IMPACTS OF R.S. 2477
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I would like to thank the Chairman and members of this Committee for your attention to the important issues pertaining to public rights-of-way across the federally owned lands in the West.

First, let me provide a bit of historical perspective on the legal meanderings that have made up the law of R.S. 2477. I offer that perspective based upon almost 20 years of legal practice in this area of law, starting with legal research and litigation conducted on behalf of Garfield County, Utah, in connection with a lawsuit filed by environmental groups attempting to stop improvements to the "Burr Trail Road," a name which became a call to arms for environmentalists, many of whom don't have a clue what it is. When I started working on "2477" in 1985, it seemed to me that I was working in an esoteric corner of the law that would not have much application in the future. And in those days very few people, including lawyers, had ever heard of R.S. 2477 or knew much about the law. Today, many people have heard about R.S. 2477 and feel very passionately about it. Unfortunately, it remains true today that few know much about the law. But it has number of lawyers fully employed for many years and is likely to do so for some time to come.

I understand that the focus of the hearing today is on the impact of R.S. 2477. I will tell you at the outset that, assuming the previously accepted law of R.S. 2477 were followed (an unsafe assumption in today's political climate) the environmental impact of R.S. 2477, in my opinion, would not be significant. I'll talk about the reasons I don't think it is significant, and the possible exceptions, later. The real "environmental" impact of R.S. 2477 is political and psychological. It provides people with a battle cry, something to fight about based upon notions that have little or nothing to do with its true impacts. For those who are attached to the thrill of activism, it provides a focus for activity. For environmental groups, it provides a fund raising mechanism. For federal employees bent upon expanding wilderness into areas that don't meet the traditional definitions stated in the Wilderness Act, it provides a critical stumbling block that must be swept aside to achieve their ultimate goals -- and they have developed some very savvy strategies to serve that agenda.

On the other hand, the impact on the lives of ordinary people in rural Utah, the impact of the loss of these rights-of-way may be significant. For your average rancher in the rural west, it may very well make a real practical difference in how (and whether) he gets to work. For county governments, who carry the burden of putative authority over the majority of R.S. 2477 roads, it provides access for their residents to go about normal daily activities. It also provides access for the search and rescue and law enforcement operations required to be carried out by counties to serve the campers, hikers, hunters, and other recreational tourists who are invited by the federal government onto the public lands.

My opinions are based largely on legal considerations, derived from court opinions, administrative actions and congressional statements in various forms, salted with observations of the "political" interface which has driven much of the litigation and other developments in the treatment of R.S. 2477 in recent years. So I'll focus on the law, with perhaps a little salt thrown in for good measure.

Revised Statutes 2477 (R.S. 2477) was a grant by Congress to the American public to establish access rights across the federal public lands. R.S. 2477, enacted in 1866, states that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

R.S. 2477 rights-of-way were created by the public or by state and local governments to provide public access across federal lands. All valid existing R.S. 2477 rights-of-way have been in existence since at least 1976, when the grant of R.S. 2477 was repealed. Many of these access routes have been used for over a century. Many are state highways. All are integral parts of the rural, and sometimes remote, transportation infrastructure that allows all Americans to travel across the vast expanses of federal lands which dominate the West.

R.S. 2477 rights-of-way have been protected by every Congressional action taken for management of the public lands, including the Federal Land Policy Management Act of 1976 (FLPMA), which repealed R.S.

2477 but preserved these prior existing rights.

R.S. 2477, like all easements, are property rights and should be entitled to the same legal protection as any other property right. The right is held by the public, which, as a practical matter means the state, county and municipal governmental authorities governing within their jurisdictional boundaries.

Until recently, courts and administrative bodies recognized state law as the basis for determination of the existence and scope of R.S. 2477 rights-of-way. These rulings were consistent with generally applicable principles of property law. Where state law has not established a defined width for these easements, the common law of easements defines the scope as that which is reasonable and necessary to provide safe travel for legitimate uses. Safety can be ensured only by continued application of these state law standards. Under the new approaches, advocated by environmentalists and agency activists, safety would not be a consideration relevant to the maintenance of these rights-of-way.

Theoretically, federal regulatory authority over R.S. 2477 is limited by the obligation to honor the vested property right. Any action by the federal government to limit or divest these rights is contrary to established legal principles. Nevertheless, in recent years, not only the land management agencies, but also the courts, have increasingly ignored the established body of court and administrative law that governed R.S. 2477 from 1866 until 1988.

R.S. 2477 rights-of-way were established by the public over a period of 110 years in reliance on the law and on administrative interpretations of the grant which were in effect at the time. As the approach to interpretation of R.S. 2477 has changed in recent years, the ability to manage these roads sensibly and effectively has been diminished, leaving little reliable basis for decisions by the right-of-way holders and the land managing agencies.

I ask that the document entitled “Settled Precedent on R.S. 2477” be included in the record of my comments. “Settled Precedent” articulates the salient points which had been established by Congress, the courts and administrative pronouncements through the issuance of the 10th Circuit Court’s opinion on the “Burr Trail” case in Sierra Club v. Hodel in 1988.

With the advent of the Clinton administration, under the guidance of Interior Solicitor John Leshy and Interior Secretary Bruce Babbitt, along with numerous environmental group representatives, both inside and outside of government, a sophisticated effort to change the course of the law of R.S. 2477 was begun. This effort has been highly successful.

With the court opinions in S. Utah Wilderness Alliance v. BLM, 147 F. Supp. 2d 1130 (2001), as affirmed by S. Utah Wilderness Alliance v. BLM, 69 Fed. Appx. 927 (2003), the statutory interpretations of R.S. 2477 have been altered from a state standard respecting the pre-existing property rights to a federal standard which makes federal bureaucrats fact finder, judge, jury and appellate body with regard to which roads might constitute R.S. 2477 rights-of-way. The legal standards have been redefined to ensure that a large number of roads that qualified under the law when they were created will no longer be recognized. The rights of state and local governments to manage their transportation infrastructure will be subservient to the preferences of federal employees, most of whom have no knowledge of road maintenance and safety issues.

Now, instead of recognizing R.S. 2477 as a property right which has already vested and for which states have a right to a fair hearing by an impartial judicial process, the courts have elected to defer to the decisions of the land management agencies, who have become hostile to the traditional standards. The State of Utah and the Bureau of Land Management have attempted to implement an MOU based upon the new standards and even that process has failed to bring any meaningful resolution to this issue to date.

Now, as to my opinion regarding the potential impacts of R.S. 2477, first it is important to reiterate that no new routes can be established under this law. Indeed, routes can only be recognized if they were in use prior to 1976, almost 30 years ago. So, the impact of recognition of R.S. 2477 rights-of-way, in terms of the status quo, would not be discernable. The real issues arise in connection with efforts to maintain or improve R.S. 2477 roads to meet applicable safety standards, because in some cases, improvements alter the visual impacts of the road on the landscape and some feel that they also encourage greater use of the backcountry, with attendant off-road impacts. I believe that these impacts would not be significant in the overall scheme of things because state and local governments have limited funds with which to perform

these tasks. Thus, they conduct improvement projects on roads like the “Burr Trail” which, in addition to forming the only east-west link serving the residents of Garfield County, was experiencing increasing use by tourists seeking access to federal public lands for recreational purposes. Garfield County elected to improve the road based upon these increasing uses and the apparent desire of many to use this road. In other words, roads get improved when the need is there.

Under the new regime, the need is there, but roads don’t get improved. Indeed, agreed upon safety improvements on a one-mile stretch of the Burr Trail road have been held up for years while the federal government conducts environmental review costing hundreds of thousands of dollars. Once those improvements are completed, the vast majority of people would never notice them.

The valid R.S. 2477 roads that potentially could cause the greatest environmental controversy are few and far between. These few roads occur in national parks or areas of critical environmental concern. These are the routes that deserve attention. As things stand, however, the wholesale eradication of R.S. 2477 rights-of-way has been the preferred approach of environmentalists and federal bureaucrats.

Even with the short term successes R.S. 2477 opponents have had in the courts and with the land management agencies, we are still left with the fundamental decisions on R.S. 2477 rights-of-way unresolved. Which routes qualify? How may they be maintained and improved? Predictably, substituting new, untried principles for the traditional principles governing R.S. 2477 has resulted in increased confusion, chaos and controversy. I believe that these issues can only be resolved by respecting the long standing principles of law that governed R.S. 2477 until recently and by finding practical ways to address those few routes which might involve real environmental impacts on sensitive federal resources.

Thank you.