109TH CONGRESS
2D SESSION

H. R. 6298

To clarify congressional intent with respect to the nature of rights-of-way granted and accepted under former section 2477 of the Revised Statutes, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES
SEPTEMBER 29, 2006

Mr. PEARCE introduced the following bill; which was referred to the Committee on Resources

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A BILL

To clarify congressional intent with respect to the nature of rights-of-way granted and accepted under former section 2477 of the Revised Statutes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE, FINDINGS, PURPOSES.

(a) **SHORT TITLE**.—This Act may be cited as the "R.S. 2477 Rights-Of-Way Recognition Act".

(b) **FINDINGS**.—Congress finds the following:

(1) Prior to its repeal by section 706 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.), section 2477 of the Revised Statutes of the United States (43 U.S.C. 932) provided a perpetual grant of a "right of way for the construction of highways over public lands, not reserved for public uses".

(2) The Federal Land Policy and Management Act of 1976 protects R.S. 2477 rights-of-way in existence on October 21, 1976, the date on which R.S. 2477 was repealed.

(3) The R.S. 2477 grant was accepted by establishing a public highway in any manner recognized under State law.

(4) State law, rather than Federal agency rules or regulations, controls how a highway is established for purposes of R.S. 2477 rights-of-way.

(5) Coal and other mineral withdrawal lands are "public lands, not reserved for public uses" for purposes of R.S. 2477 rights-of-way.

(6) Federal agencies may not issue rules or regulations, or adjudicate controversies, relating to R.S. 2477 rights-of-way.

(7) State and local governments should consult with Federal agencies before beginning road improvement projects, but no such consultation is required for routine maintenance projects, and any disagreement arising from any such consultation should be resolved by courts of law rather than by Federal agencies.

(8) Congress should acknowledge R.S. 2477 rights-of-way for routes shown in 1976–86 era official governmental maps.

(c) **PURPOSES**.—The purposes of this Act are—

(1) to clarify congressional intent with respect to the nature of R.S. 2477 rights-of-way in a manner consistent with the findings set forth in subsection (b);

(2) to establish protocols for appropriate Federal agencies with respect to maintenance, repairs, and improvements of R.S. 2477 highways; and

(3) to acknowledge, recognize, and disclaim all right, title, and interest in and to R.S. 2477 rights-of-way for roads, streets, highways, and trails across Federal land, not reserved for public uses, as recorded in timely official governmental maps and supplemented where appropriate by official governmental aerial photographs.

SEC. 2. DEFINITIONS.

In this Act, the following definitions apply:

(1) The term “R.S. 2477” means section 2477 of the Revised Statutes (43 U.S.C. 932).

(2) The term “highway” means any route over which the general public has a right of passage and includes any kind of route used for public travel, such as a road for motorized vehicles, carriage way, navigable river, trail, or footpath.

(3) The term “R.S. 2477 highway” means a highway for which an R.S. 2477 right-of-way exists.

(4) The term “R.S. 2477 right-of-way” means a right-of-way for a highway over Federal lands, not reserved for public uses, established by acts on the ground sufficient under applicable State law to establish a highway and thus accept the R.S. 2477 right-of-way grant.

(5) The term “applicable State law” means the common and statutory laws of the State or territory in which a purported R.S. 2477 highway or segment thereof is located.

(6) The term “public lands” means all public domain lands that have been owned by the United States.

(7) The term “public lands, not reserved for public uses” means—

> (A) any public lands currently under the ownership of the United States other than tribal lands, national forest reserves, national parks, national recreation areas, national monuments, congressional wilderness, national wild and scenic river system lands, congressionally designated wildlife refuge areas, and congressionally designated wilderness study areas; and
>
> (B) any public lands ever owned by the United States before the land was disposed of or before the land became tribal lands, national forest reserves, national parks, national recreation areas, national monuments, congressional wilderness, national wild and scenic river system lands, congressionally designated wildlife refuge areas, and congressionally designated wilderness study areas.

(8) The term “appropriate Federal agency” means the Federal land management agency with primary responsibility to manage and administer the public land over which a purported R.S. 2477 highway or segment thereof is located.

(9) The term “official governmental aerial photograph” means any air-to-ground photographic image or copy thereof, created by or for, or maintained as part of the records of, any department, division, service, office, bureau, or other agency of the Federal government or of any State, county, municipal, or other local government.

(10) The term “official governmental map” means any highway map, tourist map, topographical map, plat map, quadrangle, survey map, transportation map, land use map, general land office map, township or grid map or any other map issued by or for, or maintained as part of the records of, any department, division, service, office, or other agency of the Federal government or of any State, county, municipal, or other local government.

SEC. 3. CLARIFICATION OF CONGRESSIONAL INTENT WITH RESPECT TO THE NATURE OF R.S. 2477 RIGHTS-OF-WAY.

Congress makes the following clarifications:

(1) Prior to its repeal on October 21, 1976, R.S. 2477 constituted an unequivocal grant of free rights-of-way over public lands not reserved for public uses.

(2) Legal title to an R.S. 2477 right-of-way could pass to a State or local government without Federal land management agency knowledge, involvement, action, or approval of any kind.

(3) At the time R.S. 2477 was enacted, Congress incorporated applicable State law regarding the establishment of highways, and applicable State laws established the terms of acceptance for R.S. 2477 rights-of-way grants.

(4) Acts on the part of the public, at any time prior to October 21, 1976, or the date on which the subject land may have been reserved for public uses, whichever date is earlier, that were sufficient to create a public highway under applicable State law caused legal title

to an R.S. 2477 right-of-way to pass to the respective State and county in which such highway was located.

(5) The applicable laws of each State govern the resolution of issues relating to the validity and scope of R.S. 2477 rights-of-way, including—

(A) what constitutes a highway and its essential characteristics;

(B) what actions are required to establish a public highway;

(C) the length of time of public use, if any, necessary to establish a public highway and resulting R.S. 2477 right-of-way;

(D) the necessity of mechanical construction to establish a pubic highway and resulting R.S. 2477 right-of-way; and

(E) the sufficiency of public construction alone without proof of a certain number of years of continuous public use to establish a public highway and resulting R.S. 2477 right-of-way.

(6) R.S. 2477 applied retroactively to validate rights-of-way established prior to the enactment of the statute in 1866.

(7) A highway initially constructed by the Federal Government became an R.S. 2477 right-of-way upon the occurrence of acts on the part of the public, at any time prior to October 21, 1976, or the date on which the subject land may have been reserved for public uses, whichever date is earlier, that were sufficient to create a public highway under applicable State law.

(8) At the time R.S. 2477 was enacted, Congress incorporated the common law regarding what constitutes a public highway and its essential characteristics.

(9) The common law concept of a highway recognizes that any route over which the general public has a right of passage, such as a carriage way, navigable river, or footpath, is a “highway”.

(10) Unless specifically provided otherwise by applicable State law, a road need not be mechanically constructed in order to establish acceptance of an R.S. 2477 right-of-way grant.

(11) For purposes of establishing an R.S. 2477 right-of-way, the term “construction” means any one of the ways authorized by the laws of the State in which the subject land is located, including—

(A) the minimum construction necessary to enable the intended public use of the route, such as the moving of boulders, clearing of underbrush and trees, or digging of occasional crude dugways;

(B) actions to build, erect, form, or create the route; and

(C) the forming of the route by repeated use and traffic, without a mechanical means of construction.

(12) For purposes of establishing an R.S. 2477 right-of-way, applicable State law shall determine whether proof of construction alone is sufficient without proof of continuous public use. Nothing in R.S. 2477 is intended to, or shall be construed to, prohibit the establishment of an R.S. 2477 right-of-way under State law upon mere proof of construction without proof of continuous public use.

(13) For purposes of establishing an R.S. 2477 right-of-way, the nature, extent, and degree of continuous public use necessary to satisfy any State-law public continuous use requirements, and the nature, extent, and degree of “construction” activities necessary to satisfy any State-law construction requirements, are questions to be determined under applicable State law.

(14) Unless applicable State law provides to the contrary, nothing in R.S. 2477 is intended to, or shall be construed to, require that roads lead to a definite destination or terminus in order to qualify as a “highway” for purposes of an R.S. 2477 right-of-way grant.

(15) For purposes of R.S. 2477, the term “public lands, not reserved for public uses” includes—

(A) land subject to the Act entitled “An Act for the protection of surface rights of entrymen”, approved March 3, 1909 (Chapter 270, 35 Stat. 844; 30 U.S.C. 81);

(B) land subject to the Act entitled “An Act to provide for agricultural entries on coal lands”, approved June 22, 1910 (Chapter 318, 36 Stat. 583; 30 U.S.C. 83 et seq.);

(C) land subject to the Act of June 25, 1910, commonly known as the Pickett Act (Chapter 421, 36 Stat. 847; 43 U.S.C. 141 et seq.);

(D) land subject to any coal withdrawal made pursuant to the congressional Acts described in subparagraphs (A), (B), and (C);

(E) land withdrawn under Executive Order 6910, issued November 26, 1934; and

(F) any other land “withdrawn” but not “reserved”, and land “reserved” but not “reserved for public uses”.

(16) Any executive branch administrative rule or regulation pertaining to the recognition, management, validity, or scope of an R.S. 2477 right-of-way is prohibited.

(17) Congress has not delegated to any Federal land management agency, or to any other agency in the executive branch, primary jurisdiction or other authority to adjudicate, formally or informally, any claims, disputes, cases, or controversies regarding the validity or scope of R.S. 2477 rights-of-way. Such claims, disputes, cases, and controversies shall be adjudicated only through the courts.

(18) Nothing in this Act is intended nor shall be construed to prohibit a Federal land management agency from making non-binding determinations of validity and scope of R.S. 2477 rights-of-way, if such determinations are made solely—

(A) for the agency's own internal purposes without any intent to be binding or final agency actions; and

(B) for limited purposes such as internal planning decisions regarding land use, or in determining the agency's position in court litigation.

(19) Any such Federal land management agency determination shall not be—

(A) subject to the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.);

(B) construed to be a binding agency determination; or

(C) given any deference or respect in court proceedings to adjudicate issues of validity or scope of R.S. 2477 rights-of-way, other than deference to the persuasiveness of that determination.

SEC. 4. PROTOCOLS WITH RESPECT TO MAINTENANCE, REPAIRS, AND IMPROVEMENTS OF R.S. 2477 HIGHWAYS.

The following protocols apply with respect to maintenance, repairs, and improvements of R.S. 2477 highways:

(1) Federal agencies shall not require State or local governments to consult with or obtain permission from any Federal land management agency prior to performing routine maintenance and repair on R.S. 2477 rights-of-way routes, as long as State and local governments act within the scope of the right-of-way and such maintenance and repair preserves the existing condition of the route. For purposes of this paragraph, "routine repair and maintenance" includes preservation of an existing road, physical upkeep, repair of wear or damage from natural or other causes, maintenance of the shape of the road, grading or blading to preserve the character of the road in accordance with prior practice, maintenance to ensure proper drainage, and any other activities necessary to preserve the status quo.

(2) Subject to the consultation requirements specified in paragraph (3), Federal land management agencies shall permit improvements by a State or local government to an R.S. 2477 right-of-way route, beyond routine maintenance and repair, if such improvements are reasonable and necessary for the type of use to which the route was put prior to October 21, 1976, or the date on which the subject land may have been reserved for public uses, whichever date is earlier. Federal agencies shall not require State and local governments to maintain an R.S. 2477 right-of-way route in precisely the same condition it was on October 21, 1976, or the date on which the subject land may have been reserved for public uses, whichever date is earlier, but shall permit those improvements which are reasonably necessary to meet the exigencies of increased travel so long as they are done in light of traditional uses to which the right of way was put as of October 21, 1976, or the date on which the subject land may have been reserved for public uses, whichever date is earlier, as determined pursuant to State law.

(3) (A) For proposed improvements to an R.S. 2477 right-of-way route that go beyond routine maintenance and repair, the appropriate Federal agency shall require State and local governments to consult with the agency before allowing such improvement projects to proceed. Examples of improvement projects that go beyond routine maintenance and repair are the following: widening of a road; horizontal or vertical realignment; installation of bridges, culverts, and other drainage structures; significant change in surface composition; and grading or blading for the first time. The appropriate Federal agency shall require State and local governments to advise the agency of the proposed improvement sufficiently in advance of the proposed improvement project to afford the Federal agency a fair opportunity to perform its duties, including the following:

> (i) To determine whether the proposed improvement is fair and reasonable in light of the traditional uses of the right-of-way as of October 21, 1976, or the date on which the subject land may have been reserved for public uses, whichever date is earlier.

(ii) To study potential effects and determine if the proposed action would impair or degrade the surrounding lands.

(iii) To determine whether modifications in the proposed improvement plans should be made to protect the surrounding lands and propose those modifications, if appropriate.

(iv) To perform the duties described in this subparagraph in a timely and expeditious manner, and refrain from using agency authority, either by delay or unreasonable disapproval, to impair the rights of the R.S. 2477 right-of-way holder.

(B) In the event of a disagreement over the proposed improvement project after the consultation process described in subparagraph (A), the appropriate Federal agency shall resort to the courts for resolution of the disagreement before allowing the State or local government to proceed with the project. The decision of the court shall govern whether and on what terms the improvement project may proceed.

(C) No Federal agency action carried out while performing the duties set forth in subparagraph (A) constitutes a binding agency determination deserving of any deference or respect in court proceedings to adjudicate issues of validity or scope of an R.S. 2477 right-of-way, other than deference to the persuasiveness of that determination.

(D) For all proposed improvement projects within the scope of an R.S. 2477 right-of-way, as understood on October 21, 1976, or the date on which the subject land may have been reserved for public uses, whichever such date is earlier, and as determined under applicable State law, Federal agency action carried out while performing the duties set forth in subparagraph (A) shall not be subject to the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

SEC. 5. ACKNOWLEDGMENT AND RECOGNITION OF VALIDITY OF CERTAIN R.S. 2477 RIGHTS-OF-WAY RECORDED IN OFFICIAL GOVERNMENTAL MAPS AND AERIAL PHOTOGRAPHS, AND

DISCLAIMER OF ALL RIGHT, TITLE, AND INTEREST WITH RESPECT THERETO.

Without limiting the ability of States and counties to assert, claim, and pursue legal recourse with respect to other possible R.S. 2477 public rights-of-way claims as provided by law, Congress hereby acknowledges, confirms, recognizes, and forever disclaims, in favor of the respective State and county of location, as joint tenants, the following as having heretofore validly vested under R.S. 2477:

(1) **PRE–OCTOBER 21, 1976, GOVERNMENTAL TRANSPORTATION MAPS**.—A public right-of-way over Federal land (or any Federal-land portion of a public right-of-way over both Federal and non-Federal land) for each and every highway shown on any official governmental map that was published on or before October 21, 1976, excepting those portions that run over Federal land already reserved for public uses before the date on which the relevant governmental map issued. For purposes of R.S. 2477 and this paragraph, lands subject to withdrawal under the Acts described in sections 3(15)(A), 3(15)(B), and 3(15)(C), or subject to any other subsurface mineral and energy withdrawal, do not constitute "Federal land already reserved for public uses".

(2) **OFFICIAL GOVERNMENTAL MAPS PUBLISHED BETWEEN OCTOBER 21, 1976, AND OCTOBER 21, 1986**.—A public right-of-way over Federal land (or any Federal-land portion of a public right-of-way that crosses over both Federal and non-Federal land) for each and every highway shown on any official governmental map that was published between October 21, 1976, and October 21, 1986, excepting those portions that run over Federal land already reserved for public uses before the date on which the relevant government map issued; Provided, that the given road, street, highway, or trail also appears in an official governmental aerial photograph taken on or before October 21, 1976, or the date on which the subject land may have been reserved for public uses, whichever date is earlier, in which case the form, location, and scope of the right-of-way illustrated in the aerial photograph shall control the extent of the right-of-way acknowledged, confirmed, recognized, and disclaimed herein. For purposes of R.S. 2477 and this paragraph, lands subject to withdrawal under the Acts described in sections 3(15)(A), 3(15)(B), and 3(15)(C), or subject to any other subsurface mineral and energy

withdrawal, do not constitute “Federal land already reserved for public uses”.

SEC. 6. RELATIONSHIP TO THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 AND THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT.

Nothing in this Act is intended to, or shall be construed to, affect, change, alter, or modify title V of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1761 et seq.) or title XI of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3161 et seq.).