

RIGHTS-OF-WAY

HEARING BEFORE THE SUBCOMMITTEE ON NATIONAL PARKS, FORESTS, AND LANDS OF THE COMMITTEE ON RESOURCES HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

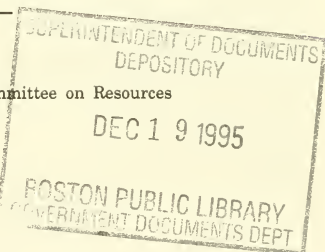
H.R. 2081

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

JULY 27, 1995—WASHINGTON, DC

Serial No. 104-31

Printed for the use of the Committee on Resources



U.S. GOVERNMENT PRINTING OFFICE

93-803 CC

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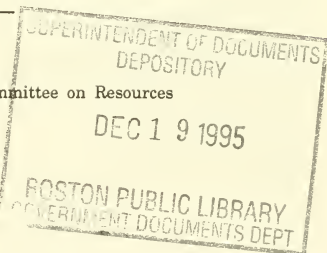
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For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-047770-0

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CONTENTS

	Page
Hearing held July 27, 1995	1
Text of H.R. 2081	34
Memorandum to Republican members, Subcommittee on National Parks, Forests and Lands on H.R. 2081	41
Statements of Members:	
Hansen, Hon. James V., a U.S. Representative from Utah and Chairman, Subcommittee on National Parks, Forests and Lands	1
Richardson, Bill, a U.S. Representative from New Mexico	33
Statements of witnesses:	
Fayad, Libby, Staff Council, National Parks and Conservation Association	27
Prepared statement	92
Groene, Scott, Staff Attorney, Southern Utah Wilderness Alliance	28
Prepared statement	96
Hjelle, Barbara, Office of Special Counsel, Environment & Public Lands Issues, Washington County, Utah	20
Prepared statement	69
Leshy, John D., Solicitor, U.S. Department of the Interior	2
Prepared statement	48
Liston, Louise, Garfield County Commissioner	16
Prepared statement	60
Masek, Beverly, Alaska State Representative, for Alaska State President Drue Pearce and Alaska State House Speaker Gail Phillips	14
Prepared statement	52
Additional material supplied:	
Coffey, PerryAnne, Director, Government Affairs, National Water Resources Association: Letter of August 10, 1995, to Hon. James V. Hansen	108
Groene, Scott, Southern Utah Wilderness Alliance: Memo of July 21, 1995, from The Utah Wilderness Coalition	101
Hjelle, Barbara, Office of Special Counsel, Environment & Public Lands Issues, Washington county, Utah:	
Settled Precedent on R.S. 2477	78
R.S. 2477 Highways in Utah Photograph Index	88
Masek, Beverly, Alaska State Representative:	
Department of Natural Resources: State of Alaska historic transportation routes	57
Katz, John W., Director of State/Federal relations and special counsel to the Governor of Alaska: Letter of July 26, 1995, to Hon. James V. Hansen	58

RIGHTS-OF-WAY

THURSDAY, JULY 27, 1995

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON NATIONAL PARKS, FORESTS & LANDS, COMMITTEE ON RESOURCES

Washington, DC.

The subcommittee met, pursuant to call, at 10:00 a.m., in room 1324, Longworth House Office Building, Hon. James Hansen [chairman of the subcommittee] presiding.

STATEMENT OF HON. JAMES V. HANSEN, A U.S. REPRESENTATIVE FROM UTAH AND CHAIRMAN, SUBCOMMITTEE ON NATIONAL PARKS, FORESTS AND LANDS

Mr. HANSEN. The Subcommittee on National Parks, Forests and Lands convenes to hear testimony on H.R. 2081, the Revised Statutes 2477 Rights-of-Way Settlement Act sponsored by myself and others on the Committee. As members of the subcommittee are aware, R.S. 2477 rights-of-way provide rural citizens access across the expanses of Federal lands in the West and in Alaska.

For 110 years, counties, cities, States and individuals were allowed to establish necessary rights-of-way across unreserved Federal lands to provide travel routes between towns, to schools and to homes. In 1976, Congress terminated this ability to establish new rights-of-way but failed to provide the mechanism to adjudicate the established routes. H.R. 2081 seeks to resolve this issue in a reasonable and efficient manner.

Secretary Babbitt has pending regulations that would place an incredible burden on the holders of these rights-of-way to prove what was already granted under the 1866 statute. H.R. 2081 levels the playing field by providing a procedure through which all rights-of-way may be settled.

Now I want you to listen to this next part, Mr. Solicitor. Critics will claim that this places an impossible burden on the Secretary to disprove these claims, yet, it is nothing more than what the Secretary himself expects from State and local governments. The simple fact is that rights were granted by Congress, those rights were accepted and our task is to catalog those rights and to determine which ones are valid and which ones are not valid.

I want to make it clear regardless of what critics say, the issue is not tied to Utah Wilderness or any wilderness. That is a worn out scare tactic and does not hold water. The ability to accept these rights was terminated in the same legislation that initiated the BLM wilderness inventories of 1976.

These are valid existing rights that must be adjudicated in a fair and reasonable manner. I would hope that we can end this hype and stop using this issue to pursue other ends. Let us find a way to settle this issue once and for all. This pertains to all of the areas in the west and many members are very concerned about it. You may think, well, if they are so concerned, why aren't they here? The main reason is we find ourselves in a situation where we are extremely busy.

We are trying to wrap this thing up. We are holding caucus meetings, both the Democrats and Republicans, and I had to walk out of some pretty important meetings to get here on time and only made it by 15 seconds so I apologize for that but we did make it.

Mr. HANSEN. We will now ask the Solicitor to come up here and I especially want you to respond, if you would, and what we have discussed among our group is why the Secretary wants to put the burden on the people and our bill merely puts it on the Secretary. Actually, most of our folks would rather go back to the way it was prior to the 76 flipback but, sir, it is good to see you again and thank you for appearing.

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

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

Mr. HANSEN. We are not going to limit your time because we want to hear everything you have to say.

Mr. LESHY. Thank you very much. I am pleased to have the opportunity to come back here again and testify today on R.S. 2477 and specifically on H.R. 2081. I will summarize my written statement, which elaborates on the reasons that the Department has to oppose this bill. In our judgment, it does more than simply level the playing field on R.S. 2477; it really stacks the deck in favor of R.S. 2477 claimants.

It would make it very easy for anyone to file new and sometimes frivolous claims, and it would make it very burdensome on the government to reject the ones that do not meet the statutory criteria. We fear that under this bill the public lands could be littered with thousands of new rights-of-way. The net effect of this bill could also quite likely restrict, without compensation, existing rights in private property that were once public lands but can be subject to R.S. 2477 rights-of-way.

Under the bill, virtually anyone on the planet, frankly, who uses or could use an R.S. 2477 right-of-way could file a claim and has ten years to do so. The bill only requires to support that claim a notice, a map, and a general description of the right-of-way. The bill would then require the United States to accept or reject every claim within two years, no matter how poorly demonstrated, and then in order to protect the rights of the public the United States would have to file a lawsuit with respect to each claim that it rejected within two years in order to preserve its objections; otherwise, the claim is deemed valid. The bill would give the United States the burden of proof on all issues.

Our fear is that in effect this bill would allow anyone to file a piece of paper and then require the government to file a lawsuit in order to disprove the claim no matter how poor the claim is.

This is really unprecedented, I think, in public land law; that the United States has to respond to any claim with a lawsuit to contest it. A claimant's failure, by the way, to file even this minimal notice within ten years has no effect on the claim because Section 5(b) goes on specifically to provide that failing to file the notice does not relinquish the claim.

In short, our fear is that this bill would multiply rather than reduce the conflicts and confusion over R.S. 2477. The Department's goal in its rulemaking is to bring fair and prompt conclusion to the uncertainties left by the repeal of R.S. 2477 by Congress nearly 20 years ago. This bill, in our judgment, does the opposite. It reopens indefinitely the opportunity that R.S. 2477 once provided for obtaining rights-of-way across Federal lands and does so at the expense of existing law, national parks, wildlife refuges, military lands, other sensitive Federal lands, as well as Indian and Alaskan native lands and private lands.

Furthermore, the bill does not provide a workable process or standards to evaluate claims. Among other things, Section 5(c) applies State law to R.S. 2477 decisions without restriction, whether or not the State law is consistent with the terms of R.S. 2477 itself. In our judgment, State law does have a role to play in R.S. 2477, but it cannot operate to supersede Federal law and specifically supersede R.S. 2477 itself. State laws that don't require the construction of highways, for example, don't meet the clear and plain requirements of R.S. 2477.

Furthermore, the bill seems to say that State law applies regardless of when State law was enacted. The only State laws that the courts and the Department have recognized in the past as applicable are those that were in effect when the right-of-way was created or in effect as of the date of repeal of R.S. 2477. But this bill, as we read it, allows any State law passed tomorrow, next week or five years from now to apply to govern the R.S. 2477 rights-of-way. That is a clear departure from past practice.

Let me emphasize our concern that the bill does not protect private property as well as public property. It does not consider the implications of creating access across public lands when those same rights-of-way pass over private, Indian or Alaskan native lands. And let me mention here a particular concern. We were contacted yesterday by the Alaska Federation of Natives, who just found out about the hearing and wanted me to relay to you, if I can, their request that the public record be kept open on this hearing for a couple of weeks so that they could submit some comments.

Let me mention a few other specific problems with the bill. We disagree strongly with Section 3(d), which restricts standing to participate and challenge actions of the Department under this bill. We are greatly concerned with the fact that the bill places the burden of proof on the Government on all issues, even on those issues where the basic information to prove or disprove the claim is in the hands of the claimants, rather than the Government. This, by the way, reverses the longstanding rule of law that in public land grants ambiguities are resolved in favor of rather than against the Federal Government.

Let me address, Mr. Chairman, as you mentioned in your opening statement, the burden allegedly put on claimants to rights-of-

way by our proposed regulations. Let me emphasize, we have gotten more than 3,000 comments on those proposed regulations. The comment period is still open. We have not moved forward yet with final regulations. The comments range from strongly supportive to strongly opposed and all points of view in between.

We would take, as we move forward through the process, a very careful look at the issue of burden that these proposed regulations allegedly place on claimants. We want this process to work. We want it to be fair. We do not want to impose undue burdens on people and that is an issue we would certainly address as we move forward through the rulemaking process.

Finally, we also question the wisdom and the necessity of Section 5(c) of the bill, which would provide new and quite restrictive procedures on R.S. 2477 rights-of way road closures. As written, this could seriously endanger public safety by precluding road closures in cases of flood, fire, or other dangerous conditions. Let me also emphasize that R.S. 2477 rights-of-way cross military bases and as we read 5(c) it could even endanger national security, because you might not be able to close a military base to public traffic on R.S. 2477 rights-of-way in cases of national emergency without, I think it is, a one-year notice in the proposed bill.

In short, the bill complicates, in our view, and prolongs the existing problems of dealing with R.S. 2477. I appreciate the opportunity to testify, and I am happy to answer questions.

[The prepared statement of John D. Leshy can be found at the end of the hearing.]

Mr. HANSEN. Thank you, Mr. Leshy. I appreciate your comments. Maybe you better check on national emergencies. You will find that the President can superimpose himself for any of these things. Under the Secretary's proposed rule any person could file an appeal to any claim and thereby tie up the system for decades. You don't want every person to have the ability to file a claim or we don't desire that every person be allowed to file an appeal that would tie up the claim for decades. How can we resolve this?

Many of us feel that the regulations coming out are so one-sided, so unfair to the people, so in violation of what has happened for many years we are trying to find a middle ground. Now under the Secretary's rule any person could file an appeal and tie you up just as much as the other way. Is there a way to resolve this or are you folks in stone on this?

Mr. LESHY. The proposed regulations, as I recall, take the general approach to administrative appeals that the Department takes in virtually all of its actions; that is, any person adversely affected by an action can file an administrative appeal, which is basically the same kind of standing requirement as the Federal courts apply.

These are public lands, Mr. Chairman, and the public of all kinds, cattlemen, ranchers, miners, graziers, recreationists, all have an interest in how these lands are managed and many of them have an interest in the right-of-way access issues. We think that the current standing requirement to show adverse affect of a decision in order to appeal it actually works pretty well.

The disruptive litigation that makes the newspapers on occasion affects a very small part of the business of the Department. We

would rather keep the channels open for aggrieved people to appeal. We think that is a price worth paying.

Mr. HANSEN. Well, let me beg to differ with you. It has worked well because your regulations aren't in place. That is what we are concerned about is the proposed regulation. Right now we would agree with you it works well but your regulations aren't in place, and as you may know in the appropriation bill there is a moratorium against these being put in place.

I am sure you recognize that in large part this bill we are proposing turns your regulations on their head. Instead of placing a tremendous unfunded and perhaps impossible mandate on the State and local government, it places a burden on the agency to take the responsibility. But you are the landlord of that area so we feel you should do it. Obviously, your proposed regulations are far from perfect and this bill is far from perfect. But what bothers me about the Department of BLM and the Department of Interior is that you are right and we are wrong.

We do not accept that. We want to say maybe there is some middle ground we can come up to that would be acceptable to our people in Alaska, Utah, Nevada, Oregon, or wherever it may be. Our people still want to put their kids on school buses and go across that area. They still want to use those roads that they have had for years. Your regulations, in a way it looks like they said in one letter to me here comes the gestapo telling us what we can and can't do.

I agree with your statement this is a republic land. I don't care who they are. They can be from New York or Florida but the guy in Panguitch, Utah, still has a right to go across that ground and we are just trying to protect that. Now how much in stone are you folks? Are we going to go to the mat on this or can we come up with some compromise?

Mr. LESHY. As I said, Mr. Chairman, we are in the middle of a rulemaking process and we would be happy to work with you as we go through preparing the final rules. As I mentioned in my opening statement, the question of burden on local governments to claim these rights-of-way is an issue that we are very sensitive to. We want to make these regulations work. We are not locked in stone on the proposed regulations on that issue.

We don't think that legislation is necessary, except there may be one point at which legislation would help, and that is to bring this process to a close. That is, this is a 130-year-old statute. It was repealed 20 years ago. There has to be some sort of end to this process. We think we have the authority administratively to bring an end to the process within a dozen or so years. If Congress wanted to legislate on that point we would welcome it.

In terms of the burden issue and the confirmation issue, we think we can do this by rulemaking in a fair way, and we would be more than happy to work with you in achieving that result.

Mr. HANSEN. In your opening remarks you talked about all the frivolous claims and I want the record clear that my intent in this legislation is to adjudicate these rights that existed as of October, 1976 and certainly not to create new rights. What proof do you folks have that the net result in this bill could litter the public lands with thousands of new rights-of-way? I doubt if you have so

little confidence in your agency that you will not be able to disprove frivolous claims.

If not, what have your BLM employees been doing out there on the ground for the past 19 years? Has the agency taken any efforts to catalog the roads on BLM lands regardless of whether they are claimed as R.S. 2477 rights-of-way?

Mr. LESHY. One of the concerns is, frankly, just the workload burden. In our view, under the bill, it would be too easy to file a claim. You essentially file a piece of paper and a map and you make a claim and then the Department has to file a lawsuit to disprove that claim. That is problem number one. Problem number two, as we read the bill, it appears to apply State law wholly to govern this process exclusively. Suppose a State that has a section line law (as a few States do) that says every section line is a right-of-way, without regard to whether a highway is constructed on it or not. This bill would appear to validate all those laws which would make, of course, a cross hatch one mile apart of rights-of-way across all public and private lands in the State. If this bill really means it when it says State law applies without restriction, that is the result we might have under this bill and that would be, I think, totally unacceptable to just about every user of public lands.

Mr. HANSEN. In your testimony you state that a two-year time period for the agency to respond to a filed notice is too short a time period.

Mr. LESHY. It is really that, plus I think more objectionable, the fact that if we respond within two years and say we don't think you have a right-of-way, that doesn't end the matter. What we then have to do within two years of that is file a Federal court lawsuit, which is a major undertaking in order to invalidate the claim.

So every piece of paper filed that we think doesn't establish a right-of-way, we have to file litigation to contest it. It is so easy to file papers, you know, we have 400,000 mining claims out there. I would think we might have 400,000 rights-of-way claims. And that is 400,000 lawsuits that we would have to file under this bill in order to clear off these claims, some of which, because making claims is so easy, would undoubtedly be spurious.

Mr. HANSEN. Yet in your own proposed regulations, you would require the holder of right-of-way to establish absolute proof that the right-of-way is valid so why is a two-year period sufficient for a financially strapped county but is not sufficient for the Department of Interior?

Mr. LESHY. As I said, under the proposed bill the problem is basically that it is so easy to file claims. We then have to respond within two years, and then we have to file a lawsuit to challenge and contest and clear the claim, no matter how spurious, and we have the burden of proof on all of these issues. That is why we say the deck is really stacked in favor of these claims and against the Government.

Mr. HANSEN. Of course, we feel and many of our people out in those areas feel that it is absolutely the opposite on the regulations. In fact, the governor of one of our States said if you sat down and wrote these regulations and made them as bad as you could and then take it times 1,000, you would find what the regulations

are. And as we have gone partly through this, we feel the same thing.

Mr. Leshy, under your proposed regulation, you place the entire burden of proof on the holder of a right to prove once again that a right was granted in 1866. Do you know what an enormous burden that is for these little financially strapped counties wherever they may be for entities to go back and try to figure this out all the way to 1866? Why is it so improper that this burden be shifted to the agency? You are the landlord. The BLM was fully functional in 1976. Just refer back to your own records and make a simple judgment as to whether or not you approve or object to the right-of-way.

Mr. LESHY. Many of these rights-of-way, of course, were established after 1866. They could have been established anywhere up to 1976 on unreserved public lands. The proposed regulations' impact on, and the burden that they would place on, local governments has been, I believe, somewhat exaggerated. What we have talked about in the proposed regulations is things like evidence of construction and maintenance.

If a highway is maintained by a county, there should be absolutely no problem with verifying that with very minimal evidence. We have no desire to put the local governments through an elaborate paperwork requirement for obvious rights-of-way. The problem is the ones that are not obvious. The problem is the ones that are either drawn on a map and don't exist on the ground, or simply don't show evidence of construction, such as Congress required in 1866.

Mr. HANSEN. But what you are telling us is you haven't kept sufficient records, and if that is the case, what makes you think the counties have done it?

Mr. LESHY. We have kept no records under R.S. 2477 because there was no process ever created to keep records. In other words, there is no permitting requirement, no notice requirement, no requirement ever since 1866 to submit any of this information to the Government.

Mr. HANSEN. But there has been no requirement on the counties to keep it, so under your regulations what you are saying is there has been no requirement but now we are asking you to say you have to do it since 1866. I can't understand this one-sided argument here. Here you are the big rich Federal Government. You are the ones who are supposed to keep all of these records.

You are going to go to these poor little counties that don't have anything and switch their entire thing every four or five years with new commissioners, new regulators, new recorders, new treasurers, and you want them to do it under your regulations. I can't see the equity in that.

Mr. LESHY. The context here is that Congress granted a right-of-way for highways that are constructed to cross unreserved public lands, and the question is whether a particular highway has been constructed across unreserved public lands. And the people who construct the highway should, if it is a legitimate highway, be able to show evidence that it was done, with minimal burden, and that is essentially what our proposed regulations are aiming to require.

Our aim in these regulations is not to require elaborate evidence or to contest obvious rights-of-way. There are clearly many out there that we would assume can be validated with minimal pain and paperwork, and if we can figure out a better way than our proposed regulations to do that, we are happy to consider it. The problem is always, of course, in the marginal or spurious cases where claims are made that do not really fit within the terms of the statute.

Mr. HANSEN. No, I say, respectfully, Mr. Leshy, your testimony implies that the agency does not trust State or county government or citizens to file a notice in good faith. And I can tell you that coming from an agency that has attempted to intimidate and spark litigation by issuing trespass notices to counties in my State and in the State of Alaska and the State of Oregon and the State of California for fixing washed out roads, there is really not much trust in the agency that rights will not be frivolously denied by the agency under your proposed regulation.

How do we handle this little gap of mistrust that we apparently have between the local folks and the big bad government?

Mr. LESHY. We would certainly like to close that gap. In many States there is no problem as far as we can tell. There are a couple of places where there have been many, many thousands of miles of rights-of-way claimed, some of which we think don't exist or are exaggerated. So in our view it is considered, West-wide, a fairly localized problem. We have heard a lot of support for our regulations as well as some opposition.

Again, let me emphasize that in the rulemaking process, we have not closed on this, and we would like the opportunity to prepare final rules that are constructive and that move this process forward.

Mr. HANSEN. Many of our people in these counties that I referred to in the States feel that these regulations were drafted and their requests were completely ignored. I have got stacks of letters saying that. Why would they say that?

Mr. LESHY. I am not sure, since we haven't completed the process. We haven't prepared final regulations. We haven't had an opportunity yet to respond to the comments received.

Mr. HANSEN. Why is it such a problem in Utah and Alaska especially?

Mr. LESHY. I am not sure. I think to some extent all public lands issues in Utah and Alaska have been controversial for the last 15 years or so. Clearly, wilderness is tied up with this to some extent, but I am not exactly sure why most of the problems and controversy seems to be confined to those two States.

Mr. HANSEN. Our people in Utah tell us there are 5,000 claims alone in Utah pending.

Mr. LESHY. Five thousand rights-of-way claims?

Mr. HANSEN. Yes.

Mr. LESHY. That could be right.

Mr. HANSEN. Five thousand times these little counties are going to have to prove under your regulations that they have a right-of-way, and they have to go all the way back to 1866 to prove it. This will drain them. We had something called the Burr Trail. We had a pretty good relationship with our environmental community for

years until the Burr Trail came up, and then the little county of Garfield had to come up with hundreds of thousands of dollars and, as I recall, they had to turn to the Governor and his contingency fee, if I am correct, to even pay the legal fees on that, probably the worse example of the Government that I have ever seen in my entire life.

The Burr Trail has been around since I was a kid. I used to drive a jeep down it when my dad had uranium claims down in that particular area, a well-established road. In fact, I took the park director down there at one time. He thought it was like the Bright Angel Trail or the Kaibab Trail down in the Grand Canyon, and I still remember his comments. He said, "Hell, Jim, this is just a road." I said, "Yes, you are right, Mr. Mott, that is all it is. But anyway I am a little concerned about it."

In your proposed rule, are you willing to commit to balancing the burden in your final rule or are you folks in cement? We are getting the impression, I mean I talked to your boss, Mr. Babbitt, and others. I get the impression that come heck or high water you are just going to see it through for the reason of closing up a lot of ground. Now I hope that is wrong.

Mr. LESHY. This is not about closing up ground or opening up ground. This is about providing a fair process for testing and determining the validity of rights-of-way claims across Federal land. We are not locked in stone on the burden issue in particular. It is something, as I said, we are sensitive to. We want to create a process that works.

With regard to the Burr Trail, if I may mention, the Burr Trail litigation is, in effect, the reason why an orderly process is necessary, and why rules are necessary, why a departmental administrative process is necessary—

Mr. HANSEN. I wouldn't disagree with that. I would agree with your statement. Where we are coming apart is we just hate to see these little communities that have a tax base of zilch now having another huge responsibility put on them because the BLM doesn't want to do the work themselves. That is what we are saying. Here the responsibility on these communities is awesome.

Put yourself as a county commissioner in one of those little counties. Some of our little counties down there are owned by the Federal Government 80, 90 percent, and they can barely make it and yet people come in by the hundreds, trash their area. They have to put out the fires. They have to pick them up because they break their legs hiking and all that stuff. And here comes another big hit from the Federal Government.

All we are saying is we would just like to see a little equity in this. Let me ask you, if we send you some suggestions to your rule-making taken out of our bill, could we have a response to those?

Mr. LESHY. Sure. Absolutely. As I said, we are genuinely interested in cooperating.

Mr. HANSEN. I would just as soon not pass this bill. If the BLM would take a moderate position, I would just as soon not bring this bill forth. We have enough support to get it right to the President's desk right now but I don't really want to do that if you come up with some reasonable approach.

Mr. LESHY. We will be happy to look at any suggestions you have and respond to them. As I said, particularly on the burden issue, I think your interest, and the Department's interest in minimizing the burdens on local government, while making sure that valid rights-of-way are recognized and invalid rights-of-way are rejected, is the same.

Let me also mention, as we both know, we may run out of money to process the rulemaking, come October 1, for a year if the House and Senate appropriations proposals make it through. So you'd better send your responses or your comments down quickly so we can get to them before October 1. Otherwise, we will have to wait a year.

Mr. HANSEN. Well, the difference between you and these little counties is, they can't go in debt.

Mr. LESHY. Right, I guess.

Mr. HANSEN. They have laws that say they can't do it. I remember when I was Speaker of the House, the attorney general of my State said to me, "If what you spend exceeds what you bring in you are personally liable." It has a real chilling effect on us in the legislature. Too bad that doesn't apply here.

The gentleman from California, Mr. Radanovich.

Mr. RADANOVICH. Just for a point of clarification, I don't know if the question needs to be asked of the gentleman testifying or by staff but how does this fit under the unfunded mandate rule? Clearly, this is an unfunded mandate on local agencies. If the cost of determining the validity of the rights-of-way are placed on county government, that is an unfunded mandate.

Mr. HANSEN. If I may, if the gentleman yields, I think the gentleman has hit upon a good point and one that very likely that under Barbara Vuchanavich's thing that we are looking at right now that maybe this should come up. However, this regulation isn't here. As the gentleman from California is perfectly aware, it affects an awful lot of people in your State.

Since 1866 up to 1976 it went along that the counties and the State pretty well established these roads. Then when the FLPMA Act was passed, the current Administration felt that it was necessary for them to determine certain regulations. The regulations that have been proposed, I think all 11 western States and Alaska vigorously opposed these regulations saying it would cause a complete undue burden on the counties and the State.

That is the reason for the bill we have in front of us and why Mr. Leshy graciously is here today as are other people to discuss this. We feel that the burden would be so horrendous that it would in effect break the budget of half the counties in the west or else they would just roll over and accept it. And we are saying the regulation, this bill which we are pushing today, is one that puts the emphasis on the BLM and not on the State and counties.

Mr. RADANOVICH. Right. I guess in a perfect world it would be nice to see a problem brought to our attention like this with a price tag attached so that it can be made an item within your own budget rather than the idea that you would call local government into question and assume that they are going to shoulder that responsibility. That is my statement.

Mr. LESHY. Mr. Chairman, if I could respond briefly. A couple of points: One is on the unfunded mandates issue. The context here is important to keep in mind and that is, number one, these are public lands we are talking about, Federal lands, military bases, national parks, etc. The issue here is Congress passed a statute well over a century ago that said State and local governments could acquire property interests in those lands under certain conditions. The question these regulations revolve around is, have the State and local governments satisfied the conditions to establish the property interest.

The United States made an invitation, and the State and local governments can accept that invitation under certain conditions, and the issue is, have the conditions been satisfied. It is not an unfunded mandate in the sense that the United States is requiring them to take some action for the United States' own benefit. The United States is in effect requiring them to show that they have satisfied the terms of the statute under which they acquire, for free, valuable property rights and public lands.

So I don't think there is, strictly speaking, an unfunded mandates problem with the regulations. Having said that, let me reemphasize that we are greatly sensitive to the burden that the proposed regulations might place on State and local governments in terms of the showing required. We don't want to argue, it is in nobody's interest to argue, about the easy cases where the rights-of-way are clear, and if we can find a method to ease some of the concerns of State and local governments, we are happy to do that.

I do not think we have the opposition of all 11 western States on a proposed regulation. A number of States were either silent or generally submitted fairly supportive and constructive comments. I have met with a number of groups and State interests out there. The western State land commissioners, for example, had some very constructive ideas about the proposed regulations.

Finally, let me also emphasize that the issue here does not concern solely public lands. Typically these rights-of-way can be established across public lands, but many of those public lands became private after the rights-of-way were established. The easier you make it to establish and confirm rights-of-way across public lands, the easier you are making it to also establish those same rights-of-way as they continue across private lands so there are really not only public property interests, but also private property interests at stake.

The more a local government, let us say, can establish a right-of-way across a military base or a national park, well, those rights-of-way don't usually end at the boundaries of the Federal lands. They also cross lands that used to be Federal but are now private, and so every time you enlarge a right-of-way opportunity under R.S. 2477, you are usually enlarging the right-of-way that traverses adjacent private property interests as well, and that is a significant concern.

Mr. HANSEN. Does the gentleman from California have further questions? Of course, the intent of our legislation is not to enlarge or add roads, it is to adjudicate the existing rights-of-way, and it is a right-of-way whether it is public ground or it is private ground, it is still an existing right-of-way. And so we don't want to get car-

ried away on the idea we are trying to create new roads. That is the last thing in the world we want to do.

What we want to do is adjudicate the roads that we have, and that is the criteria. The gentlelady from Idaho just walked in. We were just going to finish with our witness here who has been very kind and courteous to come up and spend time with us. I know it is probably not a comfortable thing to do but this is regarding R.S. 2477 roads which are quite important to us. Catching you cold this way is totally unfair and I apologize, but would you like to ask Mr. Leshy any questions? He has been very gracious in responding to our questions.

Ms. CHENOWETH. Thank you, Mr. Chairman. I do have some questions, and I apologize for the lateness of my arrival. I was caught up in another committee meeting. And I think Mr. Leshy would feel neglected if I didn't ask him questions, right?

Mr. LESHY. Delighted.

Mrs. CHENOWETH. I have received a letter that was sent by the Bureau of Land Management to a Mr. Doug Baker, in Nezperce, Idaho, who had some private land and permits and authorizations were offered and authorized under H.R. 2477 by the Bureau of Land Management and the Forest Service for other companies to use this particular road, but they were denied to Mr. Baker.

In a letter sent July 20, 1995, the Bureau wrote, "If you cause any disturbance to roads on public land or use them for hauling timber without a proper authorization from this office, you will be in violation of the Federal Land Policy and Management Act and the Federal regulations at 43 C.F.R. Part 2800 and 9239. This letter will serve as official notification that if you are engaging in any of the above-mentioned activities, you must cease and desist immediately. If you have not begun such activity, do not engage in such actions.

"Due to your prior knowledge of the right-of-way requirements of the BLM which is well-documented, your involvement in such activities will constitute an intentional trespass subjecting you to possible criminal penalties." Now I submit this to you because I think it is rather harsh, especially in view of the fact that others are using the road.

I thank you for the communication that you have sent to me based on previous questions, Mr. Leshy, but I think we will agree that although R.S. 2477 was repealed in FLPMA, it meant repealed from the point of view that no new R.S. 2477 roads would be authorized under FLPMA.

However, under FLPMA and under the Shultz decision, existing roads under R.S. 2477 prior to FLPMA were to be recognized. Now in view of that, can I have your specific attention to this particular issue because it is inconsistent with our previous communication together in these committee hearings?

Mr. LESHY. Certainly. Congresswoman Chenoweth, I will be happy to look into that. I, of course, am not familiar with the specific situation. I am actually a little mystified if this is an R.S. 2477 right-of-way. One of the longstanding policies of the Department, which we think is consistent with what Congress intended is that it be a public right-of-way. I mean, it is not for private use. If it is available for general public use, I don't frankly have any idea

what Mr. Baker is doing that would create the problem, but I am happy to look into it and to get back to you specifically on that.

Mrs. CHENOWETH. I do want you to know this is a R.S. 2477 road that has been declared by the county commissioners.

Mr. LESHY. If I could just speculate for a moment, sometimes the Federal land agencies have to close roads for fire danger reasons and that sort of thing. Conceivably, that might be involved here.

Mrs. CHENOWETH. I can assure you that is not the case, and I appreciate your personal attention. The last time you testified before this committee, we did discuss R.S. 2477 and the decision before the Ninth Circuit Court of Appeals. Would you agree with me that the Ninth Circuit Court of Appeals decision still stands now on the Shultz decision?

Mr. LESHY. No, it has been vacated. What happened in that case was the Ninth Circuit issued a ruling on an R.S. 2477 right-of-way in Alaska crossing a military base and the United States petitioned the court for a rehearing on that case and the court granted rehearing, vacated its earlier decision, and ordered new argument on the issue. The argument was held, I believe, last December.

After the argument, the court ordered the parties, actually requested the parties, to try to mediate their disagreement, and the government and Mr. Shultz went into mediation for a period of several weeks or a few months. They were unsuccessful, and it is now back before the court so there is no outstanding court decision there. We are awaiting the court's decision on rehearing of its earlier decision.

Mrs. CHENOWETH. But in normal cases wouldn't it be that the original decision would stand until the court decides otherwise?

Mr. LESHY. I believe the process used here is the process often used. When they grant rehearing they vacate, which means they wipe out, their earlier decision and they will come out with a new decision which could reach the same result as the old decision or it may be different. We are just waiting to see. So there is really no decision outstanding in the Shultz case at this point.

Mrs. CHENOWETH. Can I have your commitment that your department will abide by Idaho State law with respect to declaration of R.S. 2477 roads by county commissioners? Can I get your commitment that we can see that kind of cooperation with the agency?

Mr. LESHY. We have long taken the position that is in the proposed regulations, that we follow State law to the extent that it is consistent with the terms that Congress laid down in 1866 in the statute itself. In other words, where Congress has made a judgment about an R.S. 2477 right-of-way, that controls over inconsistent State law, but where State law is not inconsistent, we will certainly abide by it.

Mrs. CHENOWETH. See, the problem is that my constituents have been fighting the Department for years, and they have been forced to provide reams of documents and spent thousands of dollars, and often have to go to court to fight for access to their own property rights, and it is time that the Department, we think, be accountable to the existing law, and I thank you for any indication of cooperation you are willing to give us. Thank you. Thank you, Mr. Chairman.

Mr. HANSEN. Do you have any further questions? We are not putting any time limits on you today. Apparently not. Thank you, Mr. Leshy. It is very kind of you to come before the committee. I think you will probably find these next two panels very interesting if you are not terribly busy, but that is entirely up to you, sir.

Mr. LESHY. Thank you very much for having me, Mr. Chairman. I am going to have to run to some meetings down at the Department but I am leaving a couple of very good people here to take good notes so I will hear about it.

Mr. HANSEN. Well, Mr. Leshy, we are going to take you up on your offer and send you a number of things that we think would improve the regulation, and we would really appreciate a response.

Mr. LESHY. Thank you very much. We would be happy to respond.

Mr. HANSEN. Thank you. We appreciate your being here. Our next panel is Representative Beverly Masek for Alaska State President, Drue Pearce and Alaska State House Speaker, Gail Phillips, who she is representing at this time; and Louise Liston, Garfield County Commissioner from my home State of Utah; and Barbara Hjelle, Office of Special Counsel, Environmental & Public Lands Issue of Washington County.

We appreciate you being here, Representative. It is a pleasure to see you, and we will now turn the time over to you.

STATEMENT OF REPRESENTATIVE BEVERLY MASEK, FOR ALASKA STATE PRESIDENT, DRUE PEARCE AND ALASKA STATE HOUSE SPEAKER, GAIL PHILLIPS

Ms. MASEK. Thank you very much, Mr. Chairman, and members of the subcommittee. Thank you for this opportunity to testify on potential legislation involving Revised Statute R.S. 2477 rights-of-way. For the record, my name is Beverly Masek, Alaska State Representative from Willow, Alaska. I am an Anathabaskan Indian, a member of the Angalic tribe.

I will be testifying, presenting this joint testimony, on behalf of the Alaska State Senate and the House of Representatives. We have provided some written testimony which I request be entered into the record. I would also like to point out that we are commenting on discussion, draft legislation dated July 17, 1995.

Mr. Chairman, I want to express the strong support of the Alaska legislature for Federal legislation recognizing the validity of rights-of-way granted under the previous revised statute R.S. 2477. Since Alaska joined the union in 1959 we have seen an extensive land and resource allocation process. Native claims were settled, huge areas of Federal lands were designated as national parks, refuge, forest and wilderness areas, and the State also selected its land entitlement. Through this patchwork quilt of landownership and designations, it is critical that we maintain corridors for a variety of uses including subsistence, resource development, utilities, transportation and recreation. You are being given some of the maps of Alaska which will illustrate this point very clearly. The trails and roads you see on the map have historically been used by Alaskans, some of them for over thousands of years.

R.S. 2477 designations are the clearest method for legally establishing and maintaining these access corridors. When Congress

passed ANILCA in 1980 it recognized the need for transportation corridors. The law created a process in Title 11 for establishing these corridors, but the agencies responsible for implementing Title 11 created such a complex process that there has never been a major corridor established under Title 11 in Alaska.

Although Congress clearly recognized the need for access throughout Alaska for a variety of purposes, we would have to say that Title 11 has not served as a replacement for R.S. 2477 nor was it ever intended to replace R.S. 2477 designations. In Alaska the vast Federal holdings and Federal regulations of these lands have far-reaching implications of public access to lands owned by the State, native corporations and private individuals.

The rights-of-way granted in Section 8 of the Mining Law of 1866, commonly referred to as R.S. 2477 rights-of-way, were open-ended, self-executing grants by the Federal Government that were accepted or established by public use. No prior Federal application for such a right-of-way was required, and no notation appeared in the land office records.

In effect, Mr. Chairman, the R.S. 2477 grant operates to convey a permanent right-of-way to the public across unreserved Federal lands. Federal court rulings and the Department of Interior regulations confirmed this interpretation. Also, these rulings and regulations have concluded that State law will govern the method of acceptance or establishment of an R.S. 2477 right-of-way and the boundary and scope of that right-of-way.

In Alaska the State Supreme Court has adopted the procedures for accepting R.S. 2477 rights-of-way as follows: "Before a highway may be created, there must be either some positive act on the part of the appropriate public authorities of the State, clearly manifesting an intention to accept, or there must be public use for such a period of time and under such conditions as to prove that the grant has been accepted."

Historic and traditional use rather than actual construction of the right-of-way is the focus of R.S. 2477 process in Alaska. It is also important to point out that the R.S. 2477 grants were intended to include any public passageway such as a path, wagon road, pack trail, street or alley, or any other common or customary transportation routes. In Alaska this includes foot, horse and sled dog trails.

Although many of you may not be familiar with Alaska, I am sure you have heard of the Iditerod Trail sled dog race. Mr. Chairman, I have personally completed this 1,100 mile race four times as dog sled racer, and major portions of the Iditerod Trail are R.S. 2477 designations, and without them, we wouldn't even be able to run the Iditerod. Regulations recently proposed by the Department of Interior relating to R.S. 2477 rights-of-way attempt to disable the grants already vested in Section 8 of the Mining Law of 1866.

Interior's new interpretation of R.S. 2477 does not recognize the establishment of the right-of-way unless there has been an affirmative determination made by Interior or a Federal district court on the existence or scope of the claim. This attempt by the Department of Interior to alter established interpretations of R.S. 2477 grants is unacceptable. Because of the importance of these changes

to Alaska, we are asking Congress to once again clarify its policy related to the granting of these rights-of-way.

Mr. Chairman, you can see from these maps that Alaska has very few roads. As a result, many of our rural residents are dependent upon seasonal shipments by river barge or air transportation for the necessities of life and this makes the cost-of-living extremely expensive in these areas where there are very few economic opportunities. Transportation corridors can also be very important in the development of natural resources which can provide jobs for the people.

I have traveled personally to over 140 rural villages speaking to the children on setting goals and drawing upon their inner strength to be successful. We know that building a private sector economy is critical to the survival of these villages, especially considering the reduction in the Federal and State spending money. Maintaining access to trails which have been used for hunting, fishing or trapping is also very important to preserving the subsistence lifestyle in rural Alaska.

The truth is that our villages rely on a combination of subsistence and cash economy and many of our native people are very successful in both the modern and the historic world. The image of Alaska natives living entirely off the land is a romantic notation of people living in urban areas of America. Our people also need jobs.

In conclusion, Mr. Chairman, and members of the subcommittee, the Alaska State Senate and the House of Representatives applaud your efforts to address the access issues related to the rights-of-way granted under R.S. 2477. We have offered some specific comments on the draft legislation which are attached as an appendix to our written testimony. I hope the maps we have provided for you demonstrate the current access problems we face in our State.

This situation can only get worse if the limited administrative processes are further restricted or eliminated. Congressional clarification of the rights-of-way granted under R.S. 2477 would be a giant step forward for the State of Alaska. Again, I want to thank you for addressing these important issues. Thank you very much.

[The prepared statement of Beverly Masek can be found at the end of the hearing.]

Mr. HANSEN. Thank you, Representative, for your excellent testimony and I have a letter here from the Governor of Alaska in support of H.R. 2081. Without objection, it will become part of the record and it is open for any member to look at if they would like to.

Commissioner Louise Liston, we appreciate you being with us again and we will turn the time to you.

STATEMENT OF LOUISE LISTON, GARFIELD COUNTY COMMISSIONER

Ms. LISTON. Thank you, Mr. Chairman, members of the committee. I appreciate the opportunity to be here and appreciate you holding this hearing to recognize the validity of rights-of-way granted under Section R.S. 2477 of the revised statute. And my name is Louise Liston. I am a commissioner from Garfield County, Utah, the county which actually has been battling the Burr Trail

case for the past eight and a half years that I have been a commissioner, and costing the taxpayers of my State and county up-to-date well over a half million dollars and still going on.

The Burr Trail continues to be a monstrous example of a system of management that is not working and I hope that I can point that out today. Over the past several years, R.S. 2477 rights-of-way issues have become increasingly important to counties and private property owners and increasingly burdensome to Federal agencies who manage the lands adjacent to those rights-of-way.

Historical data dictates that those roads be treated as a public right but environmental groups have challenged that right in many cases and as a result agency policy and direction have that clarity and consistency. Disputes inevitably followed where procedures have not been clearly established or where actions are not in accordance with existing law. Let me give you some examples.

During the initial Burr Trail review process, the BLM examined the entire allotment of the Burr Trail including a section called the Deer Creek section and appropriate changes were made. The Burr Trail alignment including Deer Creek was further reviewed as part of the legal proceedings associated with the project and plans presented in court were approved. When the county met with BLM officials at the time when construction was to be initiated, BLM representatives informed us that although the alignment created no undue and unnecessary degradation and was perfectly acceptable in their minds, individuals higher up in the Department had arbitrarily determined that the work could not go forward because it left an intervening, undisturbed area of less than one-tenth of an acre.

Local representatives in the county agreed to initiate a legal proceeding in order to get a ruling from the court. It was anticipated that a ruling could be achieved in less than six months. The Justice Department in consultation with the BLM have prolonged court proceedings for nearly two years, and the matter is still unresolved although it is scheduled for a hearing tomorrow. This section of road has a total length of approximately 300 feet, is located on ground that was purchased by the BLM from the State of Utah, and is bordered on the north by a campground and on the south by a parking area the BLM has requested the county expand as part of their road efforts.

Now another example is the gulch area and this has been a nightmare for the county. Similar to Deer Creek, the gulch alignment was reviewed by the BLM and further examined during court proceedings. The court directed the county to relocate the road on the bench approaching the gulch, and plans were drawn and approved as to the location of a concrete structure at the stream crossing. In addition, a Title V right-of-way was also issued for relocation of the road and the crossing.

When Garfield County staked the alignment in accordance with court-approved plans, the BLM indicated that the location was unacceptable and requested that the county move the road to the north. The county complied with the BLM's request in an effort to cooperate and installed the structure at locations indicated by the BLM. Upon completion of the structure, local Federal land man-

agers determined the structure was once again unacceptable and demanded that it be relocated north of its existing location.

The structure was a pre-cast concrete box, which required the use of a crane costing the county \$80,000 to move it, to relocate it, and also necessitated several additional sections of cast concrete box in order to accommodate the revised alignment. The county staked the new alignment, and as the contractor showed up on the job to relocate the structure, the BLM protested the second alignment and threatened the contractor with a cease and desist order.

The county met with BLM officials the following day and was informed that regardless of stakes marking wilderness areas, regardless of a parking lot located adjacent to the road, and regardless of court-approved plans, the county would need to move the structure an additional ten feet north. The county complied with the BLM's demands, resulting in a total relocation from the original court-approved alignment of more than 73 feet.

The BLM then issued a trespass against the county, including a statement that the county had relocated the road too far north. The conclusion of this project has still not taken place to date, but has resulted in significant time delays and additional costs to the county. And quite honestly, the BLM now denies that they ever asked us to relocate the concrete box saying that it was a county option, that they opted to relocate the box themselves and certainly we would do that costing about \$200,000 in the process of opting to do that.

In studying R.S. 2477 history and the Congressional Record related to pre-existing rights-of-way granted under the statute when FLPMA was enacted, I find it very clear that Congress understood the importance of R.S. 2477 rights-of-way and had no intention of limiting the scope of these rights. In fact, FLPMA explicitly says so, and yet that is exactly what counties are faced with at the present time in dealing with Federal agencies when maintaining or improving these roads.

H.R. 2081 would give direction to Federal agencies regarding which rights-of-way to recognize and thereby enhance their own ability to better manage Federal lands without interfering with the county's obligation to provide safety for the traveling public. Policies which encourage the interference of providing that safety will eventually be challenged in court and bring further stress to limited budgets.

If I might add, Mr. Lesby is saying that the Federal Government anticipates ending up in court in these cases. I wonder if the burden is placed on counties if they feel like those are not going to end up in court regardless because the counties are not going to be able to do this. They are going to take the cases to court too if R.S. 2477 rights-of-way are taken away and the Federal Government will end up in court probably in many more instances than if they were through their own process.

Please keep in mind that these roads provide access to Federal lands as well as providing routes for Federal employees and local citizens to travel to work on. Maintaining and improving these roads to a safe standard benefits all ownership, whether it be private, Federal, State, county or other users. Under present management practices, it has become increasingly difficult to do that. Last

year Garfield County waited 15 months after the promise of two months for the Park Service to complete an environmental assessment on a portion of the county right-of-way that traversed Capitol Reef National Park.

We postponed planned improvements which were grading the road, which had become a channel in most places, and bar ditching the sides for better drainage to prevent flooding and washouts. We were told that if we went to work, we would likely be served with an injunction to stop us. Acting in good faith, Garfield County has tried for close to two years now to reach an agreement, even meeting here in Washington, DC, a few weeks ago with Assistant Interior Secretaries Frampton and Armstrong and several staff members and attorneys. It has cost the county a considerable amount of money, not mentioning the cost to the Park Service for the E.A. trips to see the road, etc.

In light of all the talk of budget constraints and eliminating waste, I can't help but think what this bill could do to accomplish those very goals. It is a realistic approach to settling a very controversial issue versus an unrealistic approach set forth in the DOI's proposed regulations which would place serious financial burdens on counties and the Federal Government, forcing them to use their personnel and other resources in a wasteful and unnecessary manner.

Quite honestly, I agree with the gentleman from California and many of the general public view this as yet another unfunded mandate. The National Association of Counties strongly opposes these proposed regulations and supports counties in their efforts to provide access to the public lands using R.S. 2477 corridors.

Since many of Utah's R.S. 2477 roads are State highways, I have also attached to my statement a resolution passed during the 1995 session of the State legislature and endorsed by the Governor which strongly urges the United States Department of Interior to withdraw the proposed regulations concerning R.S. 2477 rights-of-way and urging the United States Congress to recognize the authority of the State of Utah to administer rights-of-way across Federal public lands in Utah, and take action to ensure that administrative agencies of the United States take no action which would infringe upon this sovereign authority.

Also, a more detailed account of the Capitol Reef National Park issue is attached. Mr. Chairman and members of the committee, I feel the survival of Utah's rural counties and communities and other counties and communities throughout the west which rely upon access across the use of the Nation's public land is once again being threatened by Federal policy and regulations. This bill would bring balance and common sense back into the management of those vital corridors which not only benefit all owners and users, but serve as a tool to better manage the public lands which they access.

And a thought came to mind that I would like to close with, and that is that 150 years ago our ancestors in Utah sacrificed and struggled to open up that land by using these very roads and now we are having a sacrifice and struggle to keep those lands open to those who want to close them. It seems rather ironic. Thank you.

[The prepared statement of Louise Liston can be found at the end of the hearing.]

Mr. HANSEN. Thank you, Commissioner. Barbara Hjelle, we will turn to you now.

STATEMENT OF BARBARA HJELLE, OFFICE OF SPECIAL COUNSEL, ENVIRONMENTAL & PUBLIC LANDS ISSUES, WASHINGTON COUNTY, UTAH

Ms. HJELLE. Thank you, Mr. Chairman, and members of the subcommittee for this opportunity to speak to you today. I have submitted written comments as well and I would request that they be incorporated into the record.

Mr. HANSEN. Without objection all of the written statements will be incorporated into the record.

Ms. HJELLE. Thank you. We have heard a lot of discussion about R.S. 2477 rights-of-way so far today. I have disclosed a little bit in my written comments my experience with them, which in large part has been representing Garfield County with regard to the Burr Trail. Louise has eloquently described just some of the impacts on one road in one county of the current adverse policies of the Department of Interior.

These rights-of-way were granted to the American public by Congress in 1866 and they have been in existence for decades, at the latest, as Mr. Leshy indicated, since 1976 and in many cases in excess of 100 years. In Utah they are there quite often by use. They are there because they were used and they were used because they were necessary and that is what Utah law told Utahns to do. They said you can establish public highways in Utah by use alone.

So these rights-of-way and various routes have been established and have become now an accepted part of the transportation infrastructure in rural Utah and in Utah as a whole. These rights-of-way range all the way from paved State highways, paved county roads, highly developed gravel roads, all the way down to foot paths and horse trails, as the law provided for. And when you get to the lower level of construction or use, lower being, for example, paths and trails and lower constructed roads, these are often primarily by use and that use is all the more important as a consideration. They are there because they were needed.

Like the Burr Trail, many of these rights-of-way were built by the sweat and the blood of Utah's pioneers. There was eloquent testimony in the litigation on that point on how much work it took to open that road and make it accessible to the public that is now using it today. The recent hostility toward these R.S. 2477 rights-of-way has created tremendous problems and in hearing some of the earlier testimony I can't help but comment that what I am hearing is, "Gee, you know, Congress did this in 1866 but in 1976 we have new policies and we sure think the new policies ought to apply".

Well, maybe people ought to be thrown off their homesteads too, you know, when there are new policies, but you can't just go back and change the law. These rights-of-way have been granted and they are there. But, at any rate, it is easier to fight a highway rights-of-way than it is other vested property rights because they do traverse public lands that are still owned by the Federal Gov-

ernment today but the refusal to recognize the existence of these rights-of-way is creating tremendous burdens.

The proposed regulations which have been discussed already by others today would rewrite the law of R.S. 2477. It would create new law out of whole cloth and this bill does not do that, as I understand it. It reaffirms existing law. It does not create new rights-of-way, it does not provide new inroads for excessive actions. Only if you assume—as I believe Mr. Chairman suggested—why would we assume that counties and local governments and others would make bad faith claims or assertions of existing rights-of-way? Furthermore, if they do exist, they will be shown and if they don't exist, they will drop out. These are pre-existing rights. They are not new things that are being created.

So I think this legislation stands firm for standing with the law as it stood, as the people understood it, as they accepted and operated under, for 110 years. And I would also like to point out most specifically that it is consistent with regulations of the Department of Interior in effect since 1938, and let me, if I could, just quote those.

"The grant referred to in the preceding section, R.S. 2477, becomes effective upon the construction or establishment of highways in accordance with the 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."

Those regulations went into effect in 1938 and remained in effect in substantially that form until the repeal of R.S. 2477. So when the Department of Interior comes before you and comes before the American public and says State law should not apply, I would like to know what they think of the regulations that they have had in effect for decades on this point that said exactly that State law does apply, that the American public relied upon.

I have also attached to my comments some just very selected quotes from settled precedent and other departmental actions, court decisions, and so forth, and I really think that is elucidating the substantial weight in support of what your legislation would do in maintaining existing law.

I don't believe that the alarmist allegations of what this legislation would do have any merit. There could be errors made in any instance. I think reasonable people can sort those things out. They do not need to become the basis to change the law of the land and rewrite what Congress did in 1866.

I think that what you are doing here is allowing State and local governments to do the job that they have been designated to do in our system of government, to manage the local transportation infrastructure. That should not be taken over by the Federal Government, as Louise Liston has shown you is being done to great detriment to everyone. So I certainly support this legislation and hope that you are successful one way or another in ensuring that the attempt to undo decades of established precedent is not successful. Thank you.

[The prepared statement of Barbara Hjelle can be found at the end of the hearing.]

Mr. HANSEN. Thank you very much for your testimony. The gentlelady from Idaho.

Mrs. CHENOWETH. Thank you, Mr. Chairman. I mentioned to Mr. Leshy when he was here about the Shultz case but I do want to say that I have pulled the Shultz case out of my file and the Shultz case relied on Supreme Court cases dating back to 1943 that state whether a right-of-way has been established as a question of State law which has been established in our testimony today.

A decision out of the Supreme Court states that a condition of the highway, whether paved and wagon worthy, or simply a minor foot path is irrelevant if the claimant can show that the right of way was used no matter for what purpose. It refers to Ball and Dillingham and those cases. There is a whole body of case law that establishes that the Federal Government created a law, R.S. 2477, before the turn of the century and to me, I might just be very simple but to me R.S. 2477 stands as sure as the sun exists.

Now what we don't need now is a process by which the Federal Government can get its foot in to the system, require a period of time to allow the Secretary to have veto power, a period of two years for him to prove up his process. That is almost like saying the Federal Government has a right to declare whether the sun exists and if it does exist when you may or may not pull the shades in your house to see the sun. R.S. 2477 exists. It opened up the west for us.

There was a purpose for that and I see no need to have additional processes. Mr. Chairman, what I see is a need for us to require an agency to abide by the existing law that is so simple and has been upheld by the United States Supreme Court and various other Federal district courts time and time again. I would like to ask Representative Masek, in the letter that was submitted by the Governor, was that known to the legislature and was that approved by the legislature?

Ms. MASEK. The Governor sent this letter on his own.

Mrs. CHENOWETH. I must commend all three of you for your very well-constructed testimony. Ms. Liston, it is such a privilege to hear from you again, and I have studied your testimony and will continue to study it. But, again, I do want to say I appreciate the good work that has gone into this bill but I cannot be satisfied with this bill unless we see notices or a provision by the State or the county or individuals to be able to bring an action for frivolous lawsuits against the Federal Government for not allowing them access through one legal action or another to the roads that we have said time and time again they have been allowed to use.

I hope that as we work through this that is the direction that we can work and, Mr. Chairman, I thank you for taking on this huge issue because in your State and my State and all over the west, it is a big issue. I do tend to think that rather than more legislation, we need to get an agency that has been acting as an outlier in control. Thank you, Mr. Chairman.

Mr. HANSEN. Thank you. I appreciate the gentlelady's comments. The gentleman from Oregon, Mr. Cooley.

Mr. COOLEY. I want to thank the panel. I want to ask for your forgiveness for not being here earlier but I got stuck in another meeting. I too want to say that I am very happy that our Chairman is in that position because I guarantee if he was not, we would not have this legislation. I think we really truly need it. I think that

this is another "more Federal control, less State's rights." We can always talk about the war in the west. It is obviously that.

We will have people here today testifying and in the future probably talking about public use. We have a very difficult philosophy, I think, coming down in this country. We have heard a lot of people on the other side talking about private property rights, State's rights, an Anglo-Saxon theory that is well outdated. I think we have all heard that in different forms. I think that our Chairman is starting to try to address that. I hope we have others doing the same thing on the issues.

To reinforce my colleague here on my right, Mrs. Chenoweth, I think that R.S. 2477 is obvious in what it says. I think we have another interpretation by an agency that is absolutely writing their own law to do whatever they well please and appreciate you people coming forward and testifying in this way. I think for the record it shows exactly what they are doing. You are at the ground level. You feel the pain and the persecution by these agencies and I think the American public needs to know and that is why we are doing this.

So I want to thank you for being here and I want to thank the Chairman again. I am unbelievably happy that he is sitting in that chair and someone else is not sitting in that chair because we would not have this legislation, so thank you very much for spending your time here.

Mr. HANSEN. I appreciate the gentleman's comments. It is amazing to me that this issue was really brought up by local government like the representative from Alaska, county commissioners, and others. Almost to a person the governors of the 11 western States and Alaska support this change that we are trying to bring about. I can stand corrected but I see the representative from Alaska is representing the Speaker of the House and the President of the Senate. They support it.

I don't know of a president and a speaker—I haven't heard from California. I was worried about California. We haven't heard from California yet but almost to a person, they support the change in this. So this is a piece of legislation that has really emanated from local government.

Representative, I was very interested in your comment about dog sled trails. I guess that would be R.S. 2477 roads, is that right?

Ms. MASEK. Yes, that is correct.

Mr. HANSEN. In the West, we always envision a road of some kind and I know we have a lot of two-track roads we shouldn't have. I don't argue with that. R.S. 2477, we have got an awful lot of roads that are maintained. We call them class C, class B roads. I remember when I was in the State legislature we put a lot of money in those roads. The litigation of this thing just blows your mind when you think about the pending problems that could come about under these regulations.

I am really amazed that the current Administration would draw legislation that is so in conflict with the wishes and desires of the people who live on the land. Barbara Hjelle, you sat there during Mr. Lesby's presentation and the questions that I asked him. I surely didn't mean to be discourteous to him and I hope no one took it that way. He is a fine gentleman. We just have a different

point of view on the thing. But because I consider you one of the foremost legal experts on this issue, I would like to ask your response to his testimony, if I may.

Ms. HJELLE. Thank you, Mr. Chairman. He made a number of points, obviously. One of the significant points that he made is on the issue of the burden and I think you have really brought out the problems with that. The Department of Interior disclosed to the Office of Management and Budget some estimates of the burden on local governments for complying with these regulations that were nothing short of absurd. I think they would have allowed something on the order of minutes per right-of-way in Utah counties to accomplish all of the documentation that the agency lists in its regulation as required to prove a right-of-way.

When you talk about these burdens and you talk about unfunded mandates, I would like to point out that when he says that this is not an unfunded mandate because you are only going back to what is already there, what was there in the past did not include a requirement of documentation, so that by imposing a documentation requirement you are imposing an unfunded mandate. If, in order to have your right-of-way recognized by the servient landowner, you must have documentation, this is an additional requirement that must be met. It is an unfunded mandate.

The burden is substantial and I think it is ironic that you now have people coming before you saying you can't place this burden on the Federal Government, it is too heavy; who were very ready and willing to place this burden on local governments when they were the ones in these regulations that I quoted to you that set up the program that said you don't have to have any documentation. This wasn't the choice of local governments. This was the choice of the Federal Government to not require preparation of documentation.

Another interesting aspect of that is this question of State law which has received so much discussion and I again quoted you the regulation that says that State law has been the policy, not just this new notion that where the statute says the right-of-way "for" construction has been granted we are now going to interpret that to mean the right-of-way is granted upon construction. This has never been heard before this Administration.

But aside from that, just the general notion that State law is the basis upon which the Federal grant is interpreted, this is consistent with fundamental principles of common law and other fundamental legal principles and that is why the courts or whoever have addressed the question arrived at that conclusion, that you look to the law of the State to determine whether a highway was perfected under R.S. 2477.

But if you change that definition from a State law definition to something new now being created by the Department of Interior, that is an unfunded mandate. Not only is it an unfunded mandate, it is one that cannot be met. You can't go back to prior to 1976 and do something to perfect your right-of-way. So if now the Department of Interior or Congress or anyone else comes up and says, "Well, in order to have an R.S. 2477 right-of-way you didn't have to comply with State law, you had to comply with these require-

ments over here, none of which we disclosed to you before", you can't do it. It can't be done.

So it goes beyond unfunded mandates. I have asserted that it really operates as a taking without due process as it was proposed by the Department of Interior. And in that regard, if you would allow me, Mr. Chairman, I would just like to refer you to my attachment on settled precedent, so that it doesn't look like me representing a rural county in Utah with bias has this attitude alone. Let us look at what the Tenth Circuit Court said about Federal definitions versus State definitions.

I am quoting, "The adoption of a Federal definition of R.S. 2477 roads would have very little practical value to BLM. State law has defined R.S. 2477 grants since the statute's inception. A new Federal standard would necessitate the remeasurement and redemarcation of thousands of R.S. 2477 rights-of-way across the country, an administrative dust storm that would choke BLM's ability to manage the lands."

I won't finish the quote but it goes on from there and I believe this is true. And when you talk about impacts on private property, the State laws that we are asking the Federal Government to continue to honor as it did until 1976 and really until now, are the laws that determine what access rights there are across private property. It is by the creation of a new Federal standard that you wreak havoc. That is what the Tenth Circuit Court was stating.

So that when Mr. Leschy comes before you and says, "Gosh, we have to protect these private property people from these expansive claims", there is no merit in that position. I do not believe that there can be any new and frivolous claims arising out of the proposed legislation. I don't read it to allow State laws to enact new versions any more than I think the Federal Government ought to be able to enact new versions. We are talking about State laws in existence, as I understand it, up until the repeal of R.S. 2477. Everybody ought to abide by the rules when the game was being played.

I certainly think it is interesting in Mr. Leschy's comments about the quiet title concern, because he told you the last time he was here before you that the proposed regulations, as I understood him, do not in any way intend to supersede the rights of holders of R.S. 2477 to go to the court under the Quiet Title Act. That stands alone, so the fact that this legislation merely honors that right changes nothing.

However, I was surprised when he said it last time because I had been in court against the Department of Interior where they have come forward and said not only can you not quiet title to your rights-of-way because we have an administrative procedure, but you can't quiet title to your rights-of-way because we have a draft administrative procedure, and you can't do anything till we get done. And so I was kind of surprised when he said he didn't think his regulations did that.

And then I was doubly surprised to hear him say now that he thinks it is shocking that you are proposing to honor the provisions of the Quiet Title Act because that seems to contradict what I understood him to have said before, so I guess I am confused on that point at best.

I would like to point out that again your bill, as I read it, has explicit language in it that the Department of Interior will be bound by its own prior regulations. It is interesting to me that they are so opposed to the bill. I mean in essence they are saying, "Well, we don't want to be bound by what we have done before".

There are so many other comments I could make on this—another comment I have is that he seems to be expressing concern that your bill would allow lots of different people to file notices of R.S. 2477 rights-of-way. As I read the Department of Interior proposed regulations, they don't limit who can go through their process either, so I am not sure why it is such a problem in your bill if it wasn't a problem in their regulations.

I don't think I have to repeat over and over again that I don't think it would legitimize frivolous claims, because I think it is saying, "Abide by the law".

I don't want to belabor that point too much, but these are not traditional administrative actions. When you suggest to Mr. Leshy can't we sit down and work this out, I think that is such an admirable suggestion—but when you have a Department of Interior coming forward and a Federal Government who in my opinion is really a co-equal party in this situation, you have property rights here and you have property rights here.

Why should it be that the local governments who are the traditional parties charged with taking care of these transportation issues and rights-of-way are now going to be required to be totally deferential to the owner of the servient estate? These are property questions. They are questions of law. The facts and the law are already there, so to treat this as an administrative process removes local government from its legitimate role as property holders. I think that should be a matter of concern.

I also would comment that I believe the Department of Interior did ignore the interests and concerns of local governments in drafting these regulations. I was personally involved in communicating some of those concerns. None of them are evident in any way in the regulations that were proposed in draft form. So when Mr. Leshy says, "Well, we haven't finalized them so you can't tell whether or not we were responsive to the comments of local government", we were involved in the scoping process and we tried very hard to communicate these very same concerns and there is no evidence that they received any significant consideration.

I think your legislation is necessary so long as the kinds of policies stated by Mr. Leshy are the policies of the Department of Interior or unless they are willing to sit down with you as you suggested and start from an open book, respecting the law of the land as it was for many decades. Thank you.

Mr. HANSEN. Thank you. We appreciate your response. And, Commissioner, I can't believe your horror stories even though I know they are true. It amazes me that the Federal Government could create so many problems. We appreciate the panel and your great input and thank you for coming the long distances that you have to be with us. We are very grateful for it.

Our next panel is Libby Fayad, Staff Counsel, National Parks and Conservation Association; and Mr. Scott Groene, Staff Attorney, Southern Utah Wilderness Alliance. Ms. Fayad, we will take

you first and we are not running the clock on you today. It is kind of a short hearing.

STATEMENT OF LIBBY FAYAD, STAFF COUNCIL, NATIONAL PARKS AND CONSERVATION ASSOCIATION

Ms. FAYAD. I hardly know how to respond. I have never not had a time limit so I have limited my remarks substantially.

Mr. HANSEN. Go ahead.

Ms. FAYAD. I would like to submit my testimony for the record and summarize it now.

Mr. HANSEN. Excuse me, if I may. Do we have your testimony? Oh, excuse me, OK, I guess we do have your testimony. I am sorry, go ahead.

Ms. FAYAD. Mr. Chairman and members of the subcommittee, my name is Libby Fayad and I am Counsel for the National Parks and Conservation Association. NPCA is America's only private non-profit citizen organization dedicated solely to protecting, preserving, and enhancing the U.S. National Park System. NPCA has had a longstanding interest in R.S. 2477, and I welcome the opportunity to appear before you today.

NPCA strongly opposes H.R. 2081. The title of the bill, the Revised Statutes R.S. 2477 Rights-of-Way Settlement Act implies that this bill merely facilitates the settlement of existing claims and rights. However, it is our reading of the bill that it greatly expands the rights that were available under the 1866 law that established R.S. 2477.

NPCA recognizes that valid rights were granted under R.S. 2477, but we also believe that certain standards of proof should be required before giving away valuable taxpayer property and damaging national parks and wilderness areas. Mr. Chairman, on the day that the Korean War Memorial is being dedicated, on the day that veterans are here in town, I am struck by the fact that veterans have to supply much more information than a person who could use an R.S. 2477 right-of-way before they can receive their benefits.

Social Security applicants for disability have to supply much more information than would be required under your bill. I mean it is like if there is a benefit to be received here from the Federal Government, it is highly unusual except in a criminal case where of course there is no benefit to be received but where the government has to bear the substantial burden that your bill would require. The applicant has to make merely minimal showing and then the entire process is skewed toward granting the right-of-way.

The Secretary has two years in which to object and then if the Secretary doesn't object, the right is deemed valid. If the Secretary does object, then the Secretary has to file quiet title or else the right is deemed valid. I can think of no other situation where the Federal Government is involved in individuals as your bill would allow individuals to apply for R.S. 2477 rights-of-way as well as counties and States can receive such a substantial benefit, a right-of-way that could extend hundreds of miles without having to bear any of the burden.

We are also concerned that the bill seeks to limit public involvement substantially. These are public lands. As the last witness pointed out, I mean there are rights on both sides and I would

agree with that but there are certain rights on the side of the public as well as on rights of the holders of the rights-of-way and this bill would totally preclude any public involvement in the process by limiting standing and also by exempting the entire process associated with the bill from the NEPA requirements.

I would like to point out just one of the concerns NPCA has and why we feel strongly that the administrative process should be allowed to proceed although I am sure that the comments that have been received will be factored into the final rulemaking. I would just like to point out the implications for this bill in Alaska. The State of Alaska contends its asserted R.S. 2477 claims for 1,700 roads and trails based on an atlas of trails, a map of trails. This atlas includes 200 claims in 13 or 15 national park units located in Alaska.

Some of these trails are hundreds of miles long and bisect the park. Now one issue that seems to have been avoided by all the panels and it is a very complicated issue, I would be the first to admit that, is this idea of what is the scope of the right-of-way and who determines that. I mean if it were a dog sled trail and if dog sled trails are allowed to be R.S. 2477 rights-of-way, do you have a dog sled trail at the end of the process or do you have I-66? I mean these are real concerns and I think the bill does not address these and we would feel that it is more appropriate that these situations be ironed out in the administrative process.

Thank you for letting me testify today and I will be happy to answer any questions you have.

[The prepared statement of Libby Fayad can be found at the end of the hearing.]

Mr. HANSEN. Well, thank you. We appreciate you being with us. Mr. Groene.

STATEMENT OF SCOTT GROENE, STAFF ATTORNEY, SOUTHERN UTAH WILDERNESS ALLIANCE

Mr. GROENE. Mr. Chairman, members of the subcommittee, my name is Scott Groene. I am an attorney with the Southern Utah Wilderness Alliance in Cedar City, Utah. I am here today to testify for both SUWA and the Sierra Club. I request that photographs that have been attached to my testimony be made part of the record along with a letter from the Utah Wilderness Coalition which identifies their locations.

The photographs show asserted R.S. 2477 claims which have been made in Utah as they look on the ground and the Utah Citizens Wilderness Proposal which has been embodied by Congressman Hinchey in H.R. 1500. Some of the photographs also show claims that have been made within Congressman Hansen's bill H.R. 1745. If you take a look at the photographs, what you will see is these are not routes that are being used for access. In some cases, these were routes that were made to mining claims that have been abandoned, long since eroded away.

In some of these photos you will see there never was a road in these places and that these are the types of claims that would be legitimized by H.R. 2081. H.R. 2081 in essence allows anyone with a 32-cent stamp to force the United States into an expensive court battle. Section 2(a) of the bill allows anyone with an undefined in-

terest in land to file an easement claim against the United States. The bill does not require them to show they ever used the right-of-way, only that they could.

Pursuant to Section 2(a) of the bill, those who seek to interfere with public land management need do little more than scribble a line across a map. Section 2081 also opens the door for nuisance claims for decades to come, for the bill overrides the existing statute of limitations to allow R.S. 2477 issues to fester on for some two more decades, some 40 years after legislation was repealed. Because the existing Statute of Limitations is revoked and because the burden of proof is shifted by this bill to the Federal Government, the United States will be in the position of having to prove 40-year-old facts to protect the public's interest.

In another rollback of established law, the United States loses property rights to public lands by default if it is not able to address all the claims filed against it. The United States will bear enormous costs defending against these claims. The Department of Interior has suggested or estimated it is \$1,000 to \$5,000 per claim for administrative adjudications. There are 5,000 claims pending in Utah. That number will no doubt grow as people learn they can file multiple claims with little effort in the same areas.

In this bill we will not be talking about administrative adjudications but the Federal Government will have to file litigation against each and every claim. Although these were grants from the United States, H.R. 2081 allows State law to control both the scope and grant of these easements over public lands although the original R.S. 2477 legislation made no mention of State control.

If State law controls in States such as Alaska and Utah, Federal land management will be made impossible. This bill prohibits most Americans from challenging Federal agency decisions. H.R. 2081 limits standing to those who claim rights-of-way. Those who are harmed by the approval of frivolous claims by the U.S. Government will not be able to challenge those decisions.

The bill exempts these decisions from the National Environmental Policy Act. Provision 5(e) of this bill prohibits the Park Service, the Forest Service and the BLM from closing asserted rights-of-way for one year after notice is given to the State government. In other words, a dirt biker could file a right-of-way claim and then proceed unimpeded to trout streams across archaeological sites, national parks and wilderness areas, and the Federal Government would not be able to stop him for one year.

H.R. 2081 ignores the legislative history of the Federal Land Policy and Management Act which makes clear that Congress limited the grandfathered R.S. 2477 rights-of-way to existing mechanically constructed roads. Nor does the bill address R.S. 2477 claims against private property. Under this bill private landowners may not be able to defend their property against such claims even when they purchased their property decades ago.

This proposed legislation has little to do with preserving access on existing roads. Rather, it ensures that claims of nonexistent roads will be permitted to damage national parks, wildlife, wilderness and our streams. Thank you for your time.

[The prepared statement of Scott Groene can be found at the end of the hearing.]

Mr. HANSEN. Thank you, Mr. Groene. The gentlelady from Idaho.

Mrs. CHENOWETH. Mr. Groene, in your opinion, when did the right to establish an R.S. 2477 right-of-way terminate?

Mr. GROENE. Well, if it is a valid existing right, it was of course grandfathered by FLPMA in 1976 but it would have to be established as of 1976.

Mrs. CHENOWETH. Can you tell me, can you cite for me, in FLPMA where it said that it had to be a mechanized, constructed road as you stated in your testimony?

Mr. GROENE. Sure. In that bill Congress did two things. It grandfathered the R.S. 2477 rights-of-way, at the same time it established the 603 wilderness study area process. It told the Bureau of Land Management to go out and look for roadless areas which according to the——

Mrs. CHENOWETH. I don't think you understand my question.

Mr. GROENE. No, I do.

Mrs. CHENOWETH. Let me restate my question. My question was could you cite for me in FLPMA where it states that roads had to be constructed with mechanical equipment?

Mr. GROENE. What I have said is that the legislative history shows that because the legislative history showed that, DON was to go out and look for roadless areas under 603. Those were to be mechanically constructed. At the same time, Congress in the same legislation grandfathered——

Mrs. CHENOWETH. Under 603, I don't mean to be rude, but under 603 of FLPMA, Section 603, that is the section where it asks them to go out and establish areas that may have wilderness characteristics, right?

Mr. GROENE. Well, I need a couple more sentences to tie this together. Because Congress on the one hand said these are roadless areas, there are no mechanically constructed roads, on the other hand they said R.S. 2477 rights-of-way are granted and they are grandfathered. Now precepts of understanding legislative history tells us that we give Congress credit to know what it was doing and to act consistently and that it wouldn't on the one hand establish valid existing rights that conflict with the wilderness study area process.

Mrs. CHENOWETH. You haven't answered my question, sir, but I think you have answered it in the way that you prefer to. I will submit for the record there is no place in FLPMA that it requires that R.S. 2477 roads that have been grandfathered in had to be constructed with mechanical equipment. Now the BLM wilderness inventory process, that was initiated in 1976, right?

Mr. GROENE. Yes, ma'am.

Mrs. CHENOWETH. Now I want to divert just a little bit from the R.S. 2477. I don't remember hearing testimony from you and since you are from Utah, I don't remember hearing testimony from you on the Utah wilderness area. Do you have an opinion on that?

Mr. GROENE. I have a very strong opinion, Representative.

Mrs. CHENOWETH. Do you think that we ought to include more areas in that proposed legislation?

Mr. GROENE. Which legislation?

Mrs. CHENOWETH. The Utah Wilderness legislation.

Mr. GROENE. Well, I am satisfied with H.R. 1500.

Mrs. CHENOWETH. As proposed by this committee?

Mr. GROENE. No, as proposed by Maurice Hinchey. I have a disagreement with Congressman Hansen's bill H.R. 1745.

Mrs. CHENOWETH. Do you think that we ought to be able to take in more area even if it included personal property rights that had been constructed by other people such as ranchers or other interests?

Mr. GROENE. I have a feeling we might disagree over what are personal property rights but of course the bill would be subject to existing rights, yes.

Mrs. CHENOWETH. Would a personal property right be an abode or a water reservoir or a pipeline?

Mr. GROENE. Well, it would depend on who constructed it and under what circumstances.

Mrs. CHENOWETH. Thank you very much.

Mr. HANSEN. The gentleman from Oregon, Mr. Cooley.

Mr. COOLEY. Ms. Fayad, I thought it was very interesting, your discussion about public lands and rights-of-way and parks and different public interest areas. Do you believe that R.S. 2477 rights-of-way that were predetermined by the National Park System are valid?

Ms. FAYAD. R.S. 2477 rights-of-way that were valid before a unit was established as a national park would be valid, yes.

Mr. COOLEY. So if we had a road running through an area before the park was designated, you would not object to that rule being used today for ingress and regress by the public?

Ms. FAYAD. I didn't hear the end of your question, I am sorry. Use for what?

Mr. COOLEY. For ingress and regress by the general public.

Ms. FAYAD. No.

Mr. COOLEY. So that is a valid——

Ms. FAYAD. That is valid. I would suggest, sir, that there is the right of the Secretary to manage the road appropriately and that the road could not be expanded beyond what it was when it became a valid existing R.S. 2477 right-of-way.

Mr. COOLEY. Well, doesn't the present legislation or law R.S. 2477 state that same statement that you cannot expand it, that the Secretary must maintain the road in its present condition? Isn't that in there?

Ms. FAYAD. In the current proposal?

Mr. COOLEY. No, in the R.S. 2477.

Ms. FAYAD. Well, no, R.S. 2477 just says the right-of-way for construction of highways over public land is not reserved for public uses and is hereby granted. It doesn't talk about management authority and certainly not management authority that was enacted after 1866.

Mr. COOLEY. I think that the Secretary, at least this Secretary for sure, has made his own determination on that statement because we are having, as you heard by previous testimony, problems on ingress and regress over national parks, etc., that many groups feel should not be honored.

Ms. FAYAD. We recognize that there are such things as valid R.S. 2477 rights——

Mr. COOLEY. Excuse me, the question is valid, that is the determination. That is where we have a discrepancy in your opinion and others is, what is valid and what is not valid.

Ms. FAYAD. Right.

Mr. COOLEY. OK. Scott, I think it is wonderful, your statement about 32 cents can change the whole objectionary period because we on the other side have talked about your 32 cents that has literally shut us down in the West, at least after the last 20 years. And I am certainly happy to see that maybe we can turn this around and burn you a little bit on your backside. I think it is wonderful.

I have a real problem with your public interest definition. The Secretary right now has a right of waiver on NEPA reports on R.S. 2477 designations and all that area. I understand in your written testimony that you feel that under the present legislation introduced at H.R. 2081 it is not all right to have NEPA waivers. Why do you feel it is all right for one and not for the other?

Mr. GROENE. I am actually not familiar with the first instance you raised. In the second instance, Tenth Circuit law has applied NEPA to R.S. 2477 claims.

Mr. COOLEY. Except the Secretary can waive that?

Mr. GROENE. I am not familiar with what you are talking about, sir.

Mr. COOLEY. OK. Another thing that I would like to ask you is that in your testimony you have given these ten examples of qualified or unqualified or invalid claims on rights-of-way. You also stated that there are dozens of these invalid claims that are present pending. Is it possible that you could provide us an accounting of the research, etc., and documentation on invalid claims that you say that are there?

Mr. GROENE. Sure, we can provide written information about what we have been able to determine so far. Utah citizens are trying to go out and document all the claims that have been made within H.R. 1500. It is incredibly time-consuming. It is being done by volunteers. It is not completed yet. These are the results of some of the work we have done.

Mr. COOLEY. Of the 5,000 claims in Utah that you stated, how many of those have you determined with the limited amount of volunteers that you have that are valid or invalid?

Mr. GROENE. I don't know.

Mr. COOLEY. No idea?

Mr. GROENE. Probably a high percentage because the areas that we are looking at are invalid but that is not anywhere near the 5,000 number. Many of the 5,000 claims are valid claims that we use in Utah to get to work on every morning. The claims here are the ones that are being used to try to interfere with wilderness designation that we are talking about.

Mr. COOLEY. Thank you, Mr. Chairman.

Mr. HANSEN. Thank you. Libby Fayad, I appreciate your being with us. Mr. Scott Groene, thank you for your testimony. I appreciate you coming back. Let me just say very respectfully, Libby, if I may, that we didn't get your testimony until 9:30 today. The rules of our group is two days ahead of time, if we could. We would appreciate it if we could have your testimony a little sooner than

that. That gives us a little time to go over it and see what we can respond to and how we can have a good dialog with you, but I just say that for the record.

Ms. FAYAD. I apologize.

Mr. HANSEN. No problem at all. Thank you very much.

Mr. GROENE. Thank you, Mr. Hansen.

Mr. HANSEN. We have a vote on right now and as far as I see it, there are no further questions, this hearing will stand adjourned.

[Statement of Hon. Bill Richardson follows:]

STATEMENT OF HON. BILL RICHARDSON, A U.S. REPRESENTATIVE FROM NEW MEXICO

Mr. Chairman, here we go again on R.S. 2477. Nearly 20 years after passage of the Federal Land Policy and Management Act, which repealed R.S. 2477, we are still debating the validity of R.S. 2477 claims. We are in this situation because Congress made the repeal subject to "valid existing rights", an imprecise term at best. I believe the Department of the Interior has made a good faith effort in putting forth regulations to address R.S. 2477 claims. I recognize you disagree with this and introduced your own bill, H.R. 2081, last week to overrun and supercede the Department's proposed regulations.

We have seen over the past several years an explosion of R.S. 2477 claims. Dog-sled routes, footpaths, and cattle trails are being claimed as R.S. 2477 rights-of-way. Instead of a careful analysis and resolution of such claims, I am concerned that H.R. 2081 will be the vehicle to rubber-stamp any and all such claims. The bill turns case law and legal procedure on its head. What other landowner has the burden of proof placed on them, rather than the claimant?

We have heard from people concerned about the need for access across Federal lands. If R.S. 2477 claims were the only means of such access, I would be concerned too. However, it isn't. There are other existing Federal statutes that grant rights-of-way. I am aware, Mr. Chairman, that in Utah alone, over 700 FLPMA rights-of-way have been granted since 1976.

I think an important point that is overlooked in this debate is that Federal land-ownership is not what it was 50, let alone 100, years ago. To the extent R.S. 2477 claims cross what are now former Federal lands they are jeopardizing private property. Are States and counties prepared to compensate private landowners or do all these roads suddenly end where private property starts? Are States and counties prepared to pay for maintenance to a public highway standard of all these claimed rights-of-way?

Mr. Chairman, R.S. 2477 claims have serious implications for the management of our national parks, forests and refuges, as well as our public lands. As such, these claims deserve careful consideration. I look forward to the testimony of our witness on this important issue.

[Whereupon, at 11:55 a.m., the subcommittee was adjourned, and the following was submitted for the record:]

104TH CONGRESS
1ST SESSION

H. R. 2081

To recognize the validity of rights-of-way granted under section 2477 of the Revised Statutes, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 20, 1995

Mr. HANSEN (for himself, Mr. DOOLITTLE, and Mr. SHADEGG) introduced the following bill; which was referred to the Committee on Resources, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To recognize the validity of rights-of-way granted under section 2477 of the Revised Statutes, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Revised Statutes 2477
5 Rights-of-Way Settlement Act”.

1 **SEC. 2. NOTICE OF RIGHTS-OF-WAY ACROSS PUBLIC LANDS**
2 **GRANTED UNDER REVISED STATUTES SEC-**
3 **TION 2477.**

4 (a) NOTICE OF RS 2477 RIGHT-OF-WAY.—Any
5 State, political subdivision thereof, or other holder of a
6 right-of-way across public lands which was granted under
7 section 2477 of the Revised Statutes before the enactment
8 of the Federal Land Policy and Management Act of 1976,
9 or any person who uses or could use the right-of-way for
10 passage across such lands to access property in which such
11 person has an interest, may file with the appropriate Sec-
12 retary of the Department concerned (hereafter in this Act
13 referred to as the “Secretary”) a notice of the right-of-
14 way. The notice shall be filed within 10 years after the
15 date of the enactment of this Act, shall identify the State
16 or political subdivision thereof through which the right-
17 of-way passes, and shall contain a map and a general de-
18 scription of the route, termini, and scope of the right-of-
19 way.

20 (b) RECOGNITION OF OR OBJECTION TO RIGHT-OF-
21 WAY BY THE SECRETARY.—

22 (1) IN GENERAL.—Not later than two years
23 after the date on which notice is filed with the Sec-
24 retary under subsection (a), the Secretary shall no-
25 tify the holder, or other party giving notice, of the
26 recognition or objections of the Secretary of the

1 right-of-way or any portion thereof. In considering
2 any right-of-way notice filed under subsection (a),
3 the Secretary shall recognize any right-of-way which
4 was accepted or established in accordance with the
5 laws of the State where the right-of-way is located
6 or by an affirmative act of a State or political sub-
7 division thereof indicating acceptance of the grant.

8 (2) RECOGNITION.—To the extent the Sec-
9 retary accepts the right-of-way, the provisions of sec-
10 tion 4 shall apply.

11 (3) OBJECTIONS.—If the Secretary objects to
12 the right-of-way as presented under subsection (a),
13 the Secretary shall specifically state the Secretary's
14 objections to the existence, identity of the holder,
15 route, or scope of the right-of-way, or portion there-
16 of, and shall provide the factual and legal basis for
17 each objection.

18 (4) EFFECT OF FAILURE TO OBJECT.—If the
19 Secretary does not object within the two-year period
20 required by this subsection, the right-of-way shall be
21 deemed to be valid as it was presented to the Sec-
22 retary under subsection (a).

23 **SEC. 3. JUDICIAL REVIEW.**

24 (a) QUIET TITLE ACTION RELATING TO OBJEC-
25 TIONS.—Not later than two years after the date on which

1 the Secretary notifies a holder under section 2(b) of objec-
2 tions to a right-of-way, or portion thereof, the Secretary
3 may bring an action based on those objections in a United
4 States district court in which the right-of-way or a portion
5 thereof is located to challenge the validity of the right-
6 of-way or portion thereof.

7 (b) BURDEN OF PROOF.—In any action brought pur-
8 suant to subsection (a), the United States shall bear the
9 burden of proof on all issues, including (but not limited
10 to) proving that—

11 (1) the right-of-way was not a public right-of-
12 way;

13 (2) the right-of-way was not accepted or estab-
14 lished in accordance with the laws of the State
15 where the right-of-way is located or by an affirma-
16 tive act of a State or political subdivision thereof in-
17 dicating acceptance of the grant;

18 (3) the land on which the right-of-way is lo-
19 cated was reserved for public use at the time of ac-
20 ceptance of the right-of-way; and

21 (4) the scope of the right-of-way identified in
22 the notice of right-of-way exceeds that permitted
23 under State law.

24 (c) FAILURE TO BRING ACTION.—If the Secretary
25 does not bring such an action within the two-year period

1 required by this subsection, the right-of-way shall be
2 deemed to be valid in the form presented under section
3 2(a).

4 (d) **STANDING.**—Standing to challenge an action of
5 the Secretary under this Act relating to the existence, de-
6 scription, route, or scope of a right-of-way shall be limited
7 to a party with a claim of a property interest in or to
8 the right-of-way or in lands served thereby.

9 **SEC. 4. MANAGEMENT OF LANDS.**

10 A right-of-way accepted or deemed to be accepted
11 under this Act is valid. The Secretary shall record the
12 right-of-way in the land records and on maps of the Sec-
13 retary and shall manage the lands subject to the right-
14 of-way accordingly.

15 **SEC. 5. MISCELLANEOUS PROVISIONS.**

16 (a) **QUIET TITLE ACTION.**—Nothing in this Act shall
17 be construed to prevent the holder of a right-of-way de-
18 scribed in section 2 from bringing an action at any time
19 to quiet title with respect to such right-of-way under sec-
20 tion 2409a of title 28, United States Code, nor shall any
21 proceedings taken pursuant to this Act be deemed a pre-
22 requisite to filing any such action. Such action may be
23 brought within the later of—

24 (1) 12 years from the date of notice of objection
25 from the Secretary under section 2(b)(1); or

1 (2) the termination of the limitations period
2 under section 2409a of title 28, United States Code.

3 (b) RELINQUISHMENT NOT REQUIRED.—Nothing in
4 this Act shall be construed to require a relinquishment of
5 a right-of-way granted under section 2477 of the Revised
6 Statutes. A failure to file the notice provided for under
7 section 2(a) does not constitute a relinquishment of any
8 such right-of-way.

9 (c) APPLICATION OF STATE LAW.—Nothing in this
10 Act shall be construed to limit the application of State
11 law in determining the validity of rights-of-way granted
12 under section 2477 of the Revised Statutes. In every pro-
13 ceeding the law of the State where the right-of-way is lo-
14 cated shall determine the scope of the right-of-way. The
15 published regulations of the Department of the Interior
16 pertaining to section 2477 of the Revised Statutes which
17 were in effect until the date of enactment of the Federal
18 Land Policy and Management Act of 1976 shall be bind-
19 ing on the Secretary in all such proceedings.

20 (d) NEPA.—The National Environmental Policy Act
21 of 1969 shall not apply with respect to actions taken to
22 carry out this Act.

23 (e) ROAD CLOSURES.—The Secretary shall not close
24 any right-of-way granted under section 2477 of the Re-
25 vised Statutes which was in use prior to October 21, 1976,

1 until one year after providing notice to the State and any
2 political subdivision thereof with jurisdiction over high-
3 ways in that location which describes the right-of-way and
4 the purpose of the intended closure. In no event shall the
5 Secretary close any such right-of-way if closure would
6 leave any non-Federal lands adjoining the right-of-way
7 without an established public or private access.



DON YOUNG, CHAIRMAN

U.S. House of Representatives
Committee on Resources
Washington, DC 20515
July 25, 1995

MEMORANDUM

TO: Republican Members, Subcommittee on National Parks, Forests & Lands
FROM: Allen D. Freemyer, Staff Director
SUBJECT: Hearing on H.R. 2081

THURSDAY, JULY 27, 1995 IN ROOM 1324 LONGWORTH HOB AT 10:00 A.M.

H.R. 2081 (Hansen), to recognize the validity of rights-of-way granted under section 2477 of the Revised Statutes, and for other purposes.

A detailed briefing paper is attached. If you have any questions, please contact me at x67736.

Attachments

BRIEFING PAPER ON H.R. 2081

SUMMARY:

H.R. 2081, introduced by Chairman Hansen, seeks to develop a process by which RS 2477 rights can be settled. Essentially, H.R. 2081 establishes a process that will accomplish the goals of cataloging RS 2477 claims and settling those claims.

ANALYSIS:

H.R. 2081 is based on the premise that under the 1866 Act, mere acceptance of the offer of a right-of-way deems them valid unless proven otherwise. Secondly, H.R. 2081 establishes a simple process through which these rights can be settled.

Section 2: Requires that any State, political subdivision or individual who holds a right-of-way across public lands must file a notice of the right with the appropriate Secretary within ten years of enactment. The notice shall include a map, general description of the route, termini and scope of the right-of-way. The ten year period is necessary given the fact that some states contain thousands of these right-of-ways.

Not later than two years after the notice is received, the Secretary must either accept the notice as valid or must reject the notice or portions of the notice. If the Secretary accepts the notice or fails to object, the right-of-way is deemed valid. If the Secretary does object, the objection must state the what the objection is and provide a factual and legal basis for each objection.

Section 3: Not later than two years after a holder is notified of the Secretary's objections, the Secretary may bring an action based on those objections in the United States District court challenging the validity of the right-of-way. In such an action, the Secretary bears the burden of proof that the right-of-way in some fashion is invalid. If the Secretary fails to bring an action within the two year period, the right-of-way is deemed valid.

Section 4: If a right-of-way is accepted or deemed valid, the Secretary must record the right-of-way in the land records and manage the lands subject to the right-of-way.

Section 5: Nothing in the Act prevents the holder of a right-of-way from bringing a quiet title action under the Quiet Title Act and failure to file a notice does not constitute a relinquishment of a right. This section also provides that State law shall be used to determine the validity of RS 2477 right-of-ways. (This is perhaps the most important aspect of H.R. 2081.) Lastly, the Secretary is prohibited from closing any RS 2477 right-of-way without appropriate notice. In no event shall a closure result in land-locking of a non-federal owner.

Administration Position: The Administration is having difficulties getting their testimony prepared in time for the hearing although they have had the bill since the 18th of July. The Administration is expected to oppose H.R. 2081.

ORIGIN OF R.S. 2477 RIGHTS-OF-WAY

*The right-of-way for the construction of highways
over public lands, not reserved for public uses,
is hereby granted.*

With this seemingly simple, 20-word federal statute Congress offered to grant rights-of-way to construct highways over unreserved public lands. Originally, the grant was Section 8 of a law entitled "An Act Granting Right of Way To Ditch and Canal Owners Over the Public Lands, and For Other Purposes." The law was also known as the Mining Act of 1866. Several years after the Act was passed, this provision became Section 2477 of the Revised States, hence the reference as R.S. 2477. Later still, the statute was recodified as 43 United States Code 9 (U.S.C.) § 932.

HISTORIC IMPORTANCE

R.S. 2477 was passed during a period in our history when the federal government was aggressively promoting settlement of the West. Under the authority of R.S. 2477, thousands of miles of highways were established across the public domain. It was a primary authority under which many existing state and county highways were constructed and operated over federal lands in the Western United States. Highways were constructed without any approval from the federal government and with no documentation of the public lands records, so there are few official records documenting the right-of-way or indicating that a highway was constructed on federal land under this authority.

REPEALED

One hundred and ten years after its enactment, R.S. 2477 was repealed by the Federal Land Policy and Management Act (FLPMA) of 1976.

THE ISSUE

Although this century-old provision was repealed over 18 years ago, its impact is still being felt, because highways established before October 21, 1976 (the effective date of FLPMA) were protected, as valid existing rights-of-way.

GRANDFATHERED RIGHTS

In recent years, there has been growing debate and controversy over whether specific highways were constructed pursuant to R.S. 2477, and if so, the extent of the rights obtained under the grant.

EVOLUTION OF CONTROVERSY

Prior to the late 1970s, there was little hint of the ensuing controversy over R.S. 2477. The Department of the Interior (DOI) did little to manage these rights-of-way, primarily deferring to state law and control.

LINK TO WILDERNESS

The issue began to emerge with the initiation of the wilderness inventory process for BLM lands outside of Alaska in 1977. For purposes of wilderness inventory, (specifically for what constitutes a "roadless" area) the DOI followed FLPMA's legislative history and adopted a definition of a road that included a requirement for some type of construction by mechanical means. This definition allowed for inventory of large blocks of public land for wilderness consideration, but it also created confusion because the definition of what constituted a "road" over public lands could be seen as different from the definition of a "right-of-way."

STATE DIFFERENCES

There have been few problems regarding R.S. 2477 rights-of-way in most public land states although states have handled the issue differently. This may be because of the differences among state laws, although a number of other factors also influence this situation.

Some states have not recognized R.S. 2477 highways and other states have hundreds. The number of recognized highways is, however, neither an indication of problems associated with R.S. 2477 nor of the potential for controversy in the future. Oregon currently has the greatest number of recognized R.S. 2477 highways, with 450, but relatively few problems have resulted from these recognized claims. On the other hand, a state with a large number of recently asserted claims may be an indication of potential controversy. At the present time, Utah has the greatest number of assertions, with over 5,000, while only 10 R.S. 2477 highways have been recognized.

R.S. 2477 IN UTAH

To date, Utah has been the focal point for most of the controversy. The issue erupted in 1987 over a popular Southern Utah back-country road called the Burr Trail that borders BLM Wilderness Study Areas (WSAs) and passes through two units in the National Park System. With recognition of the Burr Trail as an R.S. 2477 highway, the local county holder of the right-of-way initiated maintenance and upgrading of the existing road. Plans for road realignment and resurfacing led to extensive litigation in Federal District Court and ultimately in the 10th Circuit Court of Appeals. Issues in contention included the scope of the R.S. 2477 grant and what rights, if any, the county had to improve the road and the federal government's ability to impose mitigation of impacts to WSAs and National Parks and Recreation Areas. Therefore, the County has successfully pursued its claims on the Burr Trail.

CONTROVERSY SPREADS

The R.S. 2477 controversy soon spread to other parts of the state. For several years, citizen groups have proposed that there be additional public lands, beyond BLM recommendations, considered for wilderness designation. In response, some counties began asserting R.S. 2477 rights-of-way on federal lands managed by BLM and the National Park Service. Many of these claims, if deemed valid, could potentially disqualify areas in citizen wilderness proposals. Additionally, the BLM has recently given several Utah counties trespass notices for deviations in the established right-of-way necessary for maintenance.

R.S. 2477 IN ALASKA

Prior to 1959, nearly all of Alaska was public domain under federal control. This, along with the great size of the state, its sparse population, few constructed roads, and dependence upon nontraditional means of transportation, complicates the issue of access in Alaska.

ACCESS AN ISSUE

R.S. 2477 emerged as an issue in Alaska in the mid-1980s when the U.S. Fish and Wildlife Service and National Park Service began to prepare their land-use plans for Refuges and Parks in Alaska. This federal action precipitated the State of Alaska's interest in using R.S. 2477 to obtain rights-of-way over federal lands as state and local governments in the Lower 48 States had during their own early developmental periods. The state began to identify historical access routes across federal lands (including Conservation System Units which are areas designated for special protection by the Alaska National Interest Lands Conservation Act (ANILCA)) that potentially qualified as R.S. 2477 highways. These access routes were identified under Alaska state law in 1961 in the AS § 19.45.001(9) Act. This law included seasonal trails, footpaths, and traditional roads and trails used by wheeled and tracked vehicles.

SECRETARIAL POLICY DEFINES CONSTRUCTION

In 1985, representatives from diverse Alaska interests began a concerted effort to deal with the R.S. 2477 issue. Responding to this intense interest, the Secretary of the Interior issued in 1988 new policy on R.S. 2477 in the form of a policy statement that applied to all public land states using criteria contained in the 1986 BLM Rights-Of-Way manual and expanded to include criteria defined under Alaska state law. The policy statement included a definition of construction that in certain instances accepted mere use or passage as proof of the existence of a highway. As might be expected, the policy is viewed quite differently among competing public interests. Some view the current policy as extremely important to the economic and social development of Alaska because it maximizes access options over federal and possibly even private lands. Others view the policy as a new threat to federal lands, particularly the newly established National Forests, Refuges, Park Units, and other specially designated areas.

CONGRESS DEBATES THE ISSUE AND DIRECTS THIS REPORT

The growing number of road assertions in Utah and Alaska and the growing controversy over the issue between states and counties and interest groups caught the attention of Congress. In 1991, the House of Representatives passed H.R. 1096. This bill would have imposed a cutoff date for claims and specified how the DOI would handle future claims. The Senate adjourned without acting on H.R. 1096.

MORATORIUM PROPOSED AND DROPPED

In addition, the House-passed fiscal year 1993 appropriations bill for the DOI and related agencies provided for a moratorium on further processing of claims by the DOI, pending completion of legislation. There were no comparable provisions in the Senate version. In conference, the House's moratorium provision was dropped from the appropriations bill, but the conference report did direct the DOI to conduct a study of this history and management of R.S. 2477 rights-of-way.

THE PROPOSED REGULATIONS

The Department of Interior issued proposed regulations on July 29, 1994 "aimed at settling longstanding confusion over the existence and management of many rural Western 'highways' across public lands." The initial regulations granted a 90 day public comment period and that deadline was extended at the request of the Alaska and Utah delegations. Subsequently, an additional request was made by Members of the Alaska and Utah delegations to the Secretary to withdraw the regulations completely. The Secretary responded by extending the comment period to August 1, 1995.

SUMMARY OF THE PROPOSED REGULATIONS:

As proposed, the regulations attempt to establish a uniform system by which all claimed RS 2477 rights-of-way could be adjudicated.

FILING OF CLAIMS

The proposed regulations require that a claimant file with the appropriate land management office within two years of issuance of the final rule a request for an administrative determination of the validity and/or scope of each RS 2477 right-of-way. Each claim is required to include sufficient information to demonstrate that each element of RS 2477 and the proposed regulations has been met. Claimants are required to provide historic information as well as documentation demonstrating such requirements as proof of construction, public use, etc. If the processing officer believes more information is needed, the claimant will be required to provide additional information. All of this information must be provided even if the claimed RS 2477 has already received a judicial determination of its existence.

Filing of a claim also starts the clock running on the applicable twelve year statute of limitations period for filing a quiet title action in Federal Court. However, there is no provision to extend the twelve year statute of limitations time period if a claimant does not receive a final determination from the agency within the twelve year period.

FAILURE TO FILE A CLAIM

Failure of a claimant to file a timely claim will result in relinquishment of any rights that may be acquired under the administrative adjudication. Furthermore, if a claimant is unable or does not comply with further requests for information by the agency, the claimant relinquishes any rights they may have to a right-of-way. Even if the right exists under a judicial determination, the regulations attempt to relinquish those rights if the regulations are not properly followed. Even in a state such as Oregon where there are over 450 established RS 2477 rights-of-way, the counties and state will be required to file claims on these rights-of-way, completely ignoring the judicial determinations.

ADMINISTRATIVE DETERMINATION AND APPEALS PROCESS

The appropriate Agency will make a final determination on each claim filed following a public notice and comment period. This final determination then triggers the opportunity for any interested party to appeal the final decision to the Director of the determining agency.

ANALYSIS OF REGULATIONS

By most accounts of County Commissioners, state officials and attorneys practicing in this area, the regulations as proposed are so adverse to these communities and so unworkable that the regulations must be withdrawn. Primarily, these regulations place an incredible burden on local and state governments that will be impossible to meet. Under the history of RS 2477, these rights-of-way were established and an actual property right was granted to the right-of-way holder. Thus, extinguishing these property rights is not something that can be taken through a simple administrative action and without compensation.

Although on a case-by-case basis the burden of proof does not seem tremendous, the fact is that in most cases the claimant will be a single county, borough, city or state government that must make thousands of these claims and provide the proof behind each and every right-of-way. For example, in the State of Utah there are over 5,000 proposed RS 2477 rights-of-way. Given the process as outlined in the proposed regulations, many of these claims will be finally adjudicated in a court of law.

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

July 27, 1995

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

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

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

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

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

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

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

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

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

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

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

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

rights-of-way without actual construction of a highway is a "marked and novel liberality" with the law, which "certainly was not intended to grant a right-of-way over public lands in advance of an apparent necessity therefor, or on the mere suggestion that at some future time such roads may be needed." 26 I.D. 446 (1898).

Congress did not say in 1866 that rights-of-way for highways that might be constructed in the future are hereby granted and it did not say that state law controls the matter. That, however, is what this bill says. It rewrites, in other words, the 1866 statute. The Department has long looked to state law for guidance, but has never interpreted R.S. 2477 to require the United States to follow state laws that clearly accept more than was offered by the federal statute.

The only state laws that the Department and the courts have heretofore regarded as relevant for R.S. 2477 purposes are those that were in effect at the time of the construction of the highway, or prior to the repeal of R.S. 2477. This bill would, by contrast, allow state laws that are passed much later to redefine the terms of R.S. 2477, apparently without limitation. For example, the state of Utah passed a law in 1993 that purported to redefine the terms of R.S. 2477 very broadly, seventeen years after its repeal. This bill would validate this and other such laws.

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

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

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

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

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

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

We also question the wisdom and necessity of Section 5(e), which would provide new and restrictive procedures for road closures. It could endanger public safety, by precluding road closures in cases of flood, fire, or other dangerous conditions, or so lead to an inability to protect fragile historic, cultural, or natural resources.

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

WRITTEN TESTIMONY
REPRESENTATIVE BEVERLY MASEK
FOR
ALASKA STATE SENATE PRESIDENT DRUE PEARCE
AND
ALASKA STATE HOUSE SPEAKER GAIL PHILLIPS
BEFORE THE
UNITED STATES HOUSE COMMITTEE ON RESOURCE
NATIONAL PARKS, FORESTS AND LANDS
SUBCOMMITTEE
REGARDING
REVISED STATUTE 2477 RIGHTS-OF-WAYS

JULY 27, 1995

Updated 7/24/95

INTRODUCTION

Mr. Chairman and members of the National Parks, Forests and Lands Subcommittee, I want to thank you for this opportunity to testify on potential legislation involving Revised Statute 2477 Rights-Of Way. For the record, my name is Beverly Masek, Alaska State Representative from Willow, Alaska. I will be presenting joint testimony on behalf of the Alaska State Senate and Alaska House of Representatives.

Our time is limited for oral testimony so I request that our entire written testimony be entered into the record. I would also like to point out that we are commenting on discussion draft legislation dated July 17, 1995.

Mr. Chairman, I have two purposes for testifying here today. First, I want to impress on the members of the subcommittee the dire situation that exists in Alaska relative to access to private,

state and federal lands. Access that by and large all other states in these United States have taken for granted. I have with me some maps which I hope will assist me in clearly illustrating this point.

Secondly, I want to express strong Alaskan support for federal legislation recognizing the validity of rights-of-way granted under the previous Revised Statute 2477.

Alaska has gone through a massive land and resource reallocation process since statehood in 1959. We have seen the native claims settled, the withdrawal of huge chunks of federal lands into National Parks, Refuges, Forests and Wilderness area and the state selection of its land entitlement. What is still painfully obvious, however, is that convenient and inexpensive access to these lands is either severely lacking or non-existent.

When Congress passed the 1980 Alaska National Interest Lands Conservation Act, it acknowledged the disparity between the need to establish transportation and utility corridors throughout the state and the lack of available technical information on which to establish those routes. As a result, Congress created Title 11 which prided a mechanism for establishing Transportation and Utility corridors across federal lands sometime in the future. Unfortunately, there has never been a corridor established under Title 11 due to the resulting complex process created by the agencies. My point is that Congress clearly recognized the need for access throughout Alaska for a variety of purposes. I can assure you that the need has not diminished.

Preserving traditional public rights-of-way across federal lands is an issue that is extremely important to all western states, where, in most cases, the federal government is the largest land holder.

For example, in Alaska, which is twice the size of Texas, or as large as Texas, California and Montana combined, the federal government holds over 220 million acres of land. That includes over 54 million acres of National Parks and Preserves, 90 million acres of BLM and Forest Service lands, 75 million acres of land designated as National Wildlife Refuges, and 2 million acres of Military withdrawals.

As a brief aside, I would like to share with you a fact that is a particular point of irritation to Alaskan- 68 percent of all National Park Service lands are in Alaska; 85 percent of all Fish and Wildlife Service lands are in Alaska; 34 percent of all Bureau of Land Management lands are in Alaska; and 60 percent of all federal lands designated as wilderness are in Alaska. In fact, over 34 percent of ALL federal lands are in the State of Alaska.

As you can imagine, these vast federal holdings, and federal regulation of these lands, have far-reaching implications on public access to lands owned by the state, native corporations and private individuals - about 152 million acres, or 42 percent of the total acreage of the state.

ISSUE OVERVIEW

Revised Statute 2477, which was enacted as section 8 of the Mining Law of 1866, provides, in pertinent part:

The right-of-way for the construction of highways over public lands, not served for public uses, is hereby granted.

The rights-of-way granted pursuant to section 8 of the Mining Law of 1866, commonly referred to as RS 2477 rights-of-way, were open-ended, self-executing grants by the federal government that were accepted, or established, by public use. No prior federal application for such a right-of-way was required, and no notation appeared in land office records.

In effect, the RS 2477 grant contained in the Mining law of 1866 operates to convey an irrevocable right-of-way to the public across unreserved federal lands. Federal court rulings and, in fact,

Department of Interior regulations promulgated to implement the RS 2477 grant, confirm this interpretation of the right-of-way grant contained in the Mining Law of 1866.

At this point, it is appropriate that I clarify one important point. Although section 8 of the Mining Law of 1866 granted a right-of-way for the construction of "highways," in its proper historical context, "highway" did not mean a modern public street. The word "highway" was used generically to include any public passageway, such as a path, wagon road, pack trail, street, alley or any other common or customary transportation route - in Alaska, this means sled dog trails.

Both federal case law and Department of Interior regulations interpreting the Mining Law of 1866 historically have concluded that, as a matter of federal law, state law governs the method of acceptance, or establishment, of RS 2477 right-of-way, and the boundary and scope of the right-of-way. When accepted, or established, RS 2477 rights-of-way are vested interest in real property belonging to the public at large.

In Alaska, the state supreme court has articulated the procedures for accepting RS 2477 rights-of-way as follows:

{B}efore a highway may be created, there must be either some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept, or there must be public use for such a period of time and under such condition as to prove that the grant has been accepted.

Historic "use" rather than actual "construction" of the right-of-way is the focus of the RS 2477 acceptance inquiry in Alaska.

Regulations recently proposed by the Department of Interior relating to RS 2477 rights-of-way attempt to disable the grants already vested pursuant to the provision of section 8 of the Mining Law of 1866. Interior's new interpretation of the RS 2477 grant does not recognize the establishment of a right-of-way and the vesting of the right of public use of that right-of-way unless there has been an affirmative determination made by Interior or a federal district court on the existence or scope of a "claim."

These new regulations ignore almost a century of state and federal jurisprudence relating to the grant of RS 2477 rights-of-way. I also maintain that these regulations violate fundamental principles of law established by Congress and the courts - specifically, the principle that an administrative agency reversal of an established, long-held statutory construction is impermissible.

Until the release of the new proposed regulations, the Department of Interior's interpretation of the federal grant has remained unchanged. At least since 1938, the Secretary of Interior has consistently interpreted section 8 of the Mining Law of 1866 as granting an RS 2477 right-of-way upon the construction or establishment of a highway in accordance with state law.

The provisions of the Federal Land Policy Management Act of 1976 support Interior's long-standing interpretation of section 8 of the Mining Law of 1866 and undermine the Clinton Administration's attempt at narrowly construing the RS 2477 right-of-way grant.

The RS 2477 right-of-way grant embodied in section 8 of the Mining Law of 1866 was repealed in 1976 with the enactment of the Federal Land Policy Management Act ("FLPMA"). However, pursuant to the express provision of the 1976 Act, all rights-of-way existing prior to enactment of FLPMA, including RS 2477 rights-of-way, were preserved. Specifically, sections 509 and 701 of FLPMA state:

Section 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."

Section 701 (a) - "Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act."

Section 701 (h) - "All action by the Secretary concerned under this Act, shall be subject to valid existing rights."

The attempt by the Department of Interior to alter established, long held statutory interpretations of RS 2477 grants is unacceptable. Because of the importance of these changes to Alaska, we are asking Congress to once again clarify its policy related to the granting of these rights-of-way.

IMPACT ON ALASKA

For its large expanse (586,412 square miles), there are few roads and highways in Alaska. In early days traditional travel was by river and by overland trail routes on foot, horseback or dog team. When greater numbers of settlers began to flow into Alaska in the 1930's and 1940's and subsequent decades, the airplane had become an acceptable and, albeit expensive, sensible means of transportation to remote towns and villages and other hard to reach domains. Because of the airplane era, highways and secondary road construction over earlier trails had lagged in this remote state.

A close look at Alaska's present transportation systems and the potential rights-of-way grants under RS 2477 would show that Alaska still lacks the infrastructure to adequately develop its own resources and provide basic services to its people - many of the privileges taken for granted in every other state. Unless this obstacle is adequately removed, Alaska can only look forward to greater and greater dependence on the federal government for economic relief.

A close look at Alaska's present transportation systems and the potential rights-of-way grants under RS 2477 would show that Alaska still lacks the infrastructure to adequately develop its own resources and provide basic service to its people - many of the privileges taken for granted in every other state. Unless this obstacle is adequately removed, Alaska can only look forward to greater and greater dependence on the federal government for economic relief.

In 1993, Alaska began a renewed effort to identify and adequately document grants under RS 2477. About 1,700 routes were identified with more than 1,300 being researched. About 600 routes appeared to qualify under RS 2477. Those routes have been compiled in an Atlas and illustrated on a map which I brought for illustrative purposes.

CONCLUSION

Mr. Chairman and members of the committee, the Alaska State Senate and House of Representative applaud your efforts to address the access issues embodied in rights-of-way granted under RS 2477. We have offered some specific comments on the draft legislation which are attached as an Appendix to our written testimony.

I have circulated maps to illustrate the current access dilemma we face in our state. This situation can only deteriorate if the limited access infrastructure processes and mechanisms are further restricted or eliminated. Congressional clarification of the rights-of-way granted under RS 2477 would, however, be a giant step forward.

We specifically want to thank you for this opportunity to testify before the subcommittee on this topic. As you have probably concluded from our testimony, we are extremely supportive of this legislation and offer our continued support for definitive Congressional action.

APPENDIX
SPECIFIC COMMENTS
RS 2477 DRAFT LEGISLATION

1. This draft legislation incorporates both the granting of a right-of-way and the management of the right-of-way. Alaska has contended that the management of rights-of-way granted under RS 2477 were the responsibility of the respective state. It is extremely important that we do not create a management scenario where a right-of-way is granted but the Secretary is vested the authority to essentially deny its use through closure or other authorities.
2. Page 3, Line 8-10. Section 2 (b) (2). We suggest rewording:

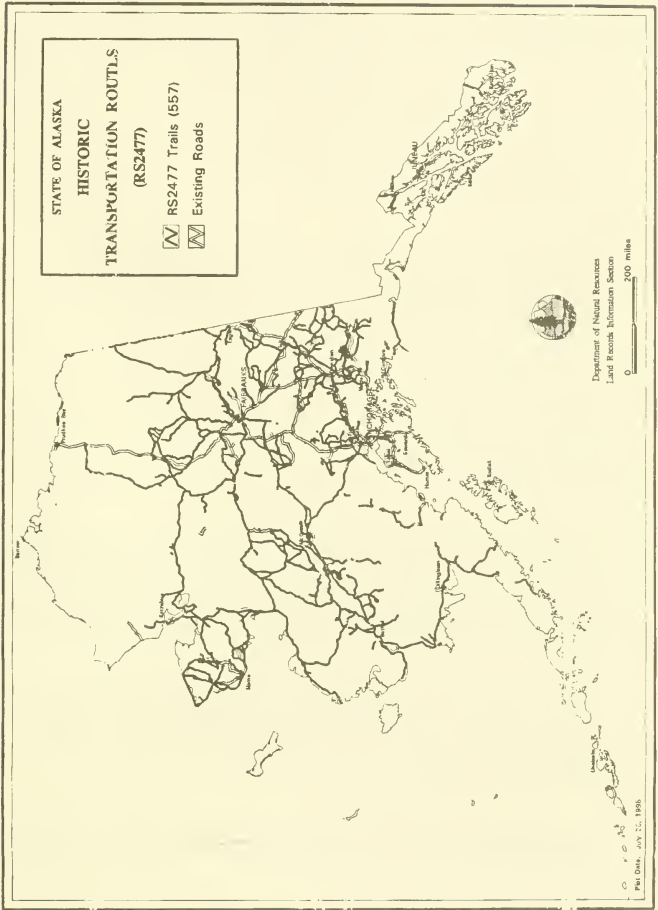
Recognition --When the Secretary accepts the right-of-way, the provisions of Section 4 shall apply.
3. Page 3, Line 11-17. Section 2 (b) (3).

We recommend that the basis for any objection must be limited to legal requirements related to the grant and not for federal management purposes.
4. Page 3, Line 15. The term "scope" needs to be clarified or defined.
5. Page 4, Line 7-23. Section 3 (b).

This section related to "Burden of Proof" is well constructed. We definitely concur with this requirement.
6. Page 5, Line 10-14. Section 4.

We are concerned that this paragraph gives the Secretary considerable land management authorities related to the right-of-way which most likely did not exist before.
7. Page 6, Line 23 - 25. Section 5 (e). We recommend the following additions:

Road Closures -- The Secretary shall not close or restrict any right-of-way, granted under section 2477 of the Revised Statutes or any other law, which was in use prior to October 21, 1976, until one year after providing notice to the state and



JY KNOWLES, GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
WASHINGTON, D.C.

July 26, 1995

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

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

Dear Chairman Hansen:

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

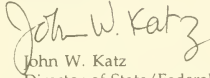
The State of Alaska, as you know, has testified extensively to Congress regarding the issues associated with RS 2477 rights-of-way in Alaska. Most recently, we were pleased to respond to your invitation by participating in the hearing and discussion session you held in March. As an alternative to providing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

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

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

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

Sincerely,

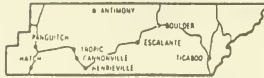
A handwritten signature in dark ink, reading "John W. Katz". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Katz" following in a similar style.

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

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

GARFIELD COUNTY

County Commissioners
 Louise Liston
 D. MaJoy Dodds
 Clare M. Ramsay
 Camile A. Moore,
 Clerk/Auditor



55 South Main Street, P.O. Box 77 • Panguitch, Utah 84759
 Ph. 801-676-8826 • Fax 801-676-8239

Tom Simkins, Assessor
 Judy Henrie, Treasurer
 Than Cooper, Sheriff
 Wallace A. Lee, Attorney
 A. Les Barker, Recorder
 John W. Yardley,
 Justice of the Peace

STATEMENT OF
 LOUISE LISTON, COMMISSIONER
 GARFIELD COUNTY, UTAH

REGARDING

REVISED STATUTES 2477
 RIGHTS-OF-WAY SETTLEMENT ACT
 (H.R. 2081)

BEFORE THE
 HOUSE SUBCOMMITTEE ON NATIONAL PARKS,
 FORESTS AND LANDS

JULY 27, 1995

WASHINGTON, D.C.

INFORMED US THAT ALTHOUGH THE ALIGNMENT CREATED NO UNDUE AND UNNECESSARY DEGRADATION AND WAS PERFECTLY ACCEPTABLE IN THEIR MINDS, INDIVIDUALS HIGHER UP IN THE DEPARTMENT HAD ARBITRARILY DETERMINED THAT THE WORK COULD NOT GO FORWARD BECAUSE IT LEFT AN INTERVENING, UNDISTURBED AREA OF LESS THAN ONE-TENTH OF AN ACRE. LOCAL REPRESENTATIVES IN THE COUNTY AGREED TO INITIATE A LEGAL PROCEEDING IN ORDER TO GET A RULING FROM THE COURT. IT WAS ANTICIPATED THAT A RULING COULD BE ACHIEVED IN LESS THAN SIX MONTHS. THE JUSTICE DEPARTMENT IN CONSULTATION WITH THE BLM HAVE PROLONGED COURT PROCEEDINGS FOR NEARLY TWO YEARS, AND THE MATTER IS STILL UNRESOLVED ALTHOUGH IT IS SCHEDULED FOR A HEARING ON FRIDAY, JULY 28TH. THIS SECTION OF ROAD HAS A TOTAL LENGTH OF APPROXIMATELY 300 FEET, IS LOCATED ON GROUND THAT WAS PURCHASED BY THE BLM FROM THE STATE OF UTAH, AND IS BORDERED ON THE NORTH BY A CAMPGROUND AND ON THE SOUTH BY A PARKING AREA THE BLM HAS REQUESTED THE COUNTY EXPAND AS PART OF THEIR ROAD EFFORTS.

THE GULCH: SIMILAR TO DEER CREEK, THE GULCH ALIGNMENT WAS REVIEWED BY THE BLM AND FURTHER EXAMINED DURING COURT PROCEEDINGS. THE COURT DIRECTED THE COUNTY TO RELOCATE THE ROAD ON THE BENCH APPROACHING THE GULCH, AND PLANS WERE DRAWN AND APPROVED AS TO THE LOCATION OF THE STREAM CROSSING. IN ADDITION, A TITLE V RIGHT-OF-WAY WAS ALSO ISSUED FOR RELOCATION OF THE ROAD AND THE CROSSING. WHEN GARFIELD COUNTY STAKED THE ALIGNMENT IN ACCORDANCE WITH COURT-APPROVED PLANS, THE BLM INDICATED THAT THE LOCATION WAS UNACCEPTABLE AND REQUESTED THAT THE COUNTY MOVE THE ROAD TO THE NORTH. THE

COUNTY COMPLIED WITH THE BLM'S REQUEST IN AN EFFORT TO COOPERATE AND INSTALLED THE STRUCTURE AT LOCATIONS INDICATED BY THE BLM. UPON COMPLETION OF THE STRUCTURE, LOCAL FEDERAL LAND MANAGERS DETERMINED THE STRUCTURE WAS UNACCEPTABLE AND DEMANDED THAT IT BE RELOCATED NORTH OF ITS EXISTING LOCATION. THE STRUCTURE WAS A PRE-CAST CONCRETE BOX, WHICH REQUIRED SIGNIFICANT EFFORT TO RELOCATE AND NECESSITATED SEVERAL ADDITIONAL SECTIONS IN ORDER TO ACCOMMODATE THE REVISED ALIGNMENT. THE COUNTY STAKED THE NEW ALIGNMENT; AND AS THE CONTRACTOR SHOWED UP ON THE JOB TO RELOCATE THE STRUCTURE, THE BLM PROTESTED THE SECOND REALIGNMENT. THE COUNTY MET WITH BLM OFFICIALS THE FOLLOWING DAY AND WAS INFORMED THAT REGARDLESS OF STAKES MARKING WILDERNESS AREAS, REGARDLESS OF A PARKING LOT LOCATED ADJACENT TO THE ROAD AND REGARDLESS OF COURT-APPROVED PLANS, THE COUNTY WOULD NEED TO MOVE THE STRUCTURE AN ADDITIONAL TEN FEET NORTH. THE COUNTY COMPLIED WITH THE BLM'S DEMANDS, RESULTING IN A TOTAL RELOCATION FROM THE ORIGINAL COURT-APPROVED ALIGNMENT OF MORE THAN SEVENTY-THREE FEET. THE BLM THEN ISSUED A TRESPASS AGAINST THE COUNTY, INCLUDING A STATEMENT THAT THE COUNTY HAD RELOCATED THE ROAD TOO FAR NORTH. THE CONCLUSION OF THIS PROJECT HAS STILL NOT TAKEN PLACE TO DATE, BUT HAS RESULTED IN SIGNIFICANT TIME DELAYS AND ADDITIONAL COSTS TO THE COUNTY.

IN STUDYING R.S.2477 HISTORY AND THE CONGRESSIONAL RECORD RELATED TO PRE-EXISTING RIGHTS-OF-WAY GRANTED UNDER THE STATUTE WHEN FLPMA WAS ENACTED, I FIND IT VERY CLEAR THAT CONGRESS UNDERSTOOD THE IMPORTANCE OF R.S.2477 RIGHTS-OF-WAY AND HAD NO INTENTION OF LIMITING THE SCOPE OF THOSE RIGHTS. IN FACT, FLPMA EXPLICITLY SAYS SO. SEE 43 U.S.C. §1701, SAVINGS PROVISIONS, NOTE (h).

AND YET THAT IS EXACTLY WHAT COUNTIES ARE FACED WITH AT THE PRESENT TIME IN DEALING WITH FEDERAL AGENCIES WHEN MAINTAINING OR IMPROVING THESE ROADS. H.R. 2081 WOULD GIVE DIRECTION TO FEDERAL AGENCIES AND THEREBY ENHANCE THEIR ABILITY TO BETTER MANAGE FEDERAL LANDS WITHOUT INTERFERING WITH THE COUNTIES' OBLIGATION TO PROVIDE SAFETY FOR THE TRAVELING PUBLIC. POLICIES WHICH ENCOURAGE THE INTERFERENCE OF PROVIDING THAT SAFETY WILL EVENTUALLY BE CHALLENGED IN COURT AND BRING FURTHER STRESS TO LIMITED BUDGETS.

PLEASE KEEP IN MIND THAT THESE ROADS PROVIDE ACCESS TO YOUR LANDS AS WELL AS PROVIDING ROUTES FOR GOVERNMENT EMPLOYEES AND COUNTY CITIZENS TO TRAVEL TO WORK ON. MAINTAINING AND IMPROVING THESE ROADS TO A SAFE STANDARD BENEFITS ALL OWNERSHIP, WHETHER IT BE PRIVATE, STATE, COUNTY OR OTHER USERS. UNDER PRESENT MANAGEMENT PRACTICES, IT HAS BECOME INCREASINGLY DIFFICULT TO DO THAT. LAST YEAR GARFIELD COUNTY WAITED FIFTEEN MONTHS FOR THE PARK SERVICE TO COMPLETE AN ENVIRONMENTAL ASSESSMENT ON A PORTION OF A COUNTY RIGHT-OF-WAY THAT TRAVERSED CAPITOL REEF NATIONAL PARK. WE POSTPONED PLANNED IMPROVEMENTS (CROWNING THE ROAD, WHICH HAD BECOME A CHANNEL IN MOST PLACES, AND BAR DITCHING THE SIDES FOR BETTER DRAINAGE TO PREVENT FLOODING AND WASHOUTS). WE WERE TOLD THAT IF WE WENT TO WORK, WE WOULD BE SERVED WITH AN INJUNCTION TO STOP US. ACTING IN GOOD FAITH, GARFIELD COUNTY HAS TRIED FOR CLOSE TO TWO YEARS NOW TO REACH AN AGREEMENT--EVEN MEETING HERE IN WASHINGTON LAST MONTH WITH ASSISTANT INTERIOR SECRETARIES FRAMPTON AND ARMSTRONG AND SEVERAL STAFF MEMBERS AND ATTORNEYS. IT HAS COST THE COUNTY A CONSIDERABLE AMOUNT OF MONEY, NOT MENTIONING THE COST TO THE PARK SERVICE FOR THE E.A., TRIPS TO SEE THE ROAD, ETC. IN

LIGHT OF ALL THE TALK OF BUDGET CONSTRAINTS AND ELIMINATING WASTE, I CAN'T HELP BUT THINK WHAT THIS BILL COULD DO TO ACCOMPLISH THOSE VERY GOALS. IT IS A REALISTIC APPROACH TO SETTLING A VERY CONTROVERSIAL ISSUE VS. AN UNREALISTIC APPROACH SET FORTH IN THE DOI'S PROPOSED REGULATIONS WHICH WOULD PLACE SERIOUS FINANCIAL BURDENS ON COUNTIES AND THE FEDERAL GOVERNMENT, FORCING THEM TO USE THEIR PERSONNEL AND OTHER RESOURCES IN A WASTEFUL AND UNNECESSARY MANNER. VERY HONESTLY, THE PROPOSED REGULATIONS ARE VIEWED BY THE GENERAL PUBLIC AS YET ANOTHER UNFUNDED MANDATE. THE NATIONAL ASSOCIATION OF COUNTIES STRONGLY OPPOSES THESE PROPOSED REGULATIONS AND SUPPORTS COUNTIES IN THEIR EFFORTS TO PROVIDE ACCESS TO THE PUBLIC LANDS USING R.S.2477 CORRIDORS.

SINCE MANY OF UTAH'S R.S.2477 ROADS ARE STATE HIGHWAYS, I HAVE ATTACHED TO MY STATEMENT A RESOLUTION PASSED DURING THE 1995 SESSION OF THE STATE LEGISLATURE AND ENDORSED BY THE GOVERNOR, WHICH STRONGLY URGES THE UNITED STATES DEPARTMENT OF THE INTERIOR TO WITHDRAW PROPOSED REGULATIONS CONCERNING R.S. 2477 RIGHTS-OF-WAY AND URGING THE UNITED STATES CONGRESS TO RECOGNIZE THE AUTHORITY OF THE STATE OF UTAH TO ADMINISTER RIGHTS-OF-WAY ACROSS FEDERAL PUBLIC LANDS IN UTAH, AND TAKE ACTION TO ENSURE THAT ADMINISTRATIVE AGENCIES OF THE UNITED STATES TAKE NO ACTION WHICH WOULD INFRINGE UPON THIS SOVEREIGN AUTHORITY.

I AM ALSO ATTACHING A COPY OF A 9TH CIRCUIT COURT DECISION REGARDING AN R.S.2477 RIGHTS-OF-WAY CASE THAT TOOK PLACE IN ALASKA AND A MORE DETAILED ACCOUNT OF THE CAPITOL REEF NATIONAL PARK ISSUE.

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, I FEEL THE SURVIVAL

OF UTAH'S RURAL COUNTIES AND COMMUNITIES AND OTHER COUNTIES AND COMMUNITIES THROUGHOUT THE WEST WHICH RELY UPON ACCESS ACROSS AND USE OF THE NATION'S PUBLIC LANDS IS ONCE AGAIN BEING THREATENED BY FEDERAL POLICY AND REGULATIONS. THIS BILL WOULD BRING BALANCE AND COMMON SENSE BACK INTO THE MANAGEMENT OF THOSE VITAL CORRIDORS WHICH NOT ONLY BENEFIT ALL OWNERS AND USERS, BUT SERVE AS A TOOL TO BETTER MANAGE THE PUBLIC LANDS WHICH THEY ACCESS.

THANK YOU.

Attachments:

Resolution on Highway Rights-of-Way
News article, January 1994

Attachment 1

CAPITOL REEF NATIONAL PARK: THE BURR TRAIL ROAD THROUGH CAPITOL REEF PARK WAS ORIGINALLY CONSTRUCTED IN THE LATE 1800'S. UTAH COUNTY HIGHWAY MAPS DATED 1956 SHOW THE CURRENT LOCATION OF THE ROAD AND ABSENCE OF ANY PARK UNIT AT THAT TIME. NEAR THE 1950'S THE COUNTY ENGAGED IN A PROJECT WHERE A SIGNIFICANT PORTION OF THE ROAD THROUGH CAPITOL REEF NATIONAL PARK HAD TREES AND OVERGROWTH PUSHED BACK TO A WIDTH OF AT LEAST FIFTY FEET EACH SIDE OF THE CENTER LINE OF THE EXISTING ROAD. IN ADDITION, THE RIGHT-OF-WAY THROUGH ONE MILE OF THE ROUTE THROUGH CAPITOL REEF TRAVERSES A SECTION OWNED BY GARFIELD COUNTY, AND PREVIOUSLY OWNED BY THE STATE OF UTAH. AN ECONOMIC DEVELOPMENT ADMINISTRATION PROJECT WAS ALSO CONDUCTED FROM 1963 TO 1969 ALONG THE BURR TRAIL AND CAPITOL REEF NATIONAL PARK FOR A LENGTH OF APPROXIMATELY 2 MILES. RIGHT-OF-WAY STAKES WERE PLACED, AND CURRENT RIGHT-OF-WAY MARKERS AT EACH END OF THE PROJECT STILL EXIST. DESPITE THE LONGSTANDING ACCEPTANCE OF THE RIGHT-OF-WAY AND THE IMPROVEMENTS PERFORMED BY GARFIELD COUNTY THROUGHOUT THE YEARS, CAPITOL REEF NATIONAL PARK NOW HAS ISSUED AN ENVIRONMENTAL ASSESSMENT, REQUIRING A NARROWING OF THE ROAD AND PROHIBITING THE PLACEMENT OF GRAVEL ALONG THE ROAD. THEY HAVE ALSO THREATENED THE COUNTY, INDICATING THAT UNLESS THE COUNTY COMPLIED WITH THEIR DEMANDS, THEY WOULD ISSUE A DEMAND FOR AN EIS RATHER THAN A FONSI ON THE PROJECT AND HAVE CONTINUALLY HADGERED THE COUNTY ABOUT ITEMS AS INSIGNIFICANT AS STAKING THE PROJECT FOR AERIAL SURVEYING. PARK OFFICIALS REFUSED TO ACKNOWLEDGE THE FULL DISTURBED WIDTH AND HAVE HARASSED THE COUNTY FOR ITS REGULAR MAINTENANCE ACTIVITIES ALONG THE ROAD.

(RESOLUTION ON HIGHWAY RIGHTS-OF-WAY)

1995

C.R. No. _____

By: _____

A CONCURRENT RESOLUTION OF THE LEGISLATURE AND THE GOVERNOR, STRONGLY URGING THE UNITED STATES DEPARTMENT OF THE INTERIOR TO WITHDRAW PROPOSED REGULATIONS CONCERNING R.S. 2477 RIGHTS-OF-WAY AND URGING THE UNITED STATES CONGRESS TO RECOGNIZE THE AUTHORITY OF THE STATE OF UTAH TO ADMINISTER RIGHTS-OF-WAY ACROSS FEDERAL PUBLIC LANDS IN UTAH.

Be it resolved by the Legislature of the State of Utah, the Governor concurring therein.

WHEREAS Congress granted the right-of-way for the construction of highways over public lands, not reserved for public uses, pursuant to Section 8 of the Act of July 26, 1866, 14 Stat. 253 (the "Act");

WHEREAS Section 8 of the Act was re-enacted and codified as Revised Statute 2477 ("R.S. 2477");

WHEREAS in H.C.R. No. 1 of the Second Special Session in 1993, the Legislature and the Governor have previously expressed their opposition to actions of the United States Congress, the Department of the Interior or the Department of Agriculture that would have the effect of infringing on the authority of the State of Utah and its subdivisions to administer existing rights-of-way established across federal public lands in Utah for reasons set forth in that resolution which are hereby incorporated by reference;

WHEREAS in H.B. No. 6 of the Second Special Session in 1993, the Legislature set forth the law of the State of Utah as it applies to R.S. 2477 rights-of-way, consistent with established law and prior administrative guidelines established by the Department of the Interior;

WHEREAS the Department of the Interior has nevertheless promulgated proposed regulations that would affect these rights-of-way in a manner which would infringe on the sovereign rights of the State of Utah and its subdivisions;

WHEREAS the Department of the Interior has not allowed the State of Utah and its subdivisions meaningful opportunity to participate in the creation of R.S. 2477 regulations;

WHEREAS the proposed regulations contradict established law and prior administrative guidelines;

WHEREAS the proposed guidelines would place inordinate burdens on the State of Utah and its political subdivisions;

WHEREAS the proposed regulations would jeopardize valid existing rights-of-way;

NOW, THEREFORE, BE IT RESOLVED that the Legislature of the State of Utah, the Governor concurring therein, strongly urge the Department of the Interior to withdraw the proposed regulations on R.S. 2477.

BE IT FURTHER RESOLVED that the Legislature of the State of Utah, the Governor concurring therein, strongly urge the United States Congress to recognize the sovereign authority of the State of Utah and its subdivisions to administer existing rights-of-way established across federal public lands in the State of Utah and take action to ensure that administrative agencies of the United States take no action which would infringe upon this sovereign authority.

BE IT FURTHER RESOLVED that copies of this resolution be sent to the Secretary of the Department of the Interior, the Speaker of the United States House of Representatives, the Vice President of the United States in his capacity as the President of the United States Senate, and to Utah's Congressional delegation.

COMMENTS ON R.S. 2477 SETTLEMENT ACT
Barbara Hjelle

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. I have been involved in litigation over Garfield County's Boulder-to-Bullfrog Road, commonly known as the "Burr Trail" Road, since 1987. I am currently involved in an action filed by Washington County, Utah, to "quiet title" to many of its R.S. 2477 rights-of-way. 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 asserted 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, at great expense to the county, to meet a technical concern regarding the asserted boundaries of a wilderness study area in a location that was already highly disturbed. 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. I have observed a whole group of federal employees, none of whom were engineers, debate the propriety of road work 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 right-of-way and unjustified distrust of the local governments who manage them, these costs are escalating, with no concomitant benefit to anyone. I question whether the federal government is truly prepared to take on the added burdens of managing hundreds of rights-of-way in rural areas which have been traditionally managed by local governments, but unless Congress acts to correct the current trends, that may well be the result.

These comments will 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).

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. 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.

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), 701(a), and 701(h), 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.

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 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. 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. 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 scope of the right-of-way, the most significant aspect being 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 in states and counties dominated by federally owned lands. 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. For this reason, 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 ten year time period is intended to allow time to inventory existing rights-of-way and compile the data required by

the provisions of this section. Ten 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, ten years appears to be the shortest realistic 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 recognizes 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.

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 Interior now attempts to do.

Section 2(b)(2) provides that the provisions of section 4 apply to rights-of-way recognized by the Secretary. As explained below, those provisions require the Secretary to record the validity of the right-of-way and manage the federal lands subject to the right-of-way.

Section 2(b)(3) 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.

Section 2(b)(4) 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 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.

Section 3(d) limits standing to parties that have a legitimate claim of property interest in the right-of-way, such as states, counties and other holders. This provision will further the Act's goal of expeditiously settling title to R.S. 2477 rights-of-way. Because the Act addresses property interests, under standard principles of law, the only parties with legitimate interests are the holders of the dominant and servient estates. Since at least one of these parties, and most often both, will be governmental entities representing the public, the public's interests will be well represented in any hearing.

D. SECTION 4

Section 4 specifies that rights-of-way deemed to be accepted according to the provisions of the Act are valid. While the Act as a whole operates as an administrative program, not intended to diminish valid existing property rights, there can be no reason to leave the validity of rights-of-way in doubt after the parties with the relevant property interests have resolved the question. 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 valid rights-of-way must be legally respected by the federal land manager. Validity of a right-of-way denotes legally protected property rights that cannot be infringed upon by the owner of the servient estate.

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) provides that failure to file notice does not cause rights-of-way to be relinquished. This provision merely states the law as it stands. These rights, where they are valid, vested as property rights prior to the repeal of R.S. 2477 on October 21, 1976. They cannot now be taken by any administrative action, whether directed by Congress or otherwise, without due process. This clarification of the law is necessary in light of the limited resources of local governmental entities and the rural nature of much of the land where these rights-of-way are located. Given the recent efforts by the Department of Interior to redefine these rights-of-way in a way that would work a de facto divestment of the rights, this provision provides a salutary recognition of fundamental legal principles. Furthermore, the Act creates an alternative to quieting title, not a substitute for it. Should a holder decide, for example, to pursue judicial procedures instead of filing a notice in the administrative process created by this Act, the holder cannot be punished with a determination that the right-of-way is relinquished.

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

Section 5(d) specifies that NEPA does not apply to actions taken pursuant to this Act. The Act does not constitute action by any party. Rather, the Act establishes a method for recognizing the legal significance of past actions.

Section 5(e) prohibits the Secretary from closing public access routes predating FLPMA without providing notice to the relevant political entities. This provision recognizes that road closures can impose tremendous difficulties on local governments and rural citizens. Before such difficulties are imposed, where the public has been using such routes 19 years or more, notice should be provided. Of course, the Secretary does not have the legal power to close a valid R.S. 2477 right-of-way, even with notice.

Additionally, road closures are impermissible if such closure would leave non-federal lands with no access. Realizing the practical realities of securing additional methods of access across federal lands and the financial burdens associated with building new roads, this Act declares that non-federal lands may not be cut-off through elimination of the sole route of access.

IV. CONCLUSION

The Act establishes a system for recognizing valid rights-of-way created by R.S. 2477, 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 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 effort 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 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 reassert the appropriate status of these R.S. 2477 rights-of-way to the benefit of the American people.

SETTLED PRECEDENT ON R.S. 2477

Revised Statutes 2477 (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." § 8 of the Act of July 26, 1866, 14 Stat. 253, later codified at 43 U.S.C. § 932.

This statute has been interpreted innumerable times over the 128 years since its passage by state and federal courts and by the Department of Interior and these interpretations have consistently outlined fundamental core principles which have guided its application over the years. In particular, the statute has been applied universally by reference to state law. Furthermore, the definitions under state law of terms such as "highway" and "construction" have always been honored. The new regulations proposed by the Department of Interior do not provide a fair treatment of this legal history and the definitions which were relied upon for the 110 years that the offer under R.S. 2477 was open. The following outline provides just a few quotations from the vast body of administrative and court-made law which the new regulations attempt to ignore and thereby reverse.

I. THE ROLE OF STATE LAW:

Early federal regulations stated:

This grant [R.S. 2477] 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 should be filed under this act, as no action on the part of the Federal Government is necessary. 56 I.D. 533 (May 28, 1938).

These regulations were retained, virtually unchanged, for 110 years:

No application should be filed under R.S. 2477, as no action on the part of the Government is necessary. . . . 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. §§ 2822.1-1, 2822.2-1 (October 1, 1974)(See also, 43 C.F.R. 244.54 (1938); 43 C.F.R. 244.58 (1963).

In 1986, the Department recognized its duty to honor prior, valid existing rights:

A right-of-way issued on or before October 21, 1976, pursuant to then existing statutory authority is covered by the provisions of this part unless administration under this part diminishes or reduces any rights conferred by the grant or the statute under which it was issued, in which event the provisions of the grant or the then existing statute shall apply. 43 U.S.C. § 2801.4 (February 25, 1986).

Supplementary information supplied by the Department stated:

It was not the intent of the proposed rulemaking, nor is it the intent of this final rulemaking, to diminish or reduce the rights conferred by a right-of-way granted prior to October 21, 1976. . . . In addition, if questions should arise regarding the rights of a right-of-way holder under a grant or statute, the earlier editions of the Code of Federal Regulations on rights-of-way will remain available to assist in interpretation of the rights conferred by the grant or earlier statute. . . . In carrying out the Department's management responsibilities, the authorized officer will be careful to avoid any action that will diminish or reduce the rights conferred under a right-of-way grant issued prior to October 21, 1976. 51 Fed.Reg. 6542 (February 25, 1976).

The Department also recognized the role of state law when making representations to the courts:

The parties are in agreement that the right of way statute is applied by reference to state law to determine when the offer of grant has been accepted by the "construction of highways. Wilkenson v. Dept. of Interior of United States, 634 F.Supp. 1265, 1272 (D. Colo. 1986) (citation omitted).

The Department's own appellate bodies also recognized the propriety of the application of state law:

The question of whether a road is a public highway is a matter of state law. The Sierra Club et al., 104 IBLA 17, 19 (1988).

State courts have also been consistent in their treatment of R.S. 2477 rights-of-way:

Under this act [R.S. 2477] highways could be established over public lands not reserved for public uses while they remained in the ownership of the government. Congress did not specify or limit the methods to be followed in the establishment of such highways. It was necessary, therefore, in order that a road should become a public highway, that it be established in accordance with the laws of the state in which it was located. Ball v. Stephens, 158 P.2d 207, 209 (Cal. Ct. App. 1945).

It has been held by numerous courts that the grant [under R.S. 2477] may be accepted by public use without formal action by public authorities, and that continued use of the road by the public for such length of time and under such circumstances as to clearly indicate an intention on the part of the public to accept the grant is sufficient. Lindsay Land & Livestock v. Churnos, 285 P. 646, 648 (Utah, 1930).

By this act [R.S. 2477] the government consented that any of its lands not reserved for a public purpose might

be taken and used for public roads. The statute was a standing offer of a free rights of way over the public domain, and as soon as it was accepted in an appropriate manner by the agents of the public, or the public itself, a highway was established. Streeter v. Stalnaker, 61 Neb. 205, 85 N.W. 47, 48 (1901).

Federal courts have concurred:

The salient issue is whether the scope of R.S. 2477 rights-of-way is a question of state or federal law. . . . Especially when an agency has followed a notorious, consistent, and long-standing interpretation, it may be presumed that Congress' silence denotes acquiescence: "[G]overnment is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself,--even when the validity of the practice is the subject of investigation." United States v. Midwest Oil Co., 236 U.S. 459, 472-73, 35 S.Ct. 309, 312- 13, 59 L.Ed. 673 (1915).. . . The perfection of an R.S. 2477 right-of-way admittedly is a different issue [from] its scope. However, all of the above-cited cases concern the conflict between an alleged R.S. 2477 right-of-way and a competing claim of right to the land. The cases subsume the question of scope into the question of perfection; and indeed a critical part of many of the state law definitions of perfection included the precise path of the purported roadway. 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. (Citations omitted.)

Ordinarily, this expression of intent [by the state legislature] would constitute valid acceptance of the right-of-way granted in Section 932. That section acts as a present grant which takes effect as soon as it is accepted by the State. . . . All that is needed for acceptance is some "positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept" Wilderness Society v. Morton, 479 F.2d 842, 882 (D.C. Cir. 1973), (quoting Hamerly v. Denton, Alaska, 359 P.2d 121, 123 (1961); citing also Kirk v. Schultz, 63 Idaho 278, 282, 119 P.2d 266, 268 (1941); Koloen v. Pilot Mound Township, 33 N.D. 529, 539, 157 N.W. 672, 675 (1916); Streeter v. Stalnaker, 61 Neb. 205, 206, 85 N.W. 47, 48 (1901)).

"Under R.S. 2477, a right-of-way could be established by public use under terms provided by state law." Sierra Club v. Hodel, 675 F.Supp. at 604. "Whether the roads have been established under the provisions of R.S. 2477 is a question of New Mexico law." U.S. v. Jenks, 804 F.Supp. 232, 235 (D.N.M. 1992). "Whether a right of way has been established is a question of state law." Shultz v. Department of Army, U.S., 10 F.3d at 655.

II. STATEMENTS OF THE 10TH CIRCUIT COURT OF APPEALS ON THE IMPORTANCE OF STATE LAW

The United States Circuit Court of Appeals for the 10th Circuit, commenting on "more than four decades of agency precedent, subsequent BLM policy as expressed in the BLM Manual, and over a century of state court jurisprudence" on this issue:

The adoption of a federal definition of R.S. 2477 roads would have very little practical value to BLM. State law has defined R.S. 2477 grants since the statute's inception. A new federal standard would necessitate the remeasurement and redemarcation of thousands of R.S. 2477 rights-of-way across the country, an administrative duststorm that would choke BLM's ability to manage the public lands That a change to a federal standard would adversely affect existing property relationships squarely refutes Sierra Club's allegation that the use of a state law standard unfairly prejudices the federal government. R.S. 2477 rightholders, on the one hand, and private landowners and BLM as custodian of the public lands, on the other, have developed property relationships around each particular state's definition of the scope of an R.S. 2477 road. The replacement of existing standards with an "actual construction" federal definition would disturb the expectations of all parties to these property relationships. Sierra Club v. Hodel, 848 F.2d at 1082-1083.

FLPMA admittedly embodies a congressional intent to centralize and systematize the management of public lands, a goal which might be advanced by establishing uniform sources and rules of law for rights-of-way in public lands. The policies supporting FLPMA, however, simply are not relevant to R.S. 2477's construction. It is incongruous to determine the source of interpretative law for one statute based on the goals and policies of a separate statute conceived 110 years later. Rather, the need for uniformity should be assessed in terms of Congress' intent at the time of R.S. 2477's passage. Id.

III. CONGRESSIONAL INTENT IN PASSING FLPMA

Debate leading up to the enactment of FLPMA, on a predecessor bill, addressed R.S. 2477 specifically. This bill contained the same terms which were later incorporated into FLPMA, providing that "All actions by the Secretary under this Act shall be subject to valid existing rights" and providing for the repeal of R.S. 2477.

Senator Stevens, of Alaska, expressed concern that rights to "*de facto public roads*" established across public lands and roads "*that through tradition, through usage, through the passage of time, in fact, have become public access roads or highways*" would be jeopardized by the repeal of R.S. 2477. 120 Cong. Rec. 22283-22284 (1974). Senator Haskell, of Colorado, speaking in favor of the legislation (S-424), stated: "*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 that grant of right-of-way is preserved by reason of section 502 of the bill.*" *Id.* at 22284.

There can be no question that Congress intended, when it passed FLPMA, that R.S. 2477 rights-of-way be interpreted in accordance with state law. In an attempt to "*make sufficient legislative history,*" Senator Haskell referred specifically to state case law, stating:

I am referring now, if the Senator would like, the citation is Koloen versus Pilot Mound Township, I believe it is, 33 North Dakota 529, it says:

To constitute acceptance of congressional grant of right-of-way for highways across public lands there must be either user sufficient to establish a highway under the laws of the State, or some positive act proper authorities manifesting intent to accept.

In other words, a use or some positive act of proper authorities manifesting intent to use. This is the way I would apply this one-sentence statute [R.S. 2477] enacted in 1866: either there is a an actual existing public use, or there is a manifest intent which could be put into action by an application to the Department of the Interior, and they would say "yes." In other words, it is a two-way proposition. Id.

It is also clear that it was an essential condition of the BLM "organic act" that the full rights under R.S. 2477, as well as other rights, were to be preserved. Senator Haskell, in support of the predecessor bill, said "*I would like to take this opportunity to reassure the various users of the natural resources lands -- and these people include those who graze cattle, it includes people who mine, it includes people who use public lands for recreation -- that none of their rights or privileges are being adversely affected.*" *Id.* at 22280.

It is also clear that Congress understood that R.S. 2477 rights-of-way would not be limited to "significant" roads:

MR. STEVENS. 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 posting signs as to the 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 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. Id. at 22284.

Furthermore, in response to a concern about "existing roads and trails from village to village" and about "dogsled trails," Senator Haskell stated:

I am not familiar with dogsled trails, but let me say I agree with the Senator that so long as the intent was for public use, then the right-of-way was established at that time under that 1866 act. Id.

A review of that debate can leave no doubt that Congress intended R.S. 2477 rights to be exercised fully in accordance with state law after the passage of the BLM "organic act."

IV. FLPMA EXPLICITLY PROTECTS PRIOR VALID EXISTING RIGHTS

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. FLPMA § 701(a), 43 U.S.C. § 1701 note (a).

All actions by the Secretary concerned under this Act shall be subject to valid existing rights. FLPMA § 701(h), 43 U.S.C. § 1701 note (h).

Nothing in this title [43 U.S.C. §§ 1761 et seq.] shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted or permitted. FLPMA § 509(a), 43 U.S.C. § 1769(a).

V. DEFINITIONS OF "HIGHWAY" AND "CONSTRUCTION"

In Colorado, the term 'highways' includes footpaths. *Simon v. Pettit*, 651 P.2d 418, 419 (Colo.Ct.App. 1982), *aff'd*, 687 P.2d 1299 (Colo.1984). "Highways" under 43 U.S.C. § 932 can also be roads "formed by the passage of wagons, etc., over the natural soil." *Central Pacific Railway Co. v. Alameda County*, 284 U.S. 463, 467, 52 S.Ct. 225, 226, 76 L.Ed. 402 (1932). The trails and wagon roads over the lands which became part of the Colorado National Monument were sufficient to be "highways" under 43 U.S.C. § 932 [R.S. 2477]. Wilkenson v. Dept. of Interior of United States, 634 F.Supp. at 1272.

"The term highway is the generic name for all kinds of public ways, whether they be carriage-ways, bridle-ways, footways, bridges, turnpike roads, railroads, canals, ferries, or navigable rivers." Bouv. Law Dict., Rowle's Third Rev. p. 1438, Tit. Highway; Elliott, Roads and Streets, p. 1; 25 Am.Jur, 340. Parsons v. Wright, 27 S.E.2d 534 (N.C. 1943)

A highway is commonly defined as a passage, road, or street which every citizen has a right to use. . . . A highway includes every public thoroughfare, "whether it be by carriage way, a horse way, a foot way, or a navigable river." Summerhill v. Shannon, 361 S.W.2d 271 (Ark. 1962).

"Roads" and "highways" are generic terms, embracing all kinds of public ways, such as county and township roads, streets, alleys, township and plank roads, turnpike or gravel roads, tramways, ferries, canals, navigable rivers Strange v. Board of Com'rs of Grant County, 91 N.E. 42 (Ind. 1910).

Highways, as they were originally developed, were for the convenience and easy passage of persons on foot, on horseback, in vehicles drawn by horses or oxen, and also for the transportation of commodities by the same means. They were open to unrestricted use by all persons. City of Rochester v. Falk, 9 N.Y.S.2d 343 (1939)

The word "highway" as ordinarily used means a way over land open to the use of the general public without unreasonable distinction or discrimination, established in a mode provided by the laws of the state where located. Lovelace v. Hightower, 50 N.M. 50, 168 P.2d 864 (1946).

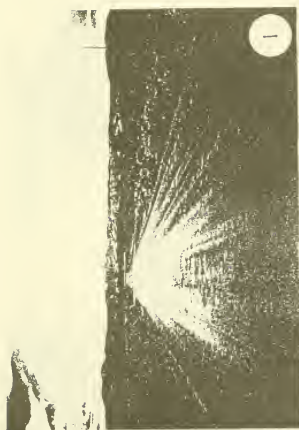
Travel and transportation of goods by wheeled vehicles is not the only use to which a highway may be put. One walking or riding horseback, or transporting goods by pack horse, over a way which the public is constantly using, is a use of such a way as a highway. Hamp v. Pend Oreille County, 172 P. 869, 870 (Wash. 1918).

"User is the requisite element, and it may be by any who have occasion to travel over public lands, and if the use be by only one, still it suffices." Wilkenson v. Dept. of Interior, 634 F.Supp. 1265, 1272 (D. Colo. 1986).

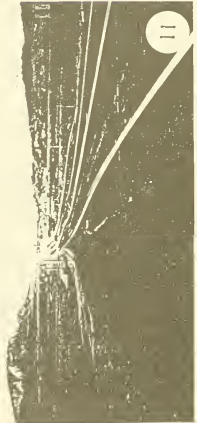
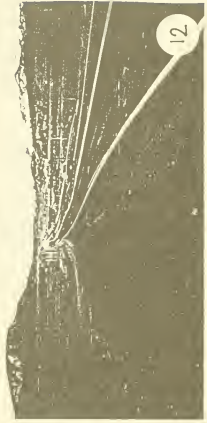
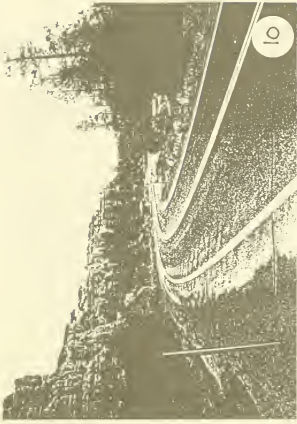
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R.S. 2477 HIGHWAYS IN UTAH
PHOTOGRAPH INDEX

1. Highway to Panguitch airport and former Garfield County landfill.
2. Highway to Panguitch airport and former Garfield County landfill.
3. Old Hatch Town Road.
4. Bridge on Old Hatch Town Road.
5. Road leading to Kodachrome Basin State Park.
6. Bridge on Kodachrome Basin State Park Road.
7. Road leading to Kodachrome Basin State Park.
8. Road leading to Kodachrome Basin State Park.
9. State Route 12 intersecting with State Route 63 and John's Valley Road, leading to Bryce Canyon National Park to right, Capitol Reef National Park straight ahead and 3 Utah State Parks straight ahead.
10. State Route 12 at Red Canyon Camp Ground, a U.S. Forest Service facility.
11. State Route 12 at U.S. 89 Junction.
12. State Route 12 at U.S. 89 Junction.







National Parks

and Conservation Association

TESTIMONY PRESENTED BY
ELIZABETH FAYAD
COUNSEL
NATIONAL PARKS AND CONSERVATION ASSOCIATION

BEFORE THE
SUBCOMMITTEE ON NATIONAL PARKS, FORESTS, AND LANDS
ON

H.R. 2081
July 27, 1995

Mr. Chairman and members of the subcommittee, my name is Elizabeth Fayad and I am Counsel 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 H.R. 2081. 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 give rights-of-way across national parks, 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. H.R. 2081 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.



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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. The bill is inconsistent with the National Park Service Organic Act, the Federal Land Policy Management Act (FLPMA), the Alaska Native Interest Lands and 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 the provision, 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 the date when the land was reserved. Yet, H.R. 2081 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, and 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 than an R.S. 2477 claimant. If social security benefits are denied, the burden of proof 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, H.R. 2081 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 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 an atlas of trails. This atlas of trails 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.S. 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."

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. H.R. 2081 would short-change the public for the benefit of a few claimants. The public deserves better treatment from those elected to represent them.

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON
NATIONAL PARKS, FORESTS AND PUBLIC LANDS

TESTIMONY OF
THE SIERRA CLUB and THE SOUTHERN UTAH WILDERNESS ALLIANCE
ON H.R. 2081,
THE "REVISED STATUTES 2477 RIGHTS-OF-WAY SETTLEMENT ACT"

Introduction.

Mr. Chairman, members of the subcommittee, my name is Scott Groene. I am a staff attorney with the Southern Utah Wilderness Alliance in Cedar City, Utah. I am testifying on behalf of the Sierra Club and the Southern Utah Wilderness Alliance.

HR 2081 would breath new life into RS 2477, a cryptic statute over a century old that was repealed nearly two decades ago. RS 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 RS 2477 Rights-of-Ways.

Included with copies of my testimony are photographs which show examples of Utah county RS 2477 assertions. I ask that these photographs be made part of the record of this hearing. I 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 RS 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 RS 2477 roads within the Utah Citizens BLM wilderness proposal, which has been incorporated by Representative Maurice Hinchey in HR 1500. Photographs seven through ten show areas with RS 2477 assertions that are also within the wilderness boundaries drawn by the Utah delegation in a proposal introduced as H.R. 1745. 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 HR 2081 would legitimize. The result would be the loss of wilderness, polluted water, and fragmented wildlife habitat.

Specific Provisions of the Bill

The proposed legislation has little to do with preserving access via existing roads. Rather, it rolls back legal precedent to create a thirty-two cent postage stamp property claim give-away

Page 2

Testimony on H.R. 2081

Sierra Club\Southern Utah Wilderness Alliance

for those who seek to undermine wilderness protection. It allows such attacks on our National Parks, National Forests, wilderness, wildlife, and water until past the year 2015. In contrast, the United States is given only two years to defend against thousands of anticipated claims, and then is handed the burden of proving forty year old facts. Public lands can be lost by default if the United States is overwhelmed and unable to bring all claims to court. The public is prohibited from challenging federal agency decisions which approve frivolous right-of-way claims. 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. HR 2081 allows anyone with a stamp and a grudge against wilderness to force the federal government into an expensive court battle.

This bill allows both state government and private individuals to make frivolous claims. County officials in Utah have already shown a willingness to claim RS 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 with an undefined interest in land to file an easement claim against the federal government. By merely filing a mining claim, an individual could be entitled to make an RS 2477 ROW claim. Section 2(a) does not even require that RS 2477 claimants show they use asserted routes, only that they "could."

Off road vehicle advocates have already published information as to how RS 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.

HR 2081 also opens the door for nuisance claims for decades to come. In 1976, Congress repealed RS 2477, and proponents of new RS 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 RS 2477 issue to fester for another two decades, some 40 years after the legislation was repealed.

Page 3
Testimony on H.R. 2081
Sierra Club\Southern Utah Wilderness Alliance

Claimants are granted yet another 10 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 5(a)(1).

States and the public have been on notice for more than 12 years that areas have been reserved as National Parks, National Forests, and Wilderness Study Areas on BLM land. In some cases, roads have been closed for decades. HR 2081 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 RS 2477 was repealed. Further, 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 HR 2081 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 HR 2081, 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. The United States would be unable to staff this level of litigation. Frivolous claims will no doubt slip through.

HR 2081 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 5000 claims pending in the state of Utah alone. The costs would be much higher under HR 2081, because the United States would be required to litigate these claims in addition to making administrative determinations.

Litigation costs will also be increased because HR 2081 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.

Page 4

Testimony on H.R. 2081

Sierra Club\Southern Utah Wilderness Alliance

The legislation also creates the unfathomable scenario where the government defaults 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 is 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 (b)(4) 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 RS 2477 was repealed to file a quiet title action, the United States is given two years on a schedule driven by the counties to challenge those claims.

The existing 12 year statute of limitations serves a purpose beyond providing certainty. 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 of the shift of 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 limitation will mean the United States will likely lose to ROW claims with little merit.

The legislation allows state law to control both the grant and scope of these easements over public land, although the original RS 2377 legislation made no mention of state control. Although most states do not have legislation that will answer these issues, some states will allow the mere passage of vehicles to constitute a constructed 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.

This bill prohibits most of the public from challenging federal agency decisions. HR 2081 limits standing in federal court to those who claim ROWs. Those who may be harmed by a Secretarial decision to approve a fraudulent claim will not be allowed to challenge the federal government.

The bill also exempts these decisions from the National Environmental Policy Act. Current 10th Circuit law binding in Utah found NEPA applies to RS 2477 claims in order that the BLM may meet its duty to protect public lands from undue and unnecessary degradation. HR 2081 eliminates this case law.

Page 5

Testimony on H.R. 2081

Sierra Club\Southern Utah Wilderness Alliance

Provision 5(e) of this bill prohibits the National Park Service, National Forest Service and the BLM from closing asserted RS 2477 ROWs for one year after a state is notified of the intended closure. In other words, dirt bike riders can claim a ROW and rip over archaeological sites, through trout streams, across critical soils and among National Park visitors, and the United States can not stop them for a year. Emery County in Utah claimed under RS 2477 that it could expand an existing road without conducting NEPA studies and damaged an archeological site in the process. They were stopped from doing more damage by federal court litigation. Under this bill they could have continued to bulldoze through thousand year-old Indian ruins without restraint.

HR 2081 ignores the compromises Congress reached in the Federal Land Policy Management Act. At the same time FLPMA repealed RS 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 RS 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 RS 2477 roads in the forms of ways within section 603 roadless areas. Let us give Congress more credit than that.

Nor does the bill address RS 2477 ROWs across private lands that have been acquired from the public domain. Under H.R. 2081, private landowners may not be able to defend their property against RS 2477 claims, even though the landowner purchased the land decades ago.



THE UTAH WILDERNESS COALITION

The Foundation for the Utah Wilderness Coalition • P.O. Box 330974, Salt Lake City, Utah 84152-0974 • Phone 801 486-2872 • Fax 801 467-9296

July 21, 1995

Re: County R.S. 2477 claims

To whom it may concern:

During the Governor's hearings on Utah wilderness in the spring of 1995, counties in Utah made claims for the existence of roads which many citizens consider unlikely. As a result, numerous volunteers participated in a systematic, coordinated effort during April, May and June of 1995 to photograph and document the routes of alleged roads claimed by counties under R.S. 2477. In addition, this effort included "roads" shown on maps obtained from, and apparently prepared by, Congressman Orton's office.

During the course of the road inventory, the volunteers took hundreds of photographs, documenting the condition of dozens of alleged roads. In numerous instances, the "roads" did not meet or even approach an ordinary person's common-sense definition of a road. Many were undriveable. Many were less noticeable than the maintained footpaths which are often present in designated wilderness areas. Some were literally impossible to find on the ground.

Some of the counties' R.S. 2477 claims are valid. However, from having helped with the volunteer review and from having looked at numerous maps and photographs taken by other volunteers, my own conviction is that many of the counties' road claims are highly exaggerated and many are entirely fictitious.

Attached to this letter are photographs of several examples of claimed county roads, or roads shown as such on Congressman Orton's maps. Their locations are as follows:

- * Photo No. 1: *"Road" near Farnsworth Wash, Emery County.* (Photo by Will McCarvill.)
- * Photo No. 2: *Kayaker paddling along Muddy Creek "road", Emery County.* (Photo by Amy O'Connor.)
- * Photo No. 3: *Valley in Wild Horse Mesa, Emery County.* Although most roads are more easily seen from above, the "road" along this valley cannot be seen at all in this photograph taken from a nearby hillside. (Photo provided by Will McCarvill and Bryan Larsen.)
- * Photo No. 4: *"Road" in North Fork of Coal Wash, Emery County.* (Photo provided by Stephanie Edgar and Ed Merrill.)

- * Photo No. 5: *"Road" near Cistern Canyon, Emery County.* (Photo by Bruce Howlett.)
- * Photo No. 6: *"Road" in Sheep Creek, Kane County.* (Photo by Gordon Swenson.)
- * Photos Nos. 7, 8, 9: *Waterfall, narrows and footpath along "road" through The Gulch, Garfield County.* The waterfall is only a foot or two wide. The narrows is only four feet wide in places. In order to drive down The Gulch, a vehicle would have to make it down the waterfall and through the narrows. By way of comparison, Photo No. 9 shows the most "driveable" part of The Gulch, which is obviously only a footpath. (Photos by Gordon Swenson.)
- * Photo No. 10: *Angel Trail near Dirty Devil River, Wayne County.* (Photo by Gordon Swenson.)

As these examples clearly show, many of the counties' road claims are entirely unfounded. Congress should postpone any attempt to resolve the R.S. 2477 issue until the counties have demonstrated that their information is reliable.

Sincerely,



GORDON J. SWENSON
Assistant Coordinator,
UWC "Adopt-A-Wilderness" Program

Attachments



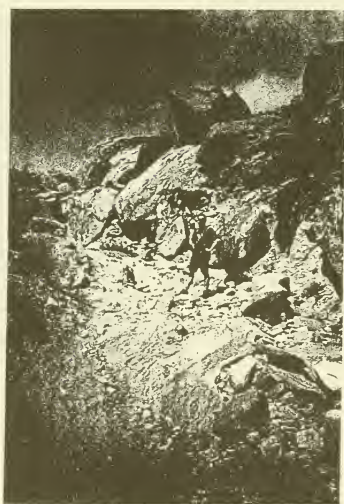
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August 10, 1995

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

Dear Chairman Hansen and Members of the Committee:

The National Water Resources Association is pleased to have the opportunity to provide comments for inclusion in the testimony record of July 27, 1995 to the Committee regarding the validity of federal rights-of-way granted under Revised Statute 2477.

NWRA is a non-profit federation representing both agriculture and municipal reclamation water users in the 17 western states. Our membership includes companies and associations as well as farmers and other individuals. NWRA is the oldest and most active national association concerned with the appropriate and efficient management and development, and its strength is a reflection of the tremendous "grass roots" participation it has generated on virtually every national issue affecting western water conservation, management, and development.

The majority of water resource facilities used by our members are located on public land throughout the western United States. Much of the access to those properties were established on roads which fall under Revised Statute 2477 and are grandfathered into the Federal Land Policy and Management Act.

As Congress and the Department of Interior consider newly proposed regulations for claims under RS 2477, NWRA members have reason for concern regarding the access to water resource facilities that, in some cases, can only be reached on these roads. If access on these roads is denied, vital operations and maintenance

Committee on Resources
Subcommittee on National Parks, Forests & Lands
August 10, 1995
Page 2

that must be performed on these facilities will be greatly hampered in a tangle of unnecessary bureaucratic red tape.

Furthermore, there is great concern among NWRA members that the government, by gaining more ownership and limiting public access, will follow an increasingly common tendency to use its regulatory authority under FLPMA to place onerous federal conditions on the renewal of special use authorizations for existing water supply facilities. As water users in Colorado have already discovered, the Forest Service has required in some instances that vested-rights-of-way or easements across federal lands for water supply facilities be abandoned as a condition of the issuance or renewal of a special use permit. This increasingly dangerous trend cannot be continued in other western states and must be reversed where it has already occurred.

We applaud Congressman Hansen's efforts to introduce H.R. 2081 and to bring this issue forward for discussion by holding hearings on this very timely subject. We believe that the current proposed regulations by the Department of Interior are unwise and will promote confusion and years of litigation. We urge that these proposed regulations not be implemented, and that Congress thoroughly explore opportunities for a rational resolution of this difficult issue.

NWRA stands ready to offer additional input on resolution of this matter with regard to access to water resource facilities. If we can provide assistance to the committee as this matter is further discussed, please to not hesitate to call upon us.

Sincerely,


PerryAnne Coffey
Director, Government Affairs



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