

\_\_\_\_\_ CONGRESS

\_\_\_\_\_ SESSION

**H.R. (or S.)** \_\_\_\_\_

To establish a procedure for resolving claims to rights-of-way under the Revised Statutes, Section 2477 (R.S. 2477), which was previously codified as Title 43, Section 932, United States Code, and which was repealed by Section 706 of the Federal Land Policy and Management Act of 1976 (Public Law 94-579; 90 Statutes 2793).

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IN THE HOUSE OF REPRESENTATIVES (or SENATE)

Date

\_\_\_\_\_ of \_\_\_\_\_ introduced the following bill, which was referred to the

Committee on \_\_\_\_\_

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**A BILL**

To establish a procedure for resolving claims to rights-of-way under the Revised Statutes, Section 2477 (R.S. 2477), which was previously codified as Title 43, Section 932, United States Code, and which was repealed by Section 706 of the Federal Land Policy and Management Act of 1976 ("FLPMA," Public Law 94-579; 90 Statutes 2793).

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

**SECTION 1. SHORT TITLE, FINDINGS, AND PURPOSE.**

(a) **SHORT TITLE.** -- This Act may be cited as the "R.S. 2477 Rights-of-Way Claims Act of 2013."

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

(1) By the Act of July 26, 1866, Ch. 262, §8 (14 Stat. 251, 253, codified at 43 U.S.C. §932), Congress passed an open-ended grant of "the right of way for the construction of highways over public lands, not reserved for public use." 43 U.S.C. §932 is commonly called Revised Statute §2477 or R.S. 2477. It was repealed by section 706 of the Federal Land Policy Management Act of 1976 ("FLPMA": Public Law 94-579, 90 Stat. 2793).

(2) The purpose of R.S. 2477 was to encourage the opening, expansion, settlement, use and development of the American West. R.S. 2477 rights-of-way established by use over land in the public domain are not terminated or abandoned by subsequent federal grants of the property underlying the right-of-way, federal attempts to re-acquire the rights-of-way, or reservation by the federal government subsequent to the R.S. 2477 rights-of-way being accepted by public use. Instead, all rights-of-way accepted prior to October 21, 1976, continue as easements that can be used by the public today.

(3) Unlike rights-of-way granted under FLPMA, the grant of R.S. 2477 rights-of-way was complete on its face, and no formalities, such as notice, entry, license, lease, application, deed, patent, hearing, or formal public written or oral acceptance were required to establish public rights-of-way under R.S. 2477. That law simply required some limited degree of construction activity on the land necessary or advisable to enable passage over it or, in the alternative, mere public usage for some undefined amount of time.

(4) When early R.S. 2477 right-of-way grants were made and accepted, the United States had no laws or regulations governing the establishment or use of roads and rights-of-way; so the territories, then the states, provided early interpretive guidance on the action -- the "use" or "construction" -- necessary to accept and establish the scope of those rights-of-way.

(5) Some rights-of-way established under R.S. 2477 were easily identified, including thoroughfares that connected settlements, towns and trade centers, postal routes, routes for inter-territory commerce, and the like. But the rights-of-way for lesser known, or lesser used, rights-of-way (perhaps established as single-person trails, horse trails, mining trails, fur trade routes, wagon routes, and other similar or lesser uses) have been more difficult to identify; and special interest organizations, business and government have argued for various interpretations regarding the establishment, acceptance and scope of R.S. 2477 rights-of-way. Those disputes have often resulted in unsuccessful settlement negotiations and expensive time-consuming litigation to establish R.S. 2477 rights-of-way.

(6) After decades of lawsuits, case-by-case negotiations, law review articles, expert commentary, and various issued and reissued government policies and procedures on point, there is still no consistent definition or agreement regarding what evidence or action is required to establish a R.S. 2477 right-of-way, whether state or federal law governs R.S. 2477 grants, and what the scope of R.S. 2477 rights-of-way are today. The uncertainty may be due, in substantial part, to the fact that rights created by past laws, such as R.S. 2477, are generally interpreted according to the understanding of terminology at the time of passage: the historic meaning of the statutory language as determined with reference to the surrounding environment and events of the day.

(7) Although court decisions have provided much of the guidance in quieting title to rights-of-way under R.S. 2477, they have often incorporated differing state law to define the acceptance and scope of R.S. 2477 rights-of-way, resulting in inconsistent outcomes under similar facts. There is still sentiment that interpretation and application of R.S. 2477 should be left exclusively to the federal government.

(8) Apparently intending to bring some certainty to R.S. 2477 right-of-way claims, in 1988 Secretary of the Interior Hodel established a Department of the Interior policy that would recognize R.S. 2477 rights-of-way if: 1) they were not reserved public lands at the time they were put into public use; 2) there was some minimal "construction" to enable public passage, such as clearing vegetation or removing obstructions; and 3) the R.S. 2477 route was open to public use by pedestrians, pack animal, wagons or motorized vehicles. Although the policy did not authorize the Department of the Interior to adjudicate applications for R.S. 2477

rights-of-way, it allowed the Department to administratively recognize the claims and record them in Department land records.

(9) A more restrictive approach evolved under Secretary of the Interior Babbitt that, among other restrictions, substantially limited motorized vehicle access to federal lands and required more than mere "use" to establish "construction" necessary to accept a R.S. 2477 right-of-way grant. Accordingly, the Federal Bureau of Land Management (the BLM) was required to determine whether "construction" equivalent to building road structures had occurred in those instances where a R.S. 2477 right-of-way was claimed. *See, for example*, 59 Fed. Reg. 39216, Aug. 1, 1994.

(10) Apparently in response to Secretary Babbitt's strict policy, Congress enacted a temporary moratorium, followed by Section 108 of the Omnibus Interior Appropriations Act of 1997, which states in part that "No final rule or regulation of any agency of the federal government pertaining to the recognition, management, or validity of a right-of-way pursuant to [R.S. 2477] shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act." That law has been determined to be permanent. *See*, General Accounting Office Letter of General Counsel, GAO , B-277719, at 1 (Aug. 20, 1997).

(11) Uncertainty leading to litigation and other expensive forms of dispute resolution regarding the acceptance and public right to use R.S. 2477 rights-of-way has persisted for more than 100 years. Although Congress in the early 1990's received a report from the Department of the Interior suggesting a federal administrative process was necessary to formally recognize validly accepted R.S. 2477 rights-of-way, action by federal administrative

agencies and departments has not been effective to determine whether there has been public acceptance of grants under R.S. 2477.

(12) It is in the best interest of the public and government to establish consistent, clear and conclusive direction to timely evaluate and officially recognize valid R.S. 2477 claims, to provide a legislative framework for objectively achieving those ends within clearly limited timeframes and with minimal executive and administrative involvement, and to minimize costs and delays typically associated with litigating R.S. 2477 claims.

PURPOSE. -- The purpose of this Act is to achieve judicial and administrative efficiency, and to reduce costs typically associated with resolving R.S. 2477 right-of-way claims by establishing a deadline for filing those claims, establishing mandatory procedures for considering those claims, and compelling action to finally resolve those claims.

## **SEC. 2. DEFINITIONS.**

As used in this Act, terms have the following meanings:

(a) **ABANDON OR ABANDONMENT** -- Formal action by the governing body of a claimant taken at a public meeting pursuant notice that declares all right, title and claim to any right-of-way or right-of-way grant under R.S. 2477 is relinquished.

(b) **ACCEPTANCE OR ACCEPTED** -- The construction and intentional continuous public use for passage over a R.S. 2477 right-of-way.

(c) **AUTHORITY OR AUTHORIZED OFFICER** -- The Secretary's designee in the federal department, agency, enclave, reservation or installation under the Secretary's jurisdiction.

(d) CLAIM -- The written document required under Section 3 of this Act, in form established by the Secretary, Authority or Authorized Officer, which shall be made available for use by any claimant within thirty days following the effective date of this Act.

(e) CLAIMANT -- A state, state political subdivision, city, town, county or government parish asserting the existence and public acceptance of a right-of-way under R.S. 2477.

(f) CONSTRUCTION -- Activity reasonably necessary, advisable or desirable to allow public passage over a R.S. 2477 right-of-way, including, without limitation, public travel merely by foot resulting in visible indication of the right-of-way. Maintenance activities or the use of tools or equipment may, but are not required, to establish construction.

(g) CONTINUOUS PUBLIC USE -- Open use for passage by the public during a length of time and under circumstances that clearly indicate an intent by the public to accept the R.S. 2477 right-of-way grant.

(h) DAY(S) -- The twenty-four hour period immediately following twelve o'clock midnight in the time zone where the longest lineal part of the claimed R.S. 2477 right-of-way is located, excluding weekends and official federal holidays.

(i) EVIDENCE -- Any item under section 4 that would be authentic or admissible proof in Federal District Court civil litigation under the Federal Rules of Civil Procedure that are in effect at the time the claim is filed under section 4.

(j) FLPMA -- The Federal Land Policy and Management Act of 1976 (Public Law 94-579, 90 Stat. 2743, 43 U.S.C. 1701 et seq., signed by the President on October 21, 1976).

(k) HIGHWAY OR HIGHWAYS -- Routes of travel over which the public at large has the right of use for passage.

(l) PUBLIC -- The people, population or community as a whole.

(m) PUBLIC LANDS -- Land that is owned and controlled by the United States Government for the benefit of the public.

(n) R.S. 2477 RIGHT-OF-WAY GRANT -- An open-ended grant or dedication of land by the United States for rights-of-way allowing public use and passage, which could be accepted by construction and continuous public use prior to October 21, 1976.

(o) R.S. 2477 -- That part of "An Act Granting the Right-of-Way to Ditch and Canal Owners Over the Public Lands and for Other Purposes," commonly called the Mining Act of 1866 (the Act of July 26, 1866, ch. 262, §8, 14 Statutes 251, 253; 43 U.S.C. §932), stating "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," as that law continued in full force and effect until October 21, 1976.

(p) RELINQUISHMENT -- Any type of deed or equivalent document in form suitable for recordation, approved and issued by the Secretary, Authority, or Authorized Officer, disclaiming the interest of the federal government in a R.S. 2477 right-of-way that has been conclusively accepted pursuant to the provisions of this Act, which grants public passage over, and within the scope permitted by, that right-of-way.



(q) **RESERVED LAND OR RESERVATION OF LAND FOR PUBLIC USE** -- Land withdrawn from the public domain by federal statute, executive order, or treaty and dedicated to a particular public use, such as a park, military post, Native American land or other specific federal public use.

(r) **SCOPE** -- The established public usage of the R.S. 2477 right-of-way prior to October 21, 1976, as necessarily improved and expanded to meet the exigencies of increased travel in light of traditional uses to which the right-of-way was put when accepted.

(s) **SECRETARY** -- The Secretary of the federal department having management jurisdiction over land owned or controlled by the United States upon which a R.S. 2477 right-of-way is claimed to be located.

### **SEC. 3. PROCEDURE.**

(a) **CLAIM AND LIMITATION OF ACTION.** -- A claimant asserting acceptance of a right-of-way granted pursuant to R.S. 2477 must file a claim and supporting evidence, including proof of the notice and reasonably attempted notice under subsection 3(c), within the twenty-one year period that shall commence to run on the effective date of this Act.

(b) **PLACE OF FILING.** --

(1) **GENERALLY.** -- Except as provided by subsection 3(b)(2), claimant shall file the evidence at the state or regional location designated by the Secretary.

(2) **DEFENSE LAND.** -- If the land underlying the claimed R.S. 2477 right-of-way is subject to the ownership or control of the United States Department of Defense, evidence

supporting the claim shall be filed with the commanding officer of the military installation or office having ownership or control of that underlying land, or at such other location as designated by the Secretary.

(c) NOTICE. -- Claimant shall provide Notice of the R.S. 2477 right-of-way claim by publication in a newspaper of general circulation once per week for the two consecutive weeks immediately following the filing of the claim. Within the four consecutive weeks immediately following the filing of the claim, claimant shall additionally provide, or reasonably attempt to provide, written notice of the claim to all record owners of land underlying the claimed R.S. 2477 right-of-way, and to all owners of land contiguous to each edge of that claimed right-of-way. Claimant's reasonable attempt to provide such written notice is sufficient additional notice under this subsection if claimant verifies that reasonable attempt under claimant's written oath or affirmation to that effect.

(d) ABANDONMENT. -- Failure to comply with subsection 3(a), (b) and (c) is, on the first day following the time period in subsection 3(a), an automatic irrevocable abandonment of any R.S. 2477 right-of-way that has not been previously established by final settlement between the claimant and the United States, or order issued by a court of competent jurisdiction, prior to the effective date of this Act. The continuance authorized by subsection 6(b) shall not apply to this subsection 3(d).

#### **SEC. 4. EVIDENCE AND FINAL DECISION**

(a) BURDEN OF PROOF. -- Claimant shall establish the scope and acceptance of the claimed R.S. 2477 right-of-way by a preponderance of the evidence.

**(b) PRESUMPTIONS. --**

**(1) ACCEPTANCE CONCLUSIVELY AND FINALLY ESTABLISHED. --** Unless the land underlying the claimed R.S. 2477 right-of-way was reserved prior to acceptance of that right-of-way, acceptance is conclusively established upon filing, under oath or affirmation by claimant attesting to its authenticity and accuracy, at least one type of evidence selected from either subsection 4(c)(1), 4(c)(2) or 4(c)(3); or at least one type of evidence selected from each subsection 4(c)(4), 4(c)(5) and 4(c)(6) showing:

(i) notwithstanding any state law to the contrary, the R.S. 2477 right-of-way was accepted prior to the effective date of FLPMA;

(ii) the location of the R.S. 2477 right-of-way; and

(iii) the scope of the public use established by the acceptance.

**(2) LOCATION. --** The location of claimant's accepted R.S. 2477 right-of-way is presumed to be substantially the same route initially used by the public and expanded as necessary over time to be consistent with the historic location of that right-of-way when accepted by public use.

**(3) SCOPE. --** Subject to subsection 4(b)(2), the scope is presumed to be the same as that established during the initial public use and as used regularly, even if sporadically, by the public prior to October 21, 1976.

**(4) GRANT WITHDRAWAL. --** Federal reservation of land underlying the alleged R.S. 2477 right-of-way, made prior to acceptance of that right-of-way, conclusively establishes withdrawal of the federal grant for that alleged right-of-way prior to its acceptance.

(c) CATEGORIES OF EVIDENCE. --

(1) A center line or other survey done by the federal government or duly licensed land surveyor, applying generally-accepted survey standards and procedures or federal Bureau of Land Management Manual of Surveying Instructions applicable to surveys prior to October 21, 1976, clearly showing the public use, control, construction, location, direction, beginning and end points, length, width and type of surface of the R.S. 2477 right-of-way as of a date certain prior to the 1976 enactment of FLPMA.

(2) A map, maps, photographs, GIS or computer-generated images showing the location of the R.S. 2477 right-of-way, prepared, kept or relied on, generally or on a case-by-case basis, by any federal or state government, college, university, or private organization historically, customarily or regularly engaged in the preparation, retention, analysis, or expert interpretation of contemporary or historic maps.

(3) Official records of government entities, or records constructed, obtained or kept by the government in the ordinary course of business, including, without limitation, local, state and territorial records, and records of the United States Bureau of Land Management, Forest Service, Natural Resources Conservation Service, Soil Conservation Service, Government Land office and Federal Centers.

(4) Historical records, including original documents, authenticated copies, facsimiles, and computer-transmitted images reliably showing evidence of construction (including tools used, if any), location (including dimensions), fixtures and other structures, or maintenance by a state or local government of the R.S. 2477 right-of-way under consideration.

(5) Written statements by at least five persons given under oath before a notary public, court recorder, judge or any other government official authorized by law to administer oaths, reciting personal knowledge that establishes the location and dimensions of the R.S. 2477 right-of-way under consideration.

(6) A title opinion prepared by a duly licensed title examiner prepared in accordance with generally-accepted title standards, establishing title, location and dimensions of the R.S. 2477 right-of-way under consideration.

(d) DETERMINATION OF ABANDONMENT. -- Within sixty days after a R.S. 2477 right-of-way is conclusively established pursuant to this section 4, the Secretary, Authority or Authorized Officer shall determine whether that right-of-way has been previously abandoned. Failure to make such determination within that sixty day period shall conclusively establish the right-of-way has not been abandoned. That determination by the Secretary, Authority or Authorized Officer, or the failure to make that determination, within the time specified by this subsection 4(d) shall be a final agency action, subject to appeal as provided by section 5.

(e) WRITTEN RECORDABLE RELINQUISHMENT REQUIRED. -- Subject to subsection 4(d), within one hundred twenty days after the evidence to establish a R.S. 2477 right-of-way has been filed pursuant to this section 4, the Secretary, Authority or Authorized Officer shall deliver or cause to be delivered to claimant a written Relinquishment of federal interest in that R.S. 2477 right-of-way. The Relinquishment shall immediately be recorded in the public land records under the jurisdiction of the Secretary, and shall conclusively establish the public right to use

the R.S. 2477 right-of-way, limited only by the scope of use established by this Section 4. The Relinquishment shall be in form to allow recording in state and local real estate records.

(f) FEDERAL REGISTER NOTICE OF FINAL AGENCY ACTION. -- Notice of final agency action under subsection 4(e) shall be published once in the Federal Register no later than thirty days after the one hundred twenty day period specified by that subsection.

(g) REQUIREMENT TO TIMELY RECORD CENTERLINE SURVEY. -- A centerline survey of the R.S. 2477 right-of-way relinquished by the federal government pursuant to this Act shall be completed and filed by Claimant with the Secretary, Authority or Authorized Officer within 10 years after the end of the last day to file an action for judicial review as computed under Section (5)(b).

(h) ABANDONMENT. -- Failure by the claimant to complete and file a centerline survey as required by subsection (g) shall be an abandonment and relinquishment of any and all rights to the R.S. 2477 right-of-way for which the Relinquishment was issued.

#### **SEC. 5. -- JUDICIAL REVIEW.**

(a) JURISDICTION. -- Any case arising under this Act shall be filed in the United States District Court located in the District within which the longest lineal segment of the R.S. 2477 right-of-way is located, which federal Court shall have exclusive jurisdiction to finally decide the matter, subject only to appeal or review under federal appellate court jurisdiction.

(b) LIMITATION OF ACTION. -- Cases shall be filed in the court specified by subsection 5(a) not later than three hundred sixty-five days after the period specified by subsection (4)(f).

(c) PRIOR ADJUDICATION UNAFFECTED. -- A final settlement, or final judgment in any court of competent jurisdiction, where the United States was a party in determining rights to a R.S. 2477 right-of-way prior to the effective date of this Act shall not be affected by this Act.

#### **SEC. 6. -- APPLICABLE LAW AND TIME EXTENSIONS**

(a) APPLICATION OF STATE AND FEDERAL LAW. -- This Act shall apply to conclusively establish the acceptance, scope, validity, and abandonment of a R.S. 2477 right-of-way. From and after the date of enactment, the provisions of this Act will be supreme, preempt and control any inconsistency or conflict between provisions of this Act and state law in determining the acceptance, scope, validity and abandonment of a R.S. 2477 right-of-way.

(b) Any deadline established by this Act may be extended one time, for a maximum of three hundred sixty-five days, for good cause stated in writing signed by claimant under oath or affirmation and delivered to the Secretary, Authority or Authorized Officer at least thirty days prior to the deadline to be continued.

#### **SEC. 7. IMPLEMENTATION REQUIRED.**

Subject to section 2(d), within 180 days after the effective date of this Act, the Secretary, Authority and Authorized Officer shall have completed all policies, procedures, delegations, forms and any other action necessary to implement the provisions of this Act and begin processing claims immediately thereafter. The duties and obligations of, or failure to perform by, the Secretary, Authority and Authorized Officer within the scope of this section 7 is

enforceable by injunction, restraining order and personal civil liability pursuant to action in any Federal District Court.

**SEC. 8. FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 AND ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT.**

Nothing in this Act is intended, or shall be construed, to affect, change, alter, or modify title V of FLPMA or Title XI of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3161 et seq.).