

110TH CONGRESS
1ST SESSION

H. R. 308

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

JANUARY 5, 2007

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

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”.

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

7 (1) Prior to its repeal by section 706 of the
8 Federal Land Policy and Management Act of 1976

1 (43 U.S.C. 1701 et seq.), section 2477 of the Re-
2 vised Statutes of the United States (43 U.S.C. 932)
3 provided a perpetual grant of a “right of way for the
4 construction of highways over public lands, not re-
5 served for public uses”.

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9 2477 was repealed.

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

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

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

19 (6) Federal agencies may not issue rules or reg-
20 ulations, or adjudicate controversies, relating to R.S.
21 2477 rights-of-way.

22 (7) State and local governments should consult
23 with Federal agencies before beginning road im-
24 provement projects, but no such consultation is re-
25 quired for routine maintenance projects, and any

1 disagreement arising from any such consultation
2 should be resolved by courts of law rather than by
3 Federal agencies.

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

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

8 (1) to clarify congressional intent with respect
9 to the nature of R.S. 2477 rights-of-way in a man-
10 ner consistent with the findings set forth in sub-
11 section (b);

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

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

22 **SEC. 2. DEFINITIONS.**

23 In this Act, the following definitions apply:

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

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

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

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

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

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

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

23 (A) any public lands currently under the
24 ownership of the United States other than trib-
25 al lands, national forest reserves, national

1 parks, national recreation areas, national monu-
2 ments, congressional wilderness, national wild
3 and scenic river system lands, congressionally
4 designated wildlife refuge areas, and congres-
5 sionally designated wilderness study areas; and

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

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

20 (9) The term “official governmental aerial pho-
21 tograph” means any air-to-ground photographic
22 image or copy thereof, created by or for, or main-
23 tained as part of the records of, any department, di-
24 vision, service, office, bureau, or other agency of the

1 Federal government or of any State, county, munic-
2 ipal, or other local government.

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

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

15 Congress makes the following clarifications:

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

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

24 (3) At the time R.S. 2477 was enacted, Con-
25 gress incorporated applicable State law regarding

1 the establishment of highways, and applicable State
2 laws established the terms of acceptance for R.S.
3 2477 rights-of-way grants.

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

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

15 (A) what constitutes a highway and its es-
16 sential characteristics;

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

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

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

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

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

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

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

21 (9) The common law concept of a highway rec-
22 ognizes that any route over which the general public
23 has a right of passage, such as a carriage way, navi-
24 gable river, or footpath, is a “highway”.

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

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

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

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

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

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

1 way under State law upon mere proof of construc-
2 tion without proof of continuous public use.

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

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

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

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

23 (B) land subject to the Act entitled “An
24 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; Provided, that the
2 given road, street, highway, or trail also appears in
3 an official governmental aerial photograph taken on
4 or before October 21, 1976, or the date on which the
5 subject land may have been reserved for public uses,
6 whichever date is earlier, in which case the form, lo-
7 cation, and scope of the right-of-way illustrated in
8 the aerial photograph shall control the extent of the
9 right-of-way acknowledged, confirmed, recognized,
10 and disclaimed herein. For purposes of R.S. 2477
11 and this paragraph, lands subject to withdrawal
12 under the Acts described in sections 3(15)(A),
13 3(15)(B), and 3(15)(C), or subject to any other sub-
14 surface mineral and energy withdrawal, do not con-
15 stitute “Federal land already reserved for public
16 uses”.

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

21 Nothing in this Act is intended to, or shall be con-
22 strued to, affect, change, alter, or modify title V of the
23 Federal Land Policy and Management Act of 1976 (43

- 1 U.S.C. 1761 et seq.) or title XI of the Alaska National
- 2 Interest Lands Conservation Act (16 U.S.C. 3161 et seq.).

