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(Original Signature of Member)

109<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# H. R. \_\_\_\_\_

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.

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## IN THE HOUSE OF REPRESENTATIVES

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

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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.

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, FINDINGS, PURPOSES.**

4 (a) SHORT TITLE.—This Act may be cited as the  
5 “R.S. 2477 Rights-Of-Way Recognition Act”.

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

2 (1) Prior to its repeal by section 706 of the  
3 Federal Land Policy and Management Act of 1976  
4 (43 U.S.C. 1701 et seq.), section 2477 of the Re-  
5 vised Statutes of the United States (43 U.S.C. 932)  
6 provided a perpetual grant of a “right of way for the  
7 construction of highways over public lands, not re-  
8 served for public uses”.

9 (2) The Federal Land Policy and Management  
10 Act of 1976 protects R.S. 2477 rights-of-way in ex-  
11 istence on October 21, 1976, the date on which R.S.  
12 2477 was repealed.

13 (3) The R.S. 2477 grant was accepted by estab-  
14 lishing a public highway in any manner recognized  
15 under State law.

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

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

22 (6) Federal agencies may not issue rules or reg-  
23 ulations, or adjudicate controversies, relating to R.S.  
24 2477 rights-of-way.

1           (7) State and local governments should consult  
2 with Federal agencies before beginning road im-  
3 provement projects, but no such consultation is re-  
4 quired for routine maintenance projects, and any  
5 disagreement arising from any such consultation  
6 should be resolved by courts of law rather than by  
7 Federal agencies.

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

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

12           (1) to clarify congressional intent with respect  
13 to the nature of R.S. 2477 rights-of-way in a man-  
14 ner consistent with the findings set forth in sub-  
15 section (b);

16           (2) to establish protocols for appropriate Fed-  
17 eral agencies with respect to maintenance, repairs,  
18 and improvements of R.S. 2477 highways; and

19           (3) to acknowledge, recognize, and disclaim all  
20 right, title, and interest in and to R.S. 2477 rights-  
21 of-way for roads, streets, highways, and trails across  
22 Federal land, not reserved for public uses, as re-  
23 corded in timely official governmental maps and sup-  
24 plemented where appropriate by official govern-  
25 mental aerial photographs.

1 **SEC. 2. DEFINITIONS.**

2 In this Act, the following definitions apply:

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

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

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

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

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

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

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

1 (A) any public lands currently under the  
2 ownership of the United States other than trib-  
3 al lands, national forest reserves, national  
4 parks, national recreation areas, national monu-  
5 ments, congressional wilderness, national wild  
6 and scenic river system lands, congressionally  
7 designated wildlife refuge areas, and congres-  
8 sionally designated wilderness study areas; and

9 (B) any public lands ever owned by the  
10 United States before the land was disposed of  
11 or before the land became tribal lands, national  
12 forest reserves, national parks, national recre-  
13 ation areas, national monuments, congressional  
14 wilderness, national wild and scenic river sys-  
15 tem lands, congressionally designated wildlife  
16 refuge areas, and congressionally designated  
17 wilderness study areas.

18 (8) The term “appropriate Federal agency”  
19 means the Federal land management agency with  
20 primary responsibility to manage and administer the  
21 public land over which a purported R.S. 2477 high-  
22 way or segment thereof is located.

23 (9) The term “official governmental aerial pho-  
24 tograph” means any air-to-ground photographic  
25 image or copy thereof, created by or for, or main-

1       tained as part of the records of, any department, di-  
2       vision, service, office, bureau, or other agency of the  
3       Federal government or of any State, county, munic-  
4       ipal, or other local government.

5               (10) The term “official governmental map”  
6       means any highway map, tourist map, topographical  
7       map, plat map, quadrangle, survey map, transpor-  
8       tation map, land use map, general land office map,  
9       township or grid map or any other map issued by or  
10      for, or maintained as part of the records of, any de-  
11      partment, division, service, office, or other agency of  
12      the Federal government or of any State, county, mu-  
13      nicipal, or other local government.

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

17       Congress makes the following clarifications:

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

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

1           (3) At the time R.S. 2477 was enacted, Con-  
2           gress incorporated applicable State law regarding  
3           the establishment of highways, and applicable State  
4           laws established the terms of acceptance for R.S.  
5           2477 rights-of-way grants.

6           (4) Acts on the part of the public, at any time  
7           prior to October 21, 1976, or the date on which the  
8           subject land may have been reserved for public uses,  
9           whichever date is earlier, that were sufficient to cre-  
10          ate a public highway under applicable State law  
11          caused legal title to an R.S. 2477 right-of-way to  
12          pass to the respective State and county in which  
13          such highway was located.

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

17                 (A) what constitutes a highway and its es-  
18                 sential characteristics;

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

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

1 (D) the necessity of mechanical construc-  
2 tion to establish a public highway and resulting  
3 R.S. 2477 right-of-way; and

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

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

12 (7) A highway initially constructed by the Fed-  
13 eral Government became an R.S. 2477 right-of-way  
14 upon the occurrence of acts on the part of the pub-  
15 lic, at any time prior to October 21, 1976, or the  
16 date on which the subject land may have been re-  
17 served for public uses, whichever date is earlier, that  
18 were sufficient to create a public highway under ap-  
19 plicable State law.

20 (8) At the time R.S. 2477 was enacted, Con-  
21 gress incorporated the common law regarding what  
22 constitutes a public highway and its essential char-  
23 acteristics.

24 (9) The common law concept of a highway rec-  
25 ognizes that any route over which the general public

1 has a right of passage, such as a carriage way, navi-  
2 gable river, or footpath, is a “highway”.

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

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

11 (A) the minimum construction necessary to  
12 enable the intended public use of the route,  
13 such as the moving of boulders, clearing of un-  
14 derbrush and trees, or digging of occasional  
15 crude dugways;

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

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

21 (12) For purposes of establishing an R.S. 2477  
22 right-of-way, applicable State law shall determine  
23 whether proof of construction alone is sufficient  
24 without proof of continuous public use. Nothing in  
25 R.S. 2477 is intended to, or shall be construed to,

1 prohibit the establishment of an R.S. 2477 right-of-  
2 way under State law upon mere proof of construc-  
3 tion without proof of continuous public use.

4 (13) For purposes of establishing an R.S. 2477  
5 right-of-way, the nature, extent, and degree of con-  
6 tinuous public use necessary to satisfy any State-law  
7 public continuous use requirements, and the nature,  
8 extent, and degree of “construction” activities nec-  
9 essary to satisfy any State-law construction require-  
10 ments, are questions to be determined under applica-  
11 ble State law.

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

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

20 (A) land subject to the Act entitled “An  
21 Act for the protection of surface rights of  
22 entrymen”, approved March 3, 1909 (Chapter  
23 270, 35 Stat. 844; 30 U.S.C. 81);

24 (B) land subject to the Act entitled “An  
25 Act to provide for agricultural entries on coal

1 lands”, approved June 22, 1910 (Chapter 318,  
2 36 Stat. 583; 30 U.S.C. 83 et seq.);

3 (C) land subject to the Act of June 25,  
4 1910, commonly known as the Pickett Act  
5 (Chapter 421, 36 Stat. 847; 43 U.S.C. 141 et  
6 seq.);

7 (D) land subject to any coal withdrawal  
8 made pursuant to the congressional Acts de-  
9 scribed in subparagraphs (A), (B), and (C);

10 (E) land withdrawn under Executive Order  
11 6910, issued November 26, 1934; and

12 (F) any other land “withdrawn” but not  
13 “reserved”, and land “reserved” but not “re-  
14 served for public uses”.

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

19 (17) Congress has not delegated to any Federal  
20 land management agency, or to any other agency in  
21 the executive branch, primary jurisdiction or other  
22 authority to adjudicate, formally or informally, any  
23 claims, disputes, cases, or controversies regarding  
24 the validity or scope of R.S. 2477 rights-of-way.

1       Such claims, disputes, cases, and controversies shall  
2       be adjudicated only through the courts.

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

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

11          (B) for limited purposes such as internal  
12      planning decisions regarding land use, or in de-  
13      termining the agency's position in court litiga-  
14      tion.

15          (19) Any such Federal land management agen-  
16      cy determination shall not be—

17          (A) subject to the requirements of the Na-  
18      tional Environmental Policy Act of 1969 (42  
19      U.S.C. 4321 et seq.);

20          (B) construed to be a binding agency de-  
21      termination; or

22          (C) given any deference or respect in court  
23      proceedings to adjudicate issues of validity or  
24      scope of R.S. 2477 rights-of-way, other than

1           deference to the persuasiveness of that deter-  
2           mination.

3 **SEC. 4. PROTOCOLS WITH RESPECT TO MAINTENANCE, RE-**  
4           **PAIRS, AND IMPROVEMENTS OF R.S. 2477**  
5           **HIGHWAYS.**

6           The following protocols apply with respect to mainte-  
7 nance, repairs, and improvements of R.S. 2477 highways:

8           (1) Federal agencies shall not require State or  
9           local governments to consult with or obtain permis-  
10          sion from any Federal land management agency  
11          prior to performing routine maintenance and repair  
12          on R.S. 2477 rights-of-way routes, as long as State  
13          and local governments act within the scope of the  
14          right-of-way and such maintenance and repair pre-  
15          serves the existing condition of the route. For pur-  
16          poses of this paragraph, “routine repair and mainte-  
17          nance” includes preservation of an existing road,  
18          physical upkeep, repair of wear or damage from nat-  
19          ural or other causes, maintenance of the shape of  
20          the road, grading or blading to preserve the char-  
21          acter of the road in accordance with prior practice,  
22          maintenance to ensure proper drainage, and any  
23          other activities necessary to preserve the status quo.

24          (2) Subject to the consultation requirements  
25          specified in paragraph (3), Federal land manage-

1       ment agencies shall permit improvements by a State  
2       or local government to an R.S. 2477 right-of-way  
3       route, beyond routine maintenance and repair, if  
4       such improvements are reasonable and necessary for  
5       the type of use to which the route was put prior to  
6       October 21, 1976, or the date on which the subject  
7       land may have been reserved for public uses, which-  
8       ever date is earlier. Federal agencies shall not re-  
9       quire State and local governments to maintain an  
10      R.S. 2477 right-of-way route in precisely the same  
11      condition it was on October 21, 1976, or the date  
12      on which the subject land may have been reserved  
13      for public uses, whichever date is earlier, but shall  
14      permit those improvements which are reasonably  
15      necessary to meet the exigencies of increased travel  
16      so long as they are done in light of traditional uses  
17      to which the right of way was put as of October 21,  
18      1976, or the date on which the subject land may  
19      have been reserved for public uses, whichever date is  
20      earlier, as determined pursuant to State law.

21           (3)(A) For proposed improvements to an R.S.  
22      2477 right-of-way route that go beyond routine  
23      maintenance and repair, the appropriate Federal  
24      agency shall require State and local governments to  
25      consult with the agency before allowing such im-

1        improvement projects to proceed. Examples of improve-  
2        ment projects that go beyond routine maintenance  
3        and repair are the following: widening of a road;  
4        horizontal or vertical realignment; installation of  
5        bridges, culverts, and other drainage structures; sig-  
6        nificant change in surface composition; and grading  
7        or blading for the first time. The appropriate Fed-  
8        eral agency shall require State and local govern-  
9        ments to advise the agency of the proposed improve-  
10       ment sufficiently in advance of the proposed im-  
11       provement project to afford the Federal agency a  
12       fair opportunity to perform its duties, including the  
13       following:

14                (i) To determine whether the proposed im-  
15                provement is fair and reasonable in light of the  
16                traditional uses of the right-of-way as of Octo-  
17                ber 21, 1976, or the date on which the subject  
18                land may have been reserved for public uses,  
19                whichever date is earlier.

20                (ii) To study potential effects and deter-  
21                mine if the proposed action would impair or de-  
22                grade the surrounding lands.

23                (iii) To determine whether modifications in  
24                the proposed improvement plans should be

1           made to protect the surrounding lands and pro-  
2           pose those modifications, if appropriate.

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

9                   (B) In the event of a disagreement over the  
10          proposed improvement project after the consultation  
11          process described in subparagraph (A), the appro-  
12          priate Federal agency shall resort to the courts for  
13          resolution of the disagreement before allowing the  
14          State or local government to proceed with the  
15          project. The decision of the court shall govern  
16          whether and on what terms the improvement project  
17          may proceed.

18                   (C) No Federal agency action carried out while  
19          performing the duties set forth in subparagraph (A)  
20          constitutes a binding agency determination deserving  
21          of any deference or respect in court proceedings to  
22          adjudicate issues of validity or scope of an R.S.  
23          2477 right-of-way, other than deference to the per-  
24          suasiveness of that determination.

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

11 **SEC. 5. ACKNOWLEDGMENT AND RECOGNITION OF VALID-**  
12 **ITY OF CERTAIN R.S. 2477 RIGHTS-OF-WAY RE-**  
13 **CORDED IN OFFICIAL GOVERNMENTAL MAPS**  
14 **AND AERIAL PHOTOGRAPHS, AND DIS-**  
15 **CLAIMER OF ALL RIGHT, TITLE, AND INTER-**  
16 **EST WITH RESPECT THERETO.**

17 Without limiting the ability of States and counties to  
18 assert, claim, and pursue legal recourse with respect to  
19 other possible R.S. 2477 public rights-of-way claims as  
20 provided by law, Congress hereby acknowledges, confirms,  
21 recognizes, and forever disclaims, in favor of the respective  
22 State and county of location, as joint tenants, the fol-  
23 lowing as having heretofore validly vested under R.S.  
24 2477:

1           (1) PRE-OCTOBER 21, 1976, GOVERNMENTAL  
2           TRANSPORTATION MAPS.—A public right-of-way over  
3           Federal land (or any Federal-land portion of a pub-  
4           lic right-of-way over both Federal and non-Federal  
5           land) for each and every highway shown on any offi-  
6           cial governmental map that was published on or be-  
7           fore October 21, 1976, excepting those portions that  
8           run over Federal land already reserved for public  
9           uses before the date on which the relevant govern-  
10          mental map issued. For purposes of R.S. 2477 and  
11          this paragraph, lands subject to withdrawal under  
12          the Acts described in sections 3(15)(A), 3(15)(B),  
13          and 3(15)(C), or subject to any other subsurface  
14          mineral and energy withdrawal, do not constitute  
15          “Federal land already reserved for public uses”.

16          (2) OFFICIAL GOVERNMENTAL MAPS PUB-  
17          LISHED BETWEEN OCTOBER 21, 1976, AND OCTOBER  
18          21, 1986.—A public right-of-way over Federal land  
19          (or any Federal-land portion of a public right-of-way  
20          that crosses over both Federal and non-Federal  
21          land) for each and every highway shown on any offi-  
22          cial governmental map that was published between  
23          October 21, 1976, and October 21, 1986, excepting  
24          those portions that run over Federal land already re-  
25          served for public uses before the date on which the

1 relevant government map issued. If the given road,  
2 street, highway, or trail also appears in an official  
3 governmental aerial photograph taken on or before  
4 October 21, 1976, or the date on which the subject  
5 land may have been reserved for public uses, which-  
6 ever date is earlier, the form, location, and scope of  
7 the right-of-way illustrated in the aerial photograph  
8 shall control the extent of the right-of-way acknowl-  
9 edged, confirmed, recognized, and disclaimed herein.  
10 For purposes of R.S. 2477 and this paragraph,  
11 lands subject to withdrawal under the Acts described  
12 in sections 3(15)(A), 3(15)(B), and 3(15)(C), or  
13 subject to any other subsurface mineral and energy  
14 withdrawal, do not constitute “Federal land already  
15 reserved for public uses”.

16 **SEC. 6. RELATIONSHIP TO THE FEDERAL LAND POLICY**  
17 **AND MANAGEMENT ACT OF 1976 AND THE**  
18 **ALASKA NATIONAL INTEREST LANDS CON-**  
19 **SERVATION ACT.**

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