service has described the potential impacts of these R.5. 2477 claims as "devastating" and stated:

> Possible R.S. 2477 rights-of-way identified by the 1974 trail atlas cross many miles of undeveloped fish and wildlife habitat, historical and archaeological resources, and sensitive coastlines and wetlands. Eleven of the Alaska national park units are bisected by possible R.S. 2477 rights-of-way, some of which are over 100 miles long. Validation of possible R.S. 2477 rights-of-way in Alaska national park areas would derogate unit values and seriously impair the ability of the NPS to manage units for the purposes for which they were established.

This is a dramatic statement, but it is not hyperbole. In fact, when R.S. 2477 is viewed through the lens of S. 1425, the NPS report seriously understates the potential impacts with respect to national parks and does not account for equally wide ranging impacts to other public lands, individual private lands and lands conveyed to Alaska Native corporations pursuant to the Alaska Native Claims Settlement Act (ANCSA). S. 1425 proposes to improve the administration of R.S. 2477 by (1) providing an extremely liberal standard for right-of-way claims, (2) shifting the burden of proof from the claimant to the Secretary, (3) allowing virtually any entity—from a state to an individual—to make a claim, and (4) requiring that the claim be adjudicated in accordance with state law. When these elements are combined, the resulting formula is a highly unstable and explosive mixture. Some of the bill's effects can be readily assessed, but others are anybody's guess, because S. 1425 raises substantial legal questions regarding other federal statutes, state and private property rights, and public process. These questions undoubtedly exist in a number of western states. However, Alaska offers a good opportunity to briefly highlight a few of the bill's most serious implications.

At the outset, my remarks assume that the administration of the State of Alaska is comprised of responsible, well intentioned, and qualified land managers. I have discussed this issue of R.S. 2477 and participated in public forums with the Attorney General, the Commissioner of the Department of Natural Resources, and others, including representatives from Alaska Native Corporations and local governments from around the State. State officials and others have stated that they are interested only in such transportation tools and approaches which are part of a rational state transportation plan. They are interested in improving access, avoiding unnecessary liability, maximizing the benefits from public expenditures, and protecting the rights and interests of the state and all its citizens. Other states also share these objectives. And, while there may be some disagreement with specifics, NPCA respects these objectives as well. I recognize the very serious transportation issues and choices facing Alaska. I recently agreed to serve on a state board which will oversee the expenditure of up to $20,000,000 annually to improve the development of state road and highway projects to provide better opportunities for Alaskans and visitors to access and experience Alaska. This new state initiative is known as TRAAK—Trails and Recreational Access for Alaskans. I have a copy of the program brochure for the committee. As a former Executive Manager for Public Services in Anchorage, I served on the local/state/federal committee which oversaw federal-aid highway projects and was part of a team effort known as the Anchorage Accelerated Roads Program—an aggressive effort to greatly improve Anchorage's transportation network. As a state park director, I developed a variety of trails and access, and recognized legal access where I might have wished I had other options. I granted a mining access permit through Chena Recreation Area near Fairbanks. However, I also closed trails or prohibited certain uses where damage to resources threatened to destroy the values and purposes of an area. I mention this only to say that I believe my experience amply demonstrates that I am not philosophically opposed to roads, or trails, or access—so long as they are considered as part of a rational approach to transportation. As currently written, S. 1425 does not result in a rational approach.

First, the potential for claims is almost limitless. As mentioned above, the state of Alaska has identified more than 1,700 potential ROWs. Even if, following further research, the state decides to apply for only a limited number of ROWs, S. 1425 allows anyone—you or I included, Mr. Chairman—to apply for all 1,700. An applicant need only be someone who could foresee himself/herself making use of the potential ROW. The state information on its potential R.S. 2477 claims is public and probably is more than adequate to meet the claim requirements under the bill. In addition, political subdivisions, the legislature, interest groups and others can file serious claims simply by drawing a line on a map and writing a brief note. Several local governments have passed resolutions calling for a public process before any R.S.

2477 can be claimed. Obviously, the potential for limitless claims is of broad concern.

Second, the United States would be hard pressed to adjudicate and deny most of these claims. The burden of proof is wholly on the Secretary, who must offer both specific factual and legal evidence to refute a claim. The claim need only be made in accordance with state law. There is no requirement that the state either act as the claimant, or even that the state accept the ROW grant. This raises the specter of bitter legal and political battles. The state has no specific law regarding who can file a claim, nor any current policies or regulations regarding acceptance and/or management of R.S. 2477 ROWs. On what basis would the state decide to accept my claim, but not yours? Are claims exclusive?

Third, among the uncertainties of the bill, what is certain is that all grants would be 100 feet in width. There is state law on this point. Alaska Statutes 19.10.015 declares that all officially proposed and existing highways on public land be not less than 100 feet in width (See Attachment 1). R.S. 2477 is a grant for the construction of a highway on public land. An R.S. 2477 either exists or it does not. If a grant for highways exists on public land in Alaska, it is 100 feet wide. This is one of the most serious issues. Currently, for example, under Secretarial regulation, the United States could determine that an historic trail at the turn of the century was a highway of the period. The Secretary could grant the ROW "ditch to ditch". If such a ROW were within a national park, the valid use at the time of establishment would be recognized, but the trail could not be expanded into a major highway without acquisition of additional ROW through the process established by Congress in the Alaska National Interest Lands Conservation Act of 1980 (ANILCA). If the same claim were recognized under S. 1425, the ROW granted would be 100 feet, trail or not.

Think of it this way. What if there had been an R.S. 2477 granted in the Grand Canyon under this bill? One morning, the state decides that visitors should not have to hike the trail and it decides to build a highway or tram. Even if the state had an accountable public process for transportation decisions, the only public hearings on the plan might be held in Flagstaff.

No governor should be able to become the sole transportation planner for the future of a national park owned by 260 million Americans—not the Grand Canyon, not Denali. There are thirty R.S. 2477 ROWs mapped through Denali, and 110 through Wrangell-St. Elias. Congress went through long and difficult discussions to arrive at provisions in ANILCA which would protect access to inholdings, provide special access for subsistence and other provisions for individual users. For the creation of major new transportation routes, Congress deliberately established a comprehensive planning process in which Congress, itself, retained a role in the most sensitive decisions. It is inconceivable to think that Congress intended that the state could decide unilaterally to turn a trail into a highway through Denali. Yet that is the effect of S. 1425. As such, as presently constructed, in practical effect, S. 1425 is a fundamental amendment to ANILCA.

Fourth, another issue of enormous potential magnitude and uncertainty concerns section lines. Under state law and decisions of the Alaska Supreme Court, there is no question that surveyed section lines constitute R.S. 2477 ROWs. There is serious question as to whether unsurveyed section lines are also R.S. 2477 ROWs under state law. There is case law on both sides and the State of Alaska, itself, does not know the answer to this question. The ramifications involve nearly a million miles of 100-foot ROWs criss-crossing virtually all lands in Alaska in a grid pattern. While these arbitrary straight lines may have little or no practical use for real transportation and access, they may be open as legal access, creating impacts on parks, public lands, fish and wildlife, subsistence uses, military reservations, private lands, etc. There is no clear law regarding their existence. There is certainly no law or regulation managing their use.

Fifth, there has been some discussion about limiting S. 1425's application to public lands and preventing application to Native and other private lands. I have two observations regarding this line of thinking. First, R.S. 2477s do not apply to private lands, but to lands that were publicly owned at the time of establishment of the ROW claim. The question is whether, in the 102 years between 1866 and the public land freezes in Alaska, there were any rights established on lands that were subsequently conveyed to Alaska Native corporations or private individuals. This question may also affect tribal lands in other western states. Secondly, if the intent is that the bill only apply to public lands, then it would be quite clear that S. 1425 is not about clarifying R.S. 2477, but is a major new land law which, whatever else it accomplishes, amends a major provision of ANILCA.

These are but a few of the legal and policy questions raised by the current legislation. There are likely many more and they likely effect more states. I can only speak with some certainty about the situation in Alaska.

Lastly, as regards Alaska, it has been asked why R.S. 2477 was not a major issue at the time of passage of ANILCA. I was present at most of the Senate committee mark-ups of the bill. R.S. 2477 was not raised. Perhaps it was because those present at the time thought they understood the nature of R.S. 2477, or at least the category of transportation rights which were protected when R.S. 2477 was repealed by FLPMA in 1976. At that time, Senator Ted Stevens was extremely concerned about the changing rules governing future transportation and the protection of pioneer roads in Alaska. He spoke directly to this issue during Senate debate of the Federal Land Policy and Management Act, and a colloquy between the senior Senator from Alaska and Senator Haskell of Colorado is particularly instructive:

> MR. STEVENS . . . Let me turn to this new amendment and explain it.
>
> Mr. President, this bill repeals the revised statutes, Section 2477. That statute is the statute that the Western States have used to acquire right-of-way for highways and public roads through Federal Land.
>
> I agree that we have now turned the corner and we are in the situation now where we deal with rights-of-way on a different basis for the future.
>
> My state raises no question as to the future with regard to rights-of-way over public land. We do not [sic] raise this question, though, that to repeal this section at this time would adversely affect the Western States, because in many areas we have actually de facto public roads in the sense that there are trails that have become wider and have been graded and then graveled and then they are suddenly maintained by the State. The State takes over.
>
> No one has on the part of the State made a declaration that these are state roads. They are state roads strictly by tradition. They have arrived without a formal declaration. There is not an existing right again, I would say to my friend from Colorado, in this State, to claim those as State roads, because they never exerted their authority under Section 2477. They just, in fact, did use the public lands for roads and highways.
>
> We question whether reservation of valid existing rights and at the same time the repeal of the revised statute 2477 will adequately protect the States. I believe there are other Western States with similar problems which have not declared that they have taken rights-of-way under 2477, but, in fact, would be entitled at any time to perfect those rights-of-way today under 2477 as a highway with a simple statement. . . . It is one of the unique statutes Congress ever passed. It is one sentence, two lines. It gave the Western States the right for public access across Federal lands.
>
> Knowing we are going into a new era as far as rights-of-way in the future are concerned, and you have a provision for the future I again state to you, why repeal 2477? . . .
>
> MR. HASKELL . . . I would say that if a strip of land is being used for a highway over public land in accordance with state law at the time of enactment of this bill, then a grant of right-of-way is preserved by reason of Section 502 of the bill.
>
> If, on the other hand, at the time this bill is enacted, a strip of land is not being used for a public highway, of course, the state will be unable to get a right-of-way under this R.S. 2477.
>
> MR. STEVENS . . . I do not know that it has ever been held clearly what the induce of a claim of right must be under that Revised Statute 2477, whether a state must, in fact, file a declaration or whether the exercise of the right under that revised statute was in and of itself sufficient.
>
> If it was, perhaps we can make sufficient legislative history to make sure of what we were doing, because I know that in my State there are many highways, many roads, where the State just gradually assumed authority, finally extended the road out, and that road was never formally applied for. . . . Would the Senator from Colorado agree that if a State has accepted an obligation to maintain a road or trail, if it has partially constructed or reconstructed it, or has indicated an exercise of its police authority by virtue of signs as to speed limits, for example, which demonstrate it is a public highway—if the state has taken actions that would normally be taken by a state in furtherance of its normal highway program, and those roads were on such a right-of-way public lands, would the Senator agree would that we have no intent of wiping those out, but those would be valid, existing rights under the one-sentence statute the Senator mentioned previously?

MR. HASKELL . . . I agree with the Senator 100 percent.
MR. STEVENS . . . I thank the Senator very much. That would satisfy my requirements in regard to that section.

[Congressional Record—Senate, July 8, 1974, Legislative History, pp. 1731–33]

NPCA agrees with the rights and interests which Senator Stevens thought were protected as valid R.S. 2477 rights when the law was repealed. S. 1425 is a dramatic expansion of that concept. So much so, that it creates a new land law. At the very least, the substantive legal and policy questions surrounding the bill—questions which cannot even be answered at present by the state of Alaska—should receive detailed analysis and review before Congress moves forward to enact what could become a time bomb of highway development in national parks and facilitate damaging impacts to Native lands and private property.

[Attachment 1]

Chapter 19.10. State Highway System.
Article 01. Designation, Marking, and Use.
Sec. 19.10.010. Dedication of Land for Public Highways.—A tract 100 feet wide between each section of land owned by the state, or acquired from the state, and a tract four rods wide between all other sections in the state, is dedicated for use as public highways. The section line is the center of the dedicated right-of-way. If the highway is vacated, title to the strip inures to the owner of the tract of which it formed a part by the original survey.
Sec. 19.10.015. Establishment of Highway Widths.—(a) It is declared that all officially proposed and existing highways on public land not reserved for public uses are 100 feet wide. This section does not apply to highways that are specifically designated to be wider than 100 feet.
(b) Notwithstanding (a) of this section, a municipality may designate the width of a road that is not a part of the state highway system if the municipality maintains the road.
Sec. 19.10.020. Designation of State Highway System.—The department may designate, locate, create, and determine what highways constitute the state highway system. In designating, locating, creating, and determining the several routes of the state highway system, the department shall strive to attain the purposes and objectives set out in AS 19.05.125.
Sec. 19.10.030. Responsibility for System.—The department is responsible for the construction and maintenance of the state highway system.

The CHAIRMAN. Thank you.
Scott Groene, staff attorney for the Utah Wilderness Alliance. Please proceed.

STATEMENT OF SCOTT GROENE, STAFF ATTORNEY, SOUTHERN UTAH WILDERNESS ALLIANCE, CEDAR CITY, UT

Mr. GROENE. Mr. Chairman, for starters I have attached photographs* with my statement that I had hoped to be included within the record, and I have got with me right now some better copies of those photographs if the staff need them.
The CHAIRMAN. Fine.
Mr. GROENE. What the photographs show are R.S. 2477 assertions that have been made in Utah and have specifically been made within the Utah citizens wilderness proposal. Some of the photographs are actually assertions that have been made within Senator Bennett's and Hatch's wilderness proposal. When you look at them you can see these are mining tracts that have long since eroded away, areas there never were roads. These claims would be legitimized under S. 1425.
In brief summary, S. 1425 would alter existing law where property claims are made against the U.S. Government by waiving the existing statute of limitations, shifting the burden of proof to the

*Retained in committee files.

U.S. Government, allowing such claims to succeed by default, and imposing an unreasonable standard for what qualifies as a legitimate property claim.

The effect of these provisions combined, if this legislation is made law, would be a massive giveaway of property rights against national parks, national forests, wildlife refuges, and wilderness. And this is for claims with no legitimate purpose. The bill does also threaten private property owners, where the definition of R.S. 2477 would be changed under State law.

This bill is not about preserving existing access in Utah. Rather, it is about whether we are going to have wilderness in Utah or not. Under section 2(a) of the bill, anyone can file a claim, whether they have ever used that route or not. You could file a mess of these from the State of Washington, D.C., for southern Utah. You need to do little more than scribble a line across a map to file these claims.?

Under this bill we are going to have these nuisance claims for decades to come. The bill overrides the existing statute of limitations to allow this to fester for another 2 decades, some 40 years after R.S. 2477 was repealed. This ensures that the U.S. Government will not be able to defend against these claims by rolling back established precedent, by putting the burden of proof on the U.S. Government to disprove these claims. And because we waive the statute of limitations, the United States is going to be in a position of trying to disprove the existing of facts that may have occurred 40 years ago with the repeal of R.S. 2477.

And of course, if the U.S. Government is not able to challenge all of these claims in court we will lose these property claims to Federal lands by default. There are 5,000 claims pending in the State of Utah alone right now and, because of the simplicity of filing future claims, you could simply have the Federal Government overwhelmed and we will lose things by default.

This bill would cause the United States to bear an enormous cost to try to defend these claims. The Department of the Interior has estimated administratively it takes 1,000 to 5,000 bucks to do one claim. The costs would be much higher here because the U.S. Government has to take them to court to protect the public's interest.

All these were grants from the United States and the original legislation makes no mention of State control. It allows State definition to control the grant and scope of these right-of-ways. Now, certainly the State should be able to control the acceptance of these right-of-ways because it may not want to do so for reasons of liability. But if you do grant States like Utah definition of what an R.S. 2477 right-of-way is, then you are going to legitimize the types of claims that are shown in the photographs attached to our testimony.

The bill also exempts these decisions from the National Environmental Policy Act, contrary to precedent in the Tenth Circuit. It ignores the legislative history of FLPMA, which made clear that Congress was trying to grandfather real roads that were mechanically constructed. Nor does it address the issue of private lands.

But because it would allow State law to control what the scope of this is, people who have acquired lands from the public domain

may be surprised to find that, decades after they have acquired their areas, they will be subject to R.S. 2477 assertions.

In summary, the proposed legislation is not in Utah to deal with preserving access that is necessary for commercial or legitimate purposes. Rather, it ensures that claims of nonexistent roads will be allowed to damage national parks, national forests, and our BLM wilderness areas.

Thank you.

[The prepared statement of Mr. Groene follows:]

PREPARED STATEMENT OF SCOTT GROENE, STAFF ATTORNEY, SOUTHERN UTAH WILDERNESS ALLIANCE, CEDAR CITY, UT

INTRODUCTION

Mr. Chairman, members of the committee, my name is Scott Groene. I am a staff attorney with the Southern Utah Wilderness Alliance in Cedar City, Utah.

S. 1425 would breath new life into R.S. 2477, a cryptic statute over a century old that was repealed nearly two decades ago. R.S. 2477 embodied the policies of a pioneer nation that sought to dispose of public land. To bring this moldy law back is to doom our public lands to out-dated thinking and to ignore current law, public sentiment and scientific knowledge.

PHOTOGRAPHS OF ASSERTED R.S. 2477 RIGHTS-OF-WAYS

Included with copies of my testimony are photographs which show examples of Utah county R.S. 2477 assertions. I ask that these photographs be made part of the record of this hearing. I also request that a letter from the Utah Wilderness Coalition, which both identifies the locations of the photographs and explains a Utah citizens project to document R.S. 2477 assertions in our state, be made part of the record as well.

The photographs labeled one through six show areas where counties have claimed the existence of R.S. 2477 roads within the Utah Citizens BLM wilderness proposal, (which has been incorporated by Representative Maurice Hinchey in legislation introduced into the House as H.R. 1500). Photographs seven through ten show areas with R.S. 2477 assertions that are also within the wilderness boundaries drawn by the Utah delegation in a proposal introduced as S. 884. As the photos indicate, in some cases these roads were built decades ago to temporarily access mining claims and have long since eroded away. In other instances, there never was a road. These are the types of claims S. 1425 would legitimize. The result would be the loss of wilderness, polluted water, and fragmented wildlife habitat.

SUMMARY

The proposed legislation has little to do with preserving access via existing roads. Rather, it rolls back legal precedent to create a property claim give-a-way for those who seek to undermine wilderness protection. It waives the existing statute of limitations as to allow such attacks on our National Parks, National Forests, National Wildlife Refuges, wilderness, and private lands until the year 2015. In contrast, the United States is given only two years to defend against thousands of anticipated claims. In another change of established precedent, the burden of proof for a property claim against the United States is shifted to the federal government. In another change of established precedent, public lands can be lost by default if the United States is overwhelmed and unable to bring all claims to court. The bill exempts these decisions from the National Environmental Policy Act.

This legislation, if passed, would waste the United State's resources in a likely futile effort to fight off dubious property claims. S. 1425 allows anyone with a stamp and a grudge against publicly owned lands to force the federal government into an expensive court battle.

SPECIFIC PROVISIONS OF THE BILL

This bill allows both state governments and private individuals to make frivolous claims. County officials in Utah have already shown a willingness to claim R.S. 2477 right-of-ways (ROWs) which cannot be driven by a four wheel drive vehicle, or for routes that cannot be found on the ground. Nor are claims limited to state entities. Section 2(a) of the bill also allows anyone to file an easement claim against the fed-

eral government. Section 2(a) does not even require that R.S. 2477 claimants show they use asserted routes, only that they "could."

Off-road vehicle advocates have already published information as to how R.S. 2477 claims can be filed. This bill will encourage more such abuses of the process.

The bill allows claims to be made without investment of time or money. Pursuant to section 2(a) of this bill, those who seek to interfere with federal land management can do so with little more than scribbling a line across a map.

S. 1425 also opens the door for nuisance claims for decades to come. In 1976, Congress repealed R.S. 2477, and proponents of new R.S. 2477 ROWs have had nearly two decades to file claims. Normally, federal land managers, and the public, can rely on the federal twelve year statute of limitations to provide the certainty that stale property claims will not interfere with public land management. This bill overrides the existing statute of limitations to allow the R.S. 2477 issue to fester for another two decades, some 40 years after the legislation was repealed. Claimants are granted yet another 5 years to file claims, under section 2(a). If the Secretary finds that the claims are fraudulent, then the claimants are granted another 12 years to challenge that determination in court, under section 2(b).

States and the public have been on notice for decades that areas have been reserved as National Parks, National Forests, and Wilderness Study Areas on BLM land. S. 1425 allows proponents to now re-litigate those ROW issues long after the facts have grown stale, and management practices have been established.

The effect is these claims will not be resolved with certainty until forty years after R.S. 2477 was repealed. Because of the waiver of the statute of limitations, the Department of the Interior may face claims for long-gone jeep trails in National Parks that have not seen vehicle use for decades.

While S. 1425, on the one hand, encourages frivolous claims, on the other it ensures the United States will not be able to defend against these claims. For the generosity provided to claimants that have sat on claims for decades is not granted the federal government. If this legislation passes, it is likely the United States will be faced with thousands of these claims. Under S. 1425, the affected agencies will have only two years to adjudicate these claims. If the agency is able to administratively respond to the numbers of claims, it must then bring a federal court action, in the form of a quiet title action, again within two years, under section 3.

S. 1425 would force the United States to expend millions of dollars to battle nuisance claims. The Department of the Interior has estimated it costs from one thousand to five thousand dollars to administratively adjudicate one of these claims. There are 5,000 claims pending in the state of Utah alone. The costs would be much higher under S. 1425, because the United States would be required to litigate these claims in addition to making administrative determinations.

Litigation costs will also be increased because S. 1425 rolls back established legal precedent by forcing the United States to bear the burden of proof. This legislation requires the United States to disprove claims, regardless of how frivolous they may be. The United States will have the burden of showing that the affected state has not accepted or established a ROW, although the state may not be a party to the litigation and it is unclear how the federal government would secure this information.

S. 1425 also waives the existing 12 year statute of limitations, which serves a purpose beyond providing certainty for the United States and private land owners. With the passage of time, it becomes more difficult to determine the facts. But here proponents of ROWs may have until after the year 2015 to file a quiet title action. Then, because S. 1425 shifts the burden of proof, the federal government must prove facts that may or may not have existed as of 1976. The combination of shifted burden of proof and waiving the statute of limitations will mean the United States will likely lose to ROW claims with little merit.

Because S. 1425, in another change of precedent, requires the United States to defend claims or default, the legislation would result in a loss of property rights to federal lands if the Secretary cannot process all claims within two years or file litigation within two years. This is likely to happen if funding has not been provided for this purpose or due to an overload of the system. Then the public will lose property rights in public lands by default, pursuant to section 3(c) of this bill. It appears the legislation is written with the intent this would happen. For while claimants are given up to four decades after R.S. 2477 was repealed to file a quiet title action, the United States is given two years on a schedule driven by the claimants to challenge those claims.

The legislation allows state law to control both the grant and scope of these easements over public land, although the original R.S. 2477 legislation made no mention of state control. Although some states do not have legislation that will answer these issues, some states will allow the mere passage of vehicles to constitute a con-

structed public highway. Other states declare that section lines on maps are constructed highways. There is no rational basis to allow the confusion of varying state standards to undermine public lands. States should be allowed to limit the terms of accepting the grant of ROWs, in order to protect against liability claims or maintenance costs. But the existence and scope of ROWs should be established by federal law.

The bill also exempts these decisions from the National Environmental Policy Act. Current 10th Circuit law binding in Utah found NEPA applies to R.S. 2477 claims in order that the BLM may meet its duty to protect public lands from undue and unnecessary degradation. S. 1425 eliminates this case law.

S. 1425 ignores the compromises Congress reached in the Federal Land Policy Management Act. At the same time FLPMA repealed R.S. 2477, subject to prior existing rights, Congress wrote section 603 which set up the BLM wilderness study process. FLPMA's legislative history makes clear that Congress intended that the BLM would find an area roadless, in order to qualify as a wilderness study area, if there were no constructed roads. Jeep tracks or ways are not roads, according to congressional intent. Precepts of determining legislative intent require that we assume Congress acted consistently—that is that Congress grandfathered existing R.S. 2477 roads which are limited to real, mechanically constructed roads. Otherwise we would have the unacceptable situation of Congress on the one hand declaring that we could have R.S. 2477 roads in the forms of ways within section 603 roadless areas.

Nor does the bill address R.S. 2477 ROWs across private lands that have been acquired from the public domain. Under S. 1425, private landowners may not be able to defend their property against R.S. 2477 claims, even though the landowner acquired the land decades ago.

PROPOSED DOI REGULATIONS

The Department of the Interior has proposed R.S. 2477 regulations that would go far to end the uncertainty that remains for public lands on this issue. These regulations appear the best means of resolving that uncertainty. The regulations properly make federal law grounds for interpreting R.S. 2477, limit a ROW to the physical dimensions and conditions as of the date of establishment, require a showing of actual construction for the establishment of a ROW, and provide a cut-off date for filing ROW claims.

Still, the proposed regulations should be revised and strengthened. The Southern Utah Wilderness Alliance submitted detailed comments on the regulations to the Department of the Interior in a letter dated November 14, 1994. We will provide these lengthy comments to the Committee if requested. Briefly, some of the weaknesses in the draft regulations include:

A failure to include a specific requirement that the approval of a ROW be based on a determination that all elements specified by statute and regulations were satisfied;

The "highway" definition should require more specific and publicly significant termini than "place to place;"

The "highway" definition should include requirements that the claimant must demonstrate established, significant, and continuous maintenance and public use, and that public use was actually established while the lands were open to acquisition of a ROW;

The regulations should be explicit in requiring that the entire route of a claimed R.S. 2477 ROW must satisfy all the elements in the regulations;

The scope of a ROW should be clarified; and

The provisions governing procedure for administrative determinations and appeals should be revised to ensure fair and effective public involvement.

The CHAIRMAN. Thank you very much, ladies and gentlemen.

I would like to try and identify for the record from the responsible proponents, Ms. Hjelle and Ms. Barry, relative to how you see the issue of validity of claims being a responsibility of both, in this case, the State of Utah and the State of Nevada—excuse me, the State of Utah and the State of Alaska, in the reality that anyone can file a claim, and the responsibility of the individual State vis a vis the responsibility of the Department of the Interior on behalf of the Federal Government to evaluate the merits of that claim and the realization that these are to have been asserted prior to 1976,

and what in each of your respective States constitutes the interpretation of the terminology that is used, and that is "highway"?

I know in our State it is not a four-wheel drive Jeep as a minimum, and I am not sure what it is in Utah. I wonder, Ms. Hjelle, if you would care to comment. Clearly, you have heard from the Solicitor, you have heard from your colleague from Utah. And Ms. Barry, you have heard from the legislative representative, Loren Leman, as well as Mr. Dennerlein and the Solicitor as well.

Could you for the record give the committee some satisfaction relative to the concerns that had been expressed on the issue, and perhaps some suggestions on how this legislation, inasmuch as this is a hearing, might be directed to ensuring that the expanded exposures that have been addressed by two of the witnesses and the Solicitor might be reduced?

Ms. HJELLE. Thank you. With regard to the definition of "highway," attached to my statement is just a smattering of a selection of State law definitions.* In Utah, as I think probably many of the public lands States and I think probably the intent of Congress when it passed this act, if you trust what the Federal courts have said and what the Department of the Interior used to say about it, the common law definition of highways applied.

So the question of what you can perfect or could have perfected prior to October 21, 1976, rests with looking at that. And the real definition of a highway in Utah and under the common law pertained to whether or not it was accessible and used by the public to come and go freely at will to do its business, whatever that might be.

That is the legal definition of "highway," and what people do, I think, in discussing this matter is they confuse what constitutes a highway for purposes of perfection of that right to travel back and forth on a given route with what might be done with the route on a later date, and they are not the same thing.

You can have a perfected route, as you have talked about, for a foot trail and a dogsled trail and other types of uses. That is a highway. What you ultimately do with that will depend on a whole variety of other considerations, and that is why I said it does not necessarily follow that these things will be turned into paved highways everywhere.

With regard to the question of individuals being able to file claims, I suspect that the reason it is in the legislation is because, as Mr. Leshy indicated, there is some case law suggesting that individuals have that legal right and the Department of the Interior, as you noted, did not preclude that in its proposed regulations. It is one of the few ways in which they did not take away an existing right or did not propose to take away an existing right.

But not having had a real opportunity to evaluate how you would take that right away in this legislation or some other route, one possibility that come to mind—and it may not be a good idea, but at least it is a consideration—would be that I think it is improper for the State and local governments to bear the burden of proof when the Department of the Interior told the public for 40 years that they did not have to prepare documentation.

*Retained in committee files.

It may be that, with regard to individuals, that that burden of proof might be reconsidered and reallocated when they are filing a claim. That would be one option that could come to mind.

But in reality this legislation as I view it is preserving the status quo, is intended to preserve the status quo, and the status quo on October 21, 1976, and today suggests that individuals do have that right to make a claim, so that they have the right to use those public access routes.

If Garfield County does not assert an R.S. 2477 right-of-way, assuming this legislation passes, and John Doe somewhere in rural Garfield County is relying on an R.S. 2477 highway to do his business, he has either got to persuade the county to do it or exercise the right himself. And he has traditionally been able to do that.

The CHAIRMAN. Well, Mr. Groene suggested that this would spur claims that have arisen since 1976, or at least that is the inference I got from a portion of your statement.

Ms. HJELLE. Well, I do not believe that is true. I do not believe that—I certainly do not support or promote the notion that you should create new rights-of-way after October 21, 1976, under R.S. 2477. Those had to have been perfected by that date.

The CHAIRMAN. How do you respond to that, Mr. Groene?

Mr. GROENE. Well, what we have seen in Utah is that there has been a series of claims filed that are not used for commercial purposes.

The CHAIRMAN. No, I am not talking about 1976. We either have that date as a cutoff or we do not. You suggested that this would——

Mr. GROENE. Our concern is that what the bill does is allow people to make claims for areas that are not being used for commercial purposes, but to try to take advantage of this legislation combined with the State law to try to frustrate wilderness.

The CHAIRMAN. Let us go back to 1976. We either have a cutoff date or we do not.

Mr. GROENE. Certainly, and I do not think anyone disagrees about that. The disagreement is what would be protected.

The CHAIRMAN. Those claims would have to be made prior to 1976 based on traditional use, right, and access; is that not correct, or they would be invalid? Nobody would even—they would throw them in the waste basket.

Mr. GROENE. My concern, Senator, with the legislation is, because of the waiving of the statute of limitations, these claims may not be filed in court until 40 years after 1976. The burden of proof is on the U.S. Government to prove the facts in 1976. You may have a situation where someone can file these claims for political reasons and they may very well win because of the burden placed on the Federal Government.

Some of the off-road vehicle magazines have published information, for example, on how you can file these claims.

The CHAIRMAN. Well, I know. But the reality and the intent of the legislation is not to allow any claims that would be initiated from 1976. You could go back 40 years ago and put in a claim prior to 1976 if you could justify that it was public use, for public access, or whatever. I want to make that distinction.

I think we all agree on the intent of the legislation. I do not want to confuse people who might want to be misled by the assumption that in this legislation we were addressing efforts to try and justify beyond the date of 1976 claims for right or access.

Ms. Barry, you have heard three broad views here relative to the claim that, in the State of Alaska's case, we were basically transferring, I think, 12 million acres of private property, or I guess Federal property, to the State of Alaska under the section line theory. I have looked at the record here and note that section lines are not unique to Alaska. Kansas, Nebraska, New Mexico, North Dakota, Oklahoma, and South Dakota all share that same characteristic.

How do you respond to this generalization that 12 million acres are theoretically passing by this legislation? Did not the State have the right to those under the application of the section line anyway, so what are we passing?

Ms. BARRY. I have been surprised by those assertions at this hearing, but the state of the law in Alaska is somewhat unclear on this issue. We do not have clear case law on what the section line acceptance requires, whether a survey is required, just what the standards are.

But I think, more fundamentally, there seems to be some confusion here between State law standards for acceptance of the grant and State law standards for management. The grants had to be accepted by 1976, so whatever the State law required for acceptance as of 1976 is set. That is done now. That does not mean that the State could not change its standards for management of a right of way, just as any other manager of a right-of-way has to adjust to changing conditions in managing that right-of-way.

But as to the acceptance of the right-of-way grant, that is set as of 1976. Realistically, for most of Alaska it is set as of, I believe, 1969, when the entire State was withdrawn.

The CHAIRMAN. Now, the submission of 1700 claims to the Department of the Interior back in 1971, do you have any history relative to why the Department so cavalierly said do not bother?

Ms. BARRY. I certainly have no direct knowledge of any of that. I would assume that it was based on their regulation which said that the filing of an application was not necessary.

The CHAIRMAN. Not necessary. And now there has been criticism or questions as to why. Now, in your statement you relate to some specific cases that you have spent with the legislature, what, $1.2 million, a couple of years of effort. Now, why is that subject to criticism relative to the process? Is there another alternative that the State should have followed?

I mean, you have heard the criticism here. Would you care to explain what other avenue would have been more appropriate for the State to initiate?

Ms. BARRY. I am not aware of any other avenue. The State has been trying to get a handle on where these routes are and what documentation exists for whether or not they are valid, and that is what the legislature appropriated the money for.

The CHAIRMAN. The idea of frivolous claims, the idea that anybody could make a claim, is certainly a legitimate fact. But I assume you have the responsibility to dismiss if indeed you do not

feel there is any justification for a claim, in the broad body of those that you have identified, those that you have rejected.

Ms. BARRY. Yes.

The CHAIRMAN. Are you satisfied that that is a responsible process by the State of Alaska?

Ms. BARRY. Yes. I believe that the State has tried very hard to examine the routes that are identified and determine whether they qualify.

The CHAIRMAN. What do we do with the frivolous ones? What do you do with those?

Ms. BARRY. There are some that the project determined were not valid, and there are a larger number that the State determined there was not sufficient information.

The CHAIRMAN. So unless you have adequate proof, you have basically said that you cannot justify submitting those claims, is that about it?

Ms. BARRY. I do not think "submitting them" is really the term that we have been looking at, but we certainly are not going to——

The CHAIRMAN. Identifying them, perhaps?

Ms. BARRY [continuing]. Put them on maps as there is a valid right-of-way here, when we do not have that information at this point.

The CHAIRMAN. Now, the suggestion is that there is another alternative other than R.S. 2477 for the State to meet its needs. I recall one of those efforts that involved an extraordinary battle with America's environmental community, involved a Federal land exchange to open up what is now the largest zinc mine and the only employment in northwestern Alaska, and that is the Red Dog. It took a land exchange act of Congress.

Now, is it your interpretation, Ms. Barry, that the other extreme as perhaps generalized by some of the witnesses who suggest there is another alternative is that process?

Ms. BARRY. We have certainly seen, and the Red Dog Mine is an example, that the title XI process does not always work.

The CHAIRMAN. In fact, in the current climate one could generalize and say it could not work without intervening at a Congressional level, which is obviously an unfortunate dictate that under certain terms and conditions seems to be necessary. And that is my opinion, obviously.

Relative to the situation in Utah—and I would ask Ms. Hjelle—what would this legislation allow in the sense of new R.S. 2477 rights-of-way to be created? You have already in effect answered that and you suggested none. That is contrary to the generalization given by your colleague. Would it allow validity to be determined by State laws that were created after the repeal of FLPMA?

Ms. HJELLE. I do not think so, and I would just like to say with regard to the Utah legislation passed in 1993 what is omitted from Mr. Leshy's statements about that legislation is that the clear stated intent of the legislature was merely to codify law that was in effect prior to October 21, 1976, and in fact that legislation virtually duplicates Federal policies regarding R.S. 2477 that were in effect for some time.

Furthermore, unlike his statements about that legislation, it explicitly states that it will honor the proper need to respect to ser-

vient estate, the Federally owned lands, and it is not intended to be a roughshod type of thing.

I also would like to point out, if I could, that with regard to this issue of frivolous claims, I know one county, for example, where the local land managers have looked at the assertions of the county and basically said, with the possible exception—and we are talking about hundreds of rights-of- way here—with the possible exception of just a few, we know from our prior experience in this county that these are valid, we do not have any problem with it.

The problem is not coming from the local land managers who know and understand these rights-of-way. It is coming from policy decisions in Washington, D.C., by people who are not affected by these decisions.

The CHAIRMAN. Briefly, because I have got about 6 minutes before the vote, how many miles of new highway construction are proposed on the theoretical R.S. 2477 rights-of-way in the State's highway budget in the next 10 years?

Mr. LEMAN. Mr. Chairman, I do not know the answer to that, but I would be willing to suggest that it would be in the single digits, the number of miles, and I just state that because our capital budget is going to be limited this year to $100 million, the State general fund portion, matched with the Federal and other funds. We are just not going to be able to be doing extensive highway projects.

So from the State's perspective, although we would like to develop some of these projects, realistically they are not going to be funded. So it is just not going to be happening.

The CHAIRMAN. Ms. Barry, you indicated that the 17(b) process in your testimony is the preferred way to validate rights-of-way across ANCSA lands. Of course, AFN is concerned about that. We are sorry they could not be here. But do you see anything in the legislation that would prevent the State or anybody else, for that matter, from using the 17(b) process?

Ms. BARRY. No, nothing would prevent it, and in fact the State is looking at 17(b) easements, and we will look to them to provide access where possible.

The CHAIRMAN. I want to thank the witnesses, and I do want to just comment on one of the things that I think is irresponsible relative to the process that we are attempting to proceed here with, and that is the statement that was made recently by one of the witnesses relative to the suggestion that somehow this hearing and this action would result in an explosion in right-of-way claims that could result in rampant highway development throughout national parks and wilderness areas.

I think it has been addressed by Mr. Leman. I think it has been highlighted as to what the intent of the State is. I think the statements are clearly irresponsible and simply meant for an effort to mislead the public, as opposed to accepting the responsibilities associated with coming up with alternatives. One that was addressed to me says, I want to change the rules so dogsled routes in Denali could be developed into major highways, and that kind of thing is hardly worth commenting further on, so I will not do it.

So with that, the hearing is closed. I wish you all a good day. Thank you for being here.

[Whereupon, at 12:14 p.m., the hearing was adjourned.]

[Subsequent to the hearing, the following statement was received for the record:]

PREPARED STATEMENT OF BOB LOESCHER, CHAIRMAN, ALASKA FEDERATION OF NATIVES LAND COMMITTEE

Chairman Murkowski, honorable members of the U.S. Senate Energy and Natural Resources Committee, ladies and gentlemen:

For the record, my name is Bob Loescher. I am honored to be here today to testify in my capacity as the Chairman of the Alaska Federation of Natives (AFN) Land Committee on S. 1425, a bill to Recognize the Validity of Rights-of-way Granted Under Section 2477 of the Revised Statutes, and for other purposes. AFN Land Committee is composed of the land and natural resources managers of eleven of the twelve Alaska-based regional corporations created pursuant to the terms of the Alaska Native Claims Settlement Act (ANCSA). Collectively, they have well over 150 years of experience of land and natural resources management under their belts.

As you may already know, AFN is a statewide Native organization formed in 1966 to represent Alaska's 85,000+ Eskimos, Indians and Aleuts on concerns which affect the rights and property interests of the Alaska Natives on a statewide basis. Please include this and my oral remarks into the record of this hearing.

On behalf of AFN, it's Board of Directors and membership, thank you for giving me this opportunity to testify to the Committee on S. 1425. My comments will be divided into two general categories. They are:

PART I. THE PROPOSED DOI RS 2477 REGULATIONS

AFN had no major problems with the proposed RS 2477 regulations that are now on hold. We agreed with their proposal that RS 2477 would not apply on ANCSA lands. One thing we would like to have seen is the development of abandonment process where an RS 2477 could be abandoned when it is no longer used for which it was reserved. We also liked the concept of finally putting the question of the applicability of RS 2477s on ANCSA lands to bed once and for all.

PART II. S. 1425

By way of the background of my statement, ANCSA was a Congressional settlement of the claims, of the Alaska Natives against the federal government. ANCSA, in part, authorized the transfer of 44 million acres of fee simple lands to the Alaska Natives through their ANCSA corporations. My comments on S. 1425 will be aimed at protecting the land interests of the Alaska Natives and the ANCSA corporations.

Section 2. Notice of rights-of-way across public lands granted under revised statutes section 2477

AFN supports the premise that this bill is only applicable to public lands. In order to clarify what public lands mean in the context of this bill, AFN recommends that:

> The term "public lands" includes all lands title to which is held by the United States as of the date of this Act, but does not include lands withdrawn or otherwise reserved for disposition to States and other non-federal parties pursuant to an Act of Congress.

AFN believes that the adoption of this definition of public lands, insofar as this legislation is concerned, will clarify where RS 2477 applies in the State of Alaska. The adoption of this definition will assure the ANCSA corporations with a better opportunity of receiving a clear title to the lands they were promised them by Congress when it passed ANCSA in 1971.

Filing of Notice: AFN recommends that in states like the State of Alaska where an extensive amount of work on RS 2477 has been done, three (3) years will be sufficient time to identify RS 2477s in Public lands rather than five (5) years as stated in the bill.

Burden of Proof: If a RS 2477 is claimed across ANCSA lands, the RS 2477 claimants must prove, beyond any shadow of doubt, that their RS 2477 claims were valid when all the lands in Alaska were frozen from any kind of public land appropriations or development until such time that the claims of the Alaska Natives against the federal government were resolved. Absent such proof, the RS 2477 claimed on ANCSA lands must be denied by the Secretary of the Interior. AFN recommends the inclusion of some language that will accomplish this.

Application of State Law: AFN supports the management of RS 2477s on public lands in Alaska by the State of Alaska so long as we are assured by this legislation

that the State of Alaska will not use this management authority to expand access across or into ANCSA lands by using the RS 2477 process.

Section Line Vacation: The question of whether or not section lines on townships in Alaska, particularly when they are located on ANCSA lands or selections, are considered RS 2477 is a long outstanding question. This issue must be put to rest once and for all through this legislation. This bill should have a provision that clearly states that the section lines on ANCSA lands will not be considered RS 2477s.

Application of 17(b) to Identify Access Across ANCSA Lands: It is the position of AFN that Section 17(b) of ANCSA is a proper method of identifying access across ANCSA land.

Congress, when it passed ANCSA, recognized the need for access across ANCSA lands and included 17(b) into ANCSA for this purpose. 17(b) of ANCSA is a process used by Bureau of Land Management (BLM) to establish access across ANCSA lands. The parties involved in the 17(b) identification process generally include the representatives of BLM, village corporations, regional corporations and the State of Alaska. The process of identifying access across ANCSA lands using Section 17(b) of ANCSA has proven its usefulness and effectiveness over time. The passage of this legislation must assure the ANCSA corporations that this process will remain in place and that it will be the only means of identification of access across ANCSA lands.

If any access across ANCSA lands is desired by any and all third parties, those parties must meet with affected ANCSA land owners to determine how such can be accomplished. AFN feels that where all access across ANCSA lands is necessary, such access must be done using 17(b) of ANCSA.

Thank you.

APPENDIX

RESPONSES TO ADDITIONAL QUESTIONS

St. George, UT, March 26, 1996.

Senator FRANK K. MURKOWSKI,
Chairman, Committee on Energy and Natural Resources, Washington, DC.

DEAR SENATOR MURKOWSKI: I appreciate the opportunity to respond to your questions regarding S. 1425. You have raised significant issues relating to this important piece of legislation. My responses to the questions are attached.

Thank you for your attention to these matters and your efforts on behalf of all Americans.

Sincerely,

BARBARA G. HJELLE.

RESPONSES TO QUESTIONS FROM SENATOR MURKOWSKI

Question 1. You mentioned some problems you had in one of the counties in Utah with the location of a box culvert and cited numerous occasions that the federal government made you move the box even after it had been moved to where they indicated.

To me this seems like sanctioned harassment by the federal government. Do you find this is a growing problem? And do you have other examples of where the federal government is infringing on right-of-way holders?

Answer. There can be no doubt but that the federal government is engaging in sanctioned harassment of right-of-way holders. The Department of the Interior's proposed regulations and the statements of Interior personnel reveal a clear hostility toward R.S. 2477 rights-of-way. Interior wants to revoke these rights-of-way or, at least, require that they be traded for FLPMA title in rights-of-way. FLPMA, however, does not give Interior the authority to require either of these actions. Rather than respect that law and honor valid R.S. 2477 rights-of-way, Interior is using its resources and might to effectively revoke these rights-of-way through intimidation. These actions amount to a capricious reversal of long-standing and well-founded administrative policy.

Federal harassment of right-of-way holders would convert the routine task of road maintenance, traditionally and responsibly carried out by state and local governments, to an act of civil disobedience. Now, before a county does anything on one of its valid R.S. 2477 rights-of-way, it must brace itself for the prospect of threats, harassment and possible litigation by the federal government. On occasion, county commissioners have received telephone calls from Departmental officials threatening them with dire consequences if they maintain their rights-of-way. In all of these cases, the officials assert the new, unfounded interpretation of the law recently created by the Department and offer no disclosure of the large body of law that supports the R.S. 2477 right-of-way.

Despite the fact that most of these roads have existed and been maintained for more years than many of us have been alive, this administration now refuses to allow virtually any activity to proceed on R.S. 2477 rights-of-way without the blessing of the federal government first having been obtained—never mind that the Congress (and the Department) determined long ago that these roads are most properly managed by state and local governments. And this "blessing" is given sparingly and arbitrarily. If a road is located in an area the Department doesn't much care about, maintenance goes forward without much trouble. However, if the Department wants to stop access to a given area, the scope of the right-of-way is mysteriously reduced. Under current Departmental policies, there is no objective measure of the scope of an R.S. 2477 right-of-way, contrary to what the courts which have directly addressed this issue have said. This situation creates untold opportunities for harassment at the whim of the land managing agency.

And let's be clear where the harassment is coming from. The local land managers, who are familiar with these rights-of-way and the local elected officials who manage them, do not have significant disagreements about road maintenance activities. But federal land managers in the field are constrained by pressure from the upper ranks of the Department, so their ability to carry out their land management duties applying fundamental common sense is strictly limited.

There have been numerous instances that illustrate this federal harassment. You mentioned the box culvert incident which took place in Garfield County, Utah. That incident provides a good example of the method by which federal agencies harass right-of-way owners. That method involves requiring the counties, by threat of lawsuit, to undertake costly actions which are unjustified in relation to normal maintenance activities.

The road in question in the box culvert incident was the Boulder-to-Bullfrog Road (also known as the "Burr Trail" Road), an R.S. 2477 right-of-way in Utah that has been in existence for more than a century and which has been judicially declared to be a valid right-of-way. The box culvert was needed for a wash crossing ("the Gulch") at a time when the road was realigned to meet safety concerns. After thorough review of Garfield County's plans for the Road, the courts ruled that the Road should be moved up onto an adjacent bench as it approached the Gulch. In 1989, the BLM completed an environmental analysis which addressed the new alignment approaching the Gulch. That analysis resulted in a "finding of no significant impact" for the County's proposed work. Garfield County accepted a modified FLPMA permit for the realignment at the Gulch, which acknowledged that the alignment was part of the County's prior R.S. 2477 right-of-way.

Then, when Garfield County staked the alignment in accordance with those approved plans, BLM, out of the blue, indicated that the location was unacceptable. BLM requested that the County move the Road northward to a second location. The County complied with BLM's request and installed the structure at the location specified by BLM. However, while the County attempted to complete its work in accordance with BLM's demands, BLM personnel continued to interfere, demanding further moves northward of the culvert location, resulting in delay and substantial additional construction costs to the County. The changes demanded in the culvert location also required costly changes in the culvert structure itself as well as changes in the Road location to allow the portions which were completed to join with the alignment across the Gulch. All of the changes made at the Gulch arose from demands made by BLM, none of which were in accordance with BLM's own environmental analysis. The relocation site ultimately selected by BLM is less safe and less aesthetically compatible with the surrounding lands than was the first site. Thus, BLM's action lacked any degree of logic, unless we assume that the logic behind that action was simply to harass the County and thereby gain dominance over road decisions. And, after all this, BLM still issued a trespass notice against the County, stating that the County had relocated the Road too far north. This sounds unbelievable, but it is true.

Garfield County has tried to work with the Interior agencies over the past decade to accomplish a road safety project which the courts have already acknowledged to be reasonable and within the scope of the County's right-of-way. All of its efforts have been met with, at best, a stone wall by agency officials, who refuse to honor the courts' decisions. Even work within areas already disturbed by past construction and maintenance gives rise to agency harassment. Right now, Garfield County is being threatened with costly litigation for making necessary safety improvements to the Road within Capitol Reef National Park, all within an existing disturbed area. The National Park Service has refused to analyze the alleged impacts of the County's work, though requested by the County to do so, but cries foul nevertheless when the County, after waiting for years for agency cooperation, exercises its rights.

This harassment and bullying has cost Garfield County vast sums of money and time and has prevented the County from completing the project to this day.

Interior and its subdivisions realize that local governments operate on limited budgets. Anytime Interior wishes to effectively close an R.S. 2477 right-of-way, the agency threatens legal action against the right-of-way holder. The holders, local governments for the most part, do not have the money to defend their rights against the United States Department of Justice. Local governments cannot afford the legions of lawyers to match those available to Interior to pursue these actions. Unless Congress acts to protect R.S. 2477 rights-of-way, Interior will likely succeed in closing these roads or forcing unsafe maintenance practices.

Question 2. I am sure you are aware of the arguments the [opponents?] proponents of this legislation are putting forward.

Would this legislation allow "new" R.S. 2477 rights-of-way to be created? Or would it allow validity to be determined by state laws that were created after the repeal of [R.S. 2477] FLPMA?

Answer. S. 1425, as I read it, would not allow "new" R.S. 2477 rights-of-way to be created. Neither would this legislation allow validity to be determined by state laws created after the grant was repealed by FLPMA. Arguments to the contrary are intended to alarm those who are uninformed about the law of R.S. 2477, thus serving the Department's goals of defeating these rights.

Opponents of this legislation repeatedly allege that it would resurrect, revive, or reopen R.S. 2477 and allow new rights-of-way to be established. But a fair reading of the statute reveals that it merely provides a mechanism for determining whether existing rights-of-way were validly established before October 21, 1976, the period the grant was available to the public. In other words, it determines whether "old" rights-of-way are valid. Thus, when opponents of this legislation state that these rights-of-way should not be revived, they really mean that valid rights-of-way should not be honored.

This legislation allows the applicable evidence for each road to be presented and examined. If the evidence shows that a right-of-way was not created prior to the earlier of withdrawal of the public lands or by September 21, 1976, the right-of-way would not be valid. This is what the applicable law requires and what this legislation ensures.

Opponents of this bill state that it would open a "new window" during which claims could be filed. This statement implicitly asserts that right-of-way holders needed to file claims before a deadline expired and that this bill eliminates the effect of missing that deadline. Such an assertion is ludicrous. Federal regulations in place during the time the grant was being offered explicitly stated that no claim or any other type of documentation had to be filed to accept the grant.

Also, opponents' assertions to the contrary, this legislation would not allow legislation passed after the repeal of R.S. 2477 to determine whether a right-of-way was validly established. While these laws might be of assistance to clarify certain issues, a right-of-way must have been established according to the then-applicable laws.

The real purpose behind opponents' assertions regarding state law is an unwillingness to have any state law apply at all. Opponents do not truly worry that newly-enacted laws will be used to determine validity. Opponents merely object that this legislation will honor prior existing precedent and, thereby, thwart Interior's attempt to enact "new" laws that would eviscerate these rights-of-way.

Just a few of the many authorities relevant to this issue might prove helpful. First, federal regulations state: "Grants of [R.S. 2477] rights-of-way . . . become effective upon the construction or establishment of highways, in accordance with the State laws. . . ." 43 C.F.R. § 2822.2-1 (October 1, 1972) Second, courts have ruled: "Having considered the arguments of all parties, we conclude that the weight of federal regulations, state court precedent, and tacit congressional acquiescence compels the use of state law to define the scope of an R.S. 2477 right-of-way." *Sierra Club* v. *Hodel*, 848 F.2d at 1080, 1083 (10th Cir. 1988). "The right of way statute is applied by reference to state law to determine when the offer of grant has been accepted. . . ." *Wilkenson* v. *Dept. of Interior*, 634 F. Supp. 1265, 1272 (D. Colo. 1986). (Please note that, in *Wilkenson*, the Department was in full agreement that state law applied to the validity determination.)

Thus, as this legislation ratifies, R.S. 2477 determinations turn on interpretation of the law of the state where the right-of-way is located. On the other hand, Interior's proposed regulations would now change the rule of construction from state law to brand new federal laws. Coincidentally, Interior would administratively create those new federal laws in the same regulation. This is a novel strategy, in a country based upon the rule of law, for eviscerating these rights. If Interior can now change the relevant terms, it can rewrite history and create a situation where a right-of-way, though never previously in question, did not, at the time the highway was established, comply with the newly created federal terms. Therefore, Interior could deem the grant never to have been accepted.

Here is an example of how Interior's logic would work if its regulations were to take effect: let's say that in 1940 Washington County, Utah, wanted to accept the R.S. 2477 grant to construct a road across federal lands. In consulting government regulations and existing case law on R.S. 2477, the County would find that it could accept the grant according to Utah law. The County would have done so and would have conducted its public business thereafter confident (and correct) that it possessed a valid right-of-way. The County would now be proved wrong by Interior's proposed regulations, however. According to those regulations, the County's entry onto federal lands would be a trespass, because the County failed in 1940 to satisfy federal standards that would be drafted fifty-four years later.

Question 3. There is the concern about the effect this legislation will have on private lands and native lands.

Can you tell us the impact that S. 1425 will have on these lands?

Answer. The Act applies only to federally owned lands. Therefore, any discussion of effects to private lands and native lands is largely irrelevant. If the Department's policies are accepted, however, many private landholders will find their access invalidated. In fact, just the threat of such invalidation is wreaking havoc with private land transactions because some title companies are no longer willing to provide insurance coverage of access which relies on the R.S. 2477 grant.

S. 1425 also will not have the impacts on federal lands asserted by its opponents, who "warn" that recognition of valid rights-of-way will impair federal lands that were dedicated for certain purposes subsequent to establishment of the rights-of-way. This assertion defies reality. Valid R.S. 2477 rights-of-way must have been established prior to withdrawal of the public lands. This means that subsequent land withdrawals for purposes such as national parks or wilderness areas would have occurred subject to the previously established and vested rights-of-way.

Despite the alarmist rhetoric of access opponents, continued recognition of these property rights will not lead to environmental calamity. These rights-of-way already exist. Recognition of their existence will not change the current situation. Furthermore, right-of-way holders are bound in their actions to the extent that statutes governing protection of cultural sites, wetlands, endangered plants and animals, and other environmental resources apply. The land managing agencies have many legitimate tools to protect federal resource values; they do not need to eliminate vested property rights to achieve legitimate goals.

The holder of an R.S. 2477 right-of-way possesses a property right which is now protected under the rule of law. Likewise, the federal government, as the holder of the underlying estate, possesses protected property rights. Courts and Federal agencies have taken great care to balance these respective rights to ensure (1) that right-of-way holders are allowed to exercise their rights and (2) that underlying federal lands will not be impermissibly impacted. The alarmist rhetoric of those who would like to see these vested rights wiped out is not based upon a realistic assessment of the interplay between the rights of the federal land owner and the rights of the holder of the R.S. 2477 right-of-way.

Question 4. We all know R.S. 2477 was repealed when FLPMA passed in 1976. Why wouldn't it be a fair resolution of this matter to merely trade R.S. 2477 rights-of-way for FLPMA rights-of-way?

Answer. It would not be fair to require that R.S. 2477 rights-of-way be traded for FLPMA rights-of-way because R.S. 2477 right-of-way have already vested as property rights. It would be contrary to the rule of law upon which this country is founded to demand such a trade. Congress explicitly prohibited such actions in FLPMA. (See 43 U.S.C. § 1769.) To demand a trade would be similar to asking the fifth-generation owner of a homestead patent to trade in his deed for a 30-year lease from the federal government.

Furthermore, FLPMA rights are different from R.S. 2477 rights-of-way. Although many differences exist, four primary differences illustrate why these rights-of-way should not be traded.

First, FLPMA rights-of-way are issued according to the discretion of the federal land manager, meaning that FLPMA rights-of-way might or might not be issued. R.S. 2477 rights-of-way, on the other hand, are already vested in the holder, are capable of being utilized immediately, and are subject to constitutional protections.

Second, permissible uses of FLPMA rights-of-way, in some cases, might be more limited than are uses of R.S. 2477 rights-of-way. For example, the scope of R.S. 2477 rights-of-way was generally established according to the uses to which the right-of-way was put. Thus, there is little uncertainty that those established uses will be accommodated if the right-of-way continues to be honored as an R.S. 2477 right-of-way. The scope of a FLPMA right-of-way, on the other hand, will be determined by a federal land manager. That means that there is no guarantee that established uses will be accommodated. Since the federal land management agencies currently oppose most maintenance activities on selected R.S. 2477 roads, it can be assumed that giving those agencies authority over those roads by way of a FLPMA permit will effectively close those roads.

Third, FLPMA permits are more in the nature of a license, not a vested property right. Also, FLPMA permits are not perpetual as are R.S. 2477 rights-of-way. In view of the recent 180 degree reversal of Interior policy regarding rights-of-way, holders need the protection afforded vested, perpetual property rights. Holders would be left in a very vulnerable position were they to be placed within the whims of Interior's discretion.

Fourth, FLPMA rights-of-way must be purchased. R.S. 2477 rights-of-way, on the other hand, are already owned.

Question. Do you have any further comments to make or anything you want to add to what the Solicitor said?

Answer. Mr. Leshy's comments provide very little input on S. 1425 itself. Instead, his comments address Departmental objections to access rights across federal lands in general. The fact that the Department of the Interior now finds these vested property rights to be inconvenient or undesirable is not germane to S. 1425. Congress has decided that these rights-of-way should exist and, through FLPMA, required that they be preserved. That is the law of the land. And, unless changed by Congress, that law must be upheld in resolving the R.S. 2477 issue. The purpose of S. 1425 is to inventory in which instances the R.S. 2477 grant has been accepted. To meet that singular task, S. 1425 creates an even-handed process for effectively determining the validity of R.S. 2477 rights-of-way.

His allegations of potential harm to wildlife, fisheries, park and wilderness values and the like are unsupported by any realistic assessment of the facts and the law. If these values exist today, they have survived a minimum of 19 years of R.S. 2477 impacts. In all common sense, how much trouble can an existing road or trail cause to a fish, for example? When you look carefully at Departmental analysis of R.S. 2477, it becomes clear that the Department wants to eliminate these vested property rights as a way of controlling the actions some people might take after they leave the rights-of-way and enter the adjacent federal lands. The Department should carry out its land management responsibilities by directly managing inappropriate activities which take place on federal lands, not by taking away the entire public's right to travel freely across the West.

Mr. Leshy expressed a willingness to resolve the "controversy" surrounding R.S. 2477 access rights. Since this "controversy" exists solely because of Interior's opposition to the continued existence of R.S. 2477 access rights, I would hope that Mr. Leshy is endorsing a reversal of recent Interior policies and a commitment to honor these vested property rights. But that is clearly not the case. Nevertheless, if the Department which Mr. Leshy represents were to agree to abide by established precedent, the controversy he asserts would be largely resolved. It is not without irony that, as far as Mr. Leshy is concerned, the most controversial aspect of S. 1425 is its insistence that this precedent be honored.

The controversy created by the new positions asserted by Mr. Leshy burdens local governments with significant, unnecessary costs; it casts uncertainty on rural property values; it imperils the safety of human beings by stifling local governments' ability to adequately maintain and improve roads. In short, the controversy jeopardizes everything that depends upon a stable and reliable transportation infrastructure. In large stretches of the West, small communities are surrounded entirely by federal lands. In Utah, for example, about 70% of all the land in the state is owned by the federal government. That scenario is similar in many other western states. Thus, access across those federal lands is crucial to the well-being of entire communities and, in a larger sense, the West itself. The Department treats this problem as if it impacts Utah and Alaska alone. But if it is successful in enforcing its interpretation of R.S. 2477, many roads in the Western states would be in trespass.

Mr. Leshy's assertion that S. 1425 "liberalizes" R.S. 2477 is consistent with the Department's refusal to recognize innumerable court decisions as valid. State law cannot contradict R.S. 2477 because it has been universally recognized that, as a matter of federal law, state law has been adopted as the rule of interpretation. Mr. Leshy may be right that this bill does not discriminate. Under his proposal, the Department could override a clear Congressional mandate not to discriminate between one state and another, but rather to honor all states which have relied on Congress' grant of the R.S. 2477 right-of-way in accordance with state law. Mr. Leshy now proposes to discriminate against the state of Utah, for example. Although, if the truth were known, all public lands states would feel the impacts of being turned into trespassers if the Department's proposed regulations were implemented.

Mr. Leshy argues that these rights-of-way need not be honored, because eradicated R.S. 2477 rights-of-way can be replaced by FLPMA Title V rights-of-way. Such argument grossly minimizes the importance of vested property rights to our system of government. The relative merits of FLPMA Title V do not present grounds to dishonor or divest existing R.S. 2477 rights-of-way. Mr. Leshy's statement that about 12,000 Title V permits have been issued since FLPMA was enacted has absolutely nothing to do with a fair determination of whether the grant of R.S. 2477 was accepted in a particular case sometime between 1866 and 1976.

Mr. Leshy's comments make it abundantly clear that the Department of the Interior is not a dispassionate, neutral arbiter when dealing with R.S. 2477 rights-of-way. For that reason, it is particularly salutary that S. 1425 allows the judiciary

to determine the validity of any right-of-way opposed by the relevant federal agency. Clearly, the judiciary will honor only those rights-of-way that were created during the period that R.S. 2477 was in effect, while the Department, if left to its own devices, would systematically invalidate these same rights.

Mr. Leshy also objects that S. 1425 imposes the burden of proof in judicial actions on the United States. Mr. Leshy's complaints about the burden of proof are ironic when you consider that the Department's proposed regulations would place a significantly greater burden on local governments whose resources cannot possibly meet this demand. Under the Department's own regulations, holders were never required to document or file any record regarding establishment of these rights-of-way. To now require that such documentation be presented in order to preserve these vested rights flies in the face of basic constitutional protections of property. If the United States now desires to inventory where and how many R.S. 2477 rights-of-way exist, it is appropriate that the United States should shoulder the consequences of its earlier decision not to require documentation. Furthermore, the federal agencies, not local governments, have traditionally prepared maps and descriptions of existing conditions on the federal lands.

Another warning in Mr. Leshy's comments concerns the threat that S. 1425 would allow trails and paths to be upgraded to paved highways. That concern is likewise baseless. R.S. 2477 precedent establishes that the scope of a right-of-way was determined during the time the grant was available. Mr. Leshy's interpretation of the 1993 Utah law is unsupported by the language of the legislation itself. The state and local governments which have been managing these rights-of-way for decades have not undertaken the wholesale construction that Mr. Leshy fears and, as a practical, financial matter as well as a legal matter, such actions will not take place. However, if Mr. Leshy's principles were adopted, the traveling public which relies on these rights-of-way would not be able to travel safely, because no improvements necessary for that purpose would be allowed under the right-of-way grant. Clearly, when Congress granted these highway rights-of-way, it intended that they be kept safe, as state law would allow.

Mr. Leshy's assertion that honoring state law would somehow harm private property holders defies reason. First, if the R.S. 2477 right-of-way was perfected prior to transfer of land from the federal domain into private hands, the private landowner has always been subject to the right-of-way. But, perhaps even more significantly, since state law clearly governs the establishment and management of public highways across private lands, the creation of a new federal standard, as proposed by Mr. Leshy, would create untold problems and inconsistencies as between private lands and adjacent public lands. Private landowners in most states would find themselves without legal access to their lands, when their access crosses federal lands. Recently, in both Utah and Colorado, we have seen private lands held hostage to the Department's proposed policies because title companies were no longer willing to insure access, recognizing that the new federal standard could invalidate long standing access routes.

If we rely on the uncontradicted precedent of R.S. 2477, there is truly no controversy regarding which laws should apply to validity determinations. Prior to Interior's recently proposed regulation, every court and every federal regulation to address the issue has stated that the proper rule of construction for R.S. 2477 is the law of the state where the right-of-way is located. Thus, it should be quite clear that state law has been adopted as the rule of construction for R.S. 2477. (Even the 1898 decision by Secretary Bliss, the case which Departmental officials cling to as a contradiction to the flood of established precedent, did not address or negate the fundamental principle that state law applies to determine validity of R.S. 2477 rights-of-way.)

S. 1425 resolves the existing R.S. 2477 controversy finally and fairly. It is unfortunate that Interior would recommend that the bill, if passed by Congress, be vetoed. This controversy needs to be resolved by honoring existing rights-of-way in accordance with existing law, for the good of rural communities, the West and the nation as a whole.

DEPARTMENT OF THE INTERIOR,
Washington, DC, April 25, 1996.

Hon. FRANK H. MURKOWSKI,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

DEAR SENATOR MURKOWSKI: This responds to the written questions you submitted to me following my testimony on March 14 on S. 1425. I appreciate the opportunity to supply this additional information on our opposition to S. 1425.

A number of your questions relate not to S. 1425, but to the Department's proposed regulations concerning R.S. 2477 claims. I am, of course, pleased to respond to these questions. I remain hopeful that final regulations will eventually be published and then implemented in a manner that accommodates the concerns of all parties.

I want to underscore, however, that enactment of S. 1425 is a drastic and ill-conceived response to the proposed regulations. Its effects go well beyond rectifying any difficulties you have with our proposal. Indeed, as I stated at the March 14 hearing, S. 1425 would have such serious negative consequences on federal land management and private property rights that if it were enacted, the Secretary would recommend to the President that he veto it.

Specific responses to your and other members' of the committee's questions are enclosed. Once again, I appreciate the opportunity to provide additional information and look forward to working with you in the future. I would be happy to respond to any further questions you might have.

Sincerely,

JOHN D. LESHY,
Solicitor.

[Enclosure.]

QUESTIONS FROM SENATOR MURKOWSKI

Question 1. Under the provisions of the Paperwork Reduction Act the Department of the Interior submitted to OMB in defense of the DOI regulations that it thought the states/counties would file one single application for all claims in the state or county and that this would take them approximately 24 hours to do. You also testified that Alaska and Utah had thousands of potential claims. Therefore by your estimates claimants can validate these Rights-of-Way by simply spending less than one minute per R.S. 2477 claim. Is it still the position of the Department as stated in its claim to OMB that it will take less than one minute per claim to gather this information and fill out the appropriate paperwork?

Answer. We continue to believe that the process called for in the proposed regulations can be readily complied with. Only Alaska and Utah have expressed great interest in filing extensive R.S. 2477 claims, and both of these states have already done extensive work to document their claims.

Question 2. The Department has previously stated that they believe the vast majority of these claims will be asserted by state and local governments, I am disturbed about your comment regarding thousands of frivolous claims. Are you saying that you do not trust the states and counties enough to believe that they will file claims in good faith? Or are you saying that you lack any confidence in your Department that you will not be able to disprove frivolous claims?

Answer. We assume that claims asserted by state and local governments would generally be made in good faith. However, private claimants would be able to assert claims under both the proposed regulations and S. 1425. Thus, the potential for questionable claims exists, particularly if states expand the rights of way that could be available under state law as provided by S. 1425. Moreover, S. 1425 in effect provides a strong incentive to file frivolous or questionable claims because it makes it very easy to file claims and very difficult for the government to reject them (by placing a heavy burden on the government, including the duty to file a lawsuit, when it chooses to contest a claim). Given unlimited resources, the Department could disprove such claims. However, requiring the Department to do so with limited resources and within strict time limits is unrealistic.

Question 3. I am sure you recognize that R.S. 2477 rights-of-way could only be created across federal lands. Yet you say they are a threat to private property. Isn't it true that they could only exist across private property if they were established before the government patented the land? If the land was patented subject to a pre-existing right of way, recognition of that right-of-way on adjacent federal land would not constitute a taking, would it?

Answer. We agree that R.S. 2477 right of ways could exist on private lands only if they came into being before the land was transferred to private ownership. However, the expansive definition of right of way in the proposed legislation, and the fact that the legislation allows such rights of way to be significantly enlarged and developed, is a significant threat to the expectations of private property owners.

For example, S. 1425 deprives all nonfederal property owners in Alaska whose land passed out of federal ownership after enactment of the state's section line law in 1923 of control of up to a 100-foot-wide strip on each section line. S. 1425 would permit the construction of paved highways along those section lines without any compensation to the owner of the underlying land. That is a significant threat to private and Native property rights. I very much doubt that many or most such owners would readily acknowledge that possibility under current law.

Question 4. The Department's regulations state that some type of "construction" must occur for an R.S. 2477 right-of-way to be valid. If this is the case, what is meant by existing DOS regulations that state the grant becomes effective upon construction or establishment of a highway under state law. Why the addition of the word establishment when it was not part of the original statute.

Answer. Under long-established principles of law, the Department cannot give away by rule more than Congress has authorized it to do. The statute (R.S. 2477) says that rights-of-way are granted for "construction." The statute does not talk in terms of "establishment" under state law—it does not mention either "establishment" or state law.

If the word "establishment" were read as allowing highways to be established without "construction," it would contradict this principle. To avoid this lawless result, the word "establishment" must be read consistent with "construction." This can readily be done by reading "establishment" to apply when a highway that has actually been constructed within the terms of R.S. 2477, but which has not been validated or recognized as a R.S. 2477 right-of-way, is given formal recognition under some state law.

Question 5(a). You say that the Department does not have any record of the potential routes and that it would be a tremendous burden for you to gather that information. However, in the case of a state like Alaska as many as 1,700 potential routes were brought to your attention in 1971. Is that information still on file with the Department and could not that be used for a starting point?

Answer. The information supplied to the Department in the 1973 Alaska Trail Atlas would be of little use in determining the total number of potential routes that would be claimed today. For one thing, we would have to determine the congruence of the definition of "routes" claimed in the 1970s with the definition of "public highways" the Department employs today. A more reasonable starting point to determine the number of public highways that might be claimed in the State of Alaska could be the routes identified by the State of Alaska, R.S. 2477 Project (July 1993–August 1995). The Project used the Atlas as a starting point. Of approximately 1,700 routes identified in the Atlas, approximately 558 were identified in the Project.

Question 5(b). If the Department has no process in place to grant R.S. 2477 right-of-ways, what is meant when you claim you have recognized thousands of these rights?

Answer. The Department proposed regulations to establish a process for evaluating and recognizing R.S. 2477 rights since no such process currently exists. Very few R.S. 2477 rights have been acknowledged by the Department in the past. The Department has, however, granted thousands of rights-of-way under Title V of the Federal Land Policy and Management Act (FLPMA) and other statutes.

Question 6. Can you provide the Committee with any statistics on the number of valid or potential R.S. 2477 claims on a state-by-state basis?

Answer. We cannot, with available information, provide a reliable estimate of the number of valid or potential R.S. 2477 claims in any state. One purpose of the Department's proposed rules was to set up a process through which claims could come to the Department's attention in an orderly way. The end result would be reliable information, on which federal, state and local governments and private parties could act, regarding these rights-of-way—in contrast to the current situation.

Question 7. When asked if you had knowledge of any right-of-way that the state of Alaska has claimed or filed based solely on a section-line easement you answered, "yes." Can you tell me where this (or these) right-of-way is?

Answer. The State has purported to create property rights on the section lines through its section line statute, first adopted in 1923 and now codified in Alaska Statutes 19.10.010. Further, in *Girves* v. *Kenai Peninsula Borough,* 536 P.2d 1221 (Alaska 1975), the Alaska Supreme Court interpreted the section line law to have created valid rights-of-way. By incorporating state law without qualification, the

proposed legislation would recognize as a matter of federal law the rights the State has purported to create by passage of this law in 1923.

Finally, I note that Senator Stevens, who of course has long experience in Alaska, testified at the March 14 hearing that section line rights-of-way were claimed or used over homestead lands and other places where development occurred.

QUESTIONS FROM SENATOR CRAIG

The following questions do not relate to S. 1425 or to R.S. 2477 rights-of-way, but rather to the implementation of the provisions of FLPMA that provide for access across public lands for utility services and others.

Question 1. What is the total number of crossing permits or grants of rights-of-way issued by the BLM for utility services including telecommunications, and how many of them impose "strict liability"?

Answer. As of October 1, 1995, the BLM administered 20,160 rights-of-way pursuant to the Mineral Leasing Act, and 52,753 rights-of-way pursuant to FLPMA and other laws. This number includes rights-of-way for telecommunication uses (BLM calls them communication site rights-of-way).

We cannot tell you how many right-of-way grants include a strict liability stipulation, without reviewing each one individually.

Question 2. FLPMA provides that "strict liability["] can be waived. Has it been waived at any time since enactment of FLPMA in 1976?

Answer. The Title V right-of-way liability provisions of FLPMA authorize but do not require the imposition of "liability without fault," 43 U.S.C. § 1764(h)(2). BLM regulations provide for the imposition of "strict liability," apart from specified exceptions, at the discretion of the authorized officer, if an activity or facility within a right-of-way area presents a foreseeable hazard or risk of damage or injury to the United States. Justification for the imposition of a strict liability stipulation must be included in the right-of-way case file and decision document, which must be forwarded to the BLM State Director and BLM Director. Regarding the number of times it has been imposed, see answer to question 1.

Question 3. Public Law 98-300 required the BLM to waive rights-of-way fees for rural telephone and electric cooperatives. What is the BLM's policy with regard to this fee waiver and are there instances in which the BLM is charging cooperative (sic] the fee?

Answer. Public Law 98-300 amended FLPMA to provide that "[r]ights of way shall be granted . . . without rental fees for electric or telephone facilities financed pursuant to the Rural Electrification Act of 1936 . . . ." BLM regulations at 43 C.F.R. § 2003.1-2(b)(1), provide that:

> No rental shall be collected where:
>
> (iii) The facilities constructed on a site or linear right-of-way are or were financed in whole or in part under the Rural Electrification Act of 1936, as amended, or are extensions from such Rural Electrification Act financed facilities.

We are not aware of any situations where this regulation has not been followed.

Question 4. Does the BLM have the administrative authority to waive rights-of-way fees for rural electric and telephone cooperatives who do not have financing through the Rural Electrification Act?

Answer. In a number of circumstances, including where other federal or state or local governments or agencies are involved, Section 504(g)) of FLPMA (43 U.S.C. § 1764(g)) authorizes the Secretary to issue rights-of-way "[f]or such lesser charge, including free use as the Secretary . . . finds equitable and in the public interest." This provision is in addition to the "no rental fees" provision added by Public Law 98-300 discussed above. The Secretary has delegated the exercise of this authority to the BLM. Apart from 43 C.F.R. § 2803.1-2(b) (1) (iii) (quoted above), current BLM regulations provide that no rental will be collected if:

> The holder is a Federal, State or local government or agency or instrumentality thereof, except municipal utilities and cooperatives whose principal source of revenue is customer charges . . . .

43 C.F.R. § 2803.1-2(b) (1) (i). Thus, under the current regulatory scheme BLM waives the full rental fee charged to a municipal electric or telephone cooperative, not financed wholly or partly under the Rural Electrification Act, unless the primary source of the cooperative's revenue is derived from customer charges.

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