Committee on Resources
Subcommittee on National Parks, Recreation & Public Lands
U.S. House of Representatives
St. George, Utah, June 28, 2004

Mr. Chairman,

I am a former county commissioner and current resident of San Juan County, Utah. Thank you for the opportunity to present my views on the RS2477 question. I will begin with a visual demonstration of the subject of which we speak.

1-Economic activities maps
2- Road maps- economics cardiovascular system
3- Comparative Road maps and analysist sheets, showing the arbitrary and capricious methodology of road determinations.
4- Road map and BLM analysis sheet indicating the animas and disdain of the DOI employees requested to make the road decisions.

I will now detail for you what I believe to be the relevant historical context in which the RS2477 question should be addressed. The relevant historical context cannot be disassociated from the original, solemn trust entered into between the original states and respecting territorial lands held by the United States. This original and binding trust was set down in the Resolution of Congress of 1780:

Resolution of Congress of 1780:
"*Resolved, That the unappropriated lands that may be ceded or relinquished to the United States, by any particular states, pursuant to the recommendation of Congress of the 6 day of September last, shall be granted and disposed of for the common benefit of all the United States that shall be members of the federal union, and be settled and formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states: that each state which shall be so formed shall contain a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square, or as near thereto as circumstances will admit: and that upon such cession being made by any State and approved and accepted by Congress, the United States shall guaranty the remaining territory of the said States respectively. ...*" "*That the said lands shall be granted and settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled, or any nine or more of them ....*" (emphasis added)

By this resolution, the United States bound themselves to two courses of action relative to territorial lands that might come into their possession and one course of action relative to the lands within the several states. With respect to the land coming into the possession of the United States agreed that all such lands would, **1.** be disposed of for the benefit of the member states of the Union and, **2.** new states would be established within such territories that would be equal to the original states as to *"sovereignty, freedom and independence*." With respect to the remaining lands of the several states, Congress would make no claim upon it but, rather, would guarantee this territory to each respective state.

Virginia Act of Cession: The landed states accepted the offer set down by Congress in its 1780 resolution by way of there respective cession documents. The Virginia Act of Cession, in pertinent portion, reads as follows:

Cession of Right, Title and Claim: "*(T)his State, by proper deeds or instrument in writing, under their hands and seals, to convey, transfer, assign and make over unto the United States in Congress assembled, for the benefit of the said states, all right, title and claim, as well of soil as jurisdiction, ... upon condition that the territory so ceded, shall be laid out and formed into states, containing a suitable extent of territory, ... ; and that the states so formed, shall be distinct republican states, and admitted members of the federal union; having the same rights of sovereignty, freedom and independence, as the other states.*" Virginia Act of Cession

For the Purposes Intended and for No Other: "*That all the lands within the territory so ceded to the United States, and not reserved for or appropriated to any of the before-mentioned purposes, or disposed of in bounties to the officers and soldiers of the American army, shall be considered as a common fund for the use and benefit of such of the United States, as have become or shall become members of the confederation or federal alliance of the said states, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever.*" Virginia Act of Cession

President Jackson, Veto of the Land Bill: The offer made by Congress in the Resolution of 1780 and acceptance of its terms in the several state cession compacts established a trust respecting federal territorial lands that was fundamental to formation of the American union of states as we know it. These documents constitute a binding compact of trust establishing the destiny of federal territorial lands and Congress may not exempt itself from its obligations under this trust:

"*These solemn compacts, invited by Congress in a resolution declaring the purposes to which the proceeds of these lands should be applied, originating before the constitution, and forming the basis on which it was made, bound the United States to a particular course of policy in relation to them by ties as strong as can be invented to secure the faith of nations.*" President Andrew Jackson, Message from the President of the United States, Returning the Land Bill. IN SENATE, *December 5, 1833.*

Cession of Right, Title and Claim: It is critical in this analysis to note that within the state land cession documents, the respective states ceded "*right, title* ***and claim, as well of soil as jurisdiction***." By these words, the states gave up both proprietary "*right and title*" and also their "*claim*" to sovereign jurisdiction over the ceded land. Upon their cession, the ceded lands no longer lay within the confines of the ceding states. Therefore, it was proper that the states cede their governmental jurisdiction or "*claim*" over them to the United States.

Northwest Ordinance: The Northwest Ordinance was the instrument adopted by the Continental Congress for the purpose of carrying out its obligation under the Resolution of 1780. In part, the Northwest Ordinance provided for: **1.** temporary government of the territory by the United States pending establishment of the territory as states, **2.** disclamation of proprietary rights in the soil by the inhabitants therein, and **3.** that the carrying places for canoes and the like between waterways **shall be common highways** and forever free, as well to the inhabitants of the said territory as to the citizens of the United States.

Temporary Government: "*For purposes of temporary government*" .... (and also) "*to provide also for the establishment of States, and permanent government therein.*"

Obligation for Disposition: "*The legislatures of those districts or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers.*" Northwest Ordinance

Carrying Places are Highways: "*The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways ....*" Northwest Ordinance, 1787

Common Elements: Northwest Ordinance and State Enabling Acts: The essential trust fulfilling elements of the Northwest Ordinance are to be found in every subsequent state enabling act. The pertinent, common elements found both in the Ordinance and state enabling acts include the following:

a. Both are compacts between the United States and the people of a territory
b. Both provide for admission of new states on an equal footing with the original states
c. Both contain a provision for the adoption of certain ordinances that are to be unalterable but by common consent
d. Both provide for disclamation of proprietary right and title to unappropriated public lands remaining within the new state.
e. Both provide for the right of self-governance and equal footing with the original states

f. Both provide for disposition of the public domain remaining within state borders

Consistent Recognition of the Trust Obligation for Public Land Disposition Originating in the Resolution of 1780: The solemn trust obligation resting upon Congress to dispose of the territorial lands ceded to it is clearly stated in the Resolution of 1780. In keeping with its solemn trust obligation to dispose of the territorial lands that may come into its possession, Congress has repeated this obligation in every subsequent document bearing upon the issue of the admission of new states into the Union. After the congressional Resolution of 1780, the obligation for public land disposal is found repeated in:

a. Northwest Ordinance of July 13, 1787
b. Constitutional Property Clause, Article IV, sec. 3
c. Utah Enabling Act; July 16, 1894, section 3, second

The Utah Enabling Act: We now consider the Utah Enabling Act in greater detail. The trust binding upon Congress which originated with the Resolution of 1780 reverberates throughout the text of this Act:

a. An ordinance irrevocable: Section 3 of the Act requires that the provisions set down thereunder are to be adopted by the state by ordinance irrevocable other than by mutual consent of the state and the United States. Hence, this section 3 is the embodiment of a compact and, in fact, it is the embodiment of the original compact respecting federal territories dating to the Resolution of 1780. The provisions included in this section:
   1. require that the people disclaim "*all right and title*" to the public lands within the state
   2. require that "*until the title* (to the public lands) *shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States*."
   3. "*absolute*" federal jurisdiction is to be retained only over "*Indian lands*."

b. By section 19, the laws of the state are to be operative "*in said state*" and the laws of the United States "*shall have the same force and effect within the said State as elsewhere within the United States*."

c. placed in a metaphorical context, the genetic fiber of the solemn trust respecting federal territorial lands that was set down first in the Resolution of Congress of 1780 are found complete and without defect in the "genetic structure" of the Utah State Enabling Act and in every state enabling act.

Presidential Vetoes of Internal Improvement Bills: The federal government is entirely a creature of the Constitution. It possesses no powers not delegated to it in that document. No power was delegated to the federal government in the Constitution with which it may govern land. Accordingly, improvements to land within states is entirely a function of the retained sovereignty of states. Most particularly, the federal government has no constitutional authority over roads within a state. Proof of these statements is found in vetoes of internal improvement bills by the earliest presidents:

When President Madison vetoed an internal improvements bill in 1817 which included roads, Jefferson approved, writing that the bill was "*negatived by the President on constitutional, and I believe, sound grounds ...* because roads, "*are not among those (objects) enumerated in the Constitution and to which it permits the public monies to be applied."* The Constitutional Thought of Thomas Jefferson, David N. Mayer, The University Press of Virginia, 1994.

In 1822, President Monroe vetoed a federal road act: "*It was one thing to make appropriations for public improvements, but an entirely different thing to assume jurisdiction and sovereignty over the land whereon those improvements were made. This has been the Federal position on highway grants to the States down to the present day*." Federal Highway Administration, U.S. Dept. of Transportation, *America's Highways, 1776-1976*, Washington D.C.: GPO, 1977, p. 21.

There can be no doubt that roads are among the sovereign attributes of states and statehood. As such, they must be among those sovereign "*claims*" of States which neither the United States nor Congress have any constitutional capacity to "*prejudice*" pursuant to Article IV, sec. 3, c.2., the constitutional Claims Clause.

To Act Upon State Roads is to Act Upon the State Itself: To the extent that the federal government presumes to possess authority to determine what is and what is not a road within the confines of a sovereign state is to presume also that the federal government may assert its sovereign authorities over the instrumentalities of the state. The federal government was given no

authority under the Constitution to act upon the instrumentalities of the states:

> "*Under the existing Confederacy, Congress represents the States not the people of the States: their acts operate on the States, not on the individuals. The case will be changed in the new plan of Government. The people will be represented*;" Col. Mason, Debates in the Federal Convention of 1787, Wed. June 6, Comm. of the Whole.

> "*But when, 'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The government of the Union, then ... is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit*," M'culloch v. State, 17 U.S. 316, 1819.

The Constitutional Claims Clause: That the federal government was given no legislative power whatsoever with which it might prejudice the claims of the sovereign states, including the sovereign claim of the states to their internal system of highways is affirmed in bold word by the Constitution:

> "*And nothing in this Constitution shall be so construed as to prejudice any claims of the United states, or of any particular state*." Article IV, sec. 3, cl. 2, the Claims Clause.

Supreme Court Affirmation of the Sovereign Claim of State to Roads: The Supreme Court has affirmed that roads are, in fact, a component or instrumentality of the sovereign states:

> "*Clearly, Congress could exact of the new State the surrender of no attribute inherent in her character as a sovereign independent State, or indispensable to her equality with her sister States, necessarily implied and guarantied by the very nature of the Federal compact. Obviously, and it may be said primarily, among the incidents of that equality, is the right to make improvements in the rivers, water-courses, and highways, situated within the State*," Withers v. Buckley, 61 US 84, 1857.

The RS2477 Grant of Right of Way: RS2477 reads, - grant of a right-of-way, not a highway: "*the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted*."

Characterization of the grant:

a. The grant was unconditional with the sole exception that it applies only to unappropriated public land and it is a grant for a single purpose

b. The grant contains no reversionary clause

c. The grant contains no requirement for specific performance

d. The grant plainly constituted divestiture, by the federal government, of a portion of its property right upon public lands

e. The grant was not of a physical thing. Rather, the grant was of a power to construct public highways over unreserved public land

f. A "*grant*" is a grant and not an offer

g. A grant is accepted unless declined in accord with a principle in law which state that "*... a proffered benefit is accepted unless its nonacceptance is demonstrated*," Jurisdiction Over Federal Areas Within the State: Report of the Interdepartmental committee for the Study of Jurisdiction Over Federal Areas Within the States, Part I, ch. 2, pg. 8, April 1956.

g. *"A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant*," Fletcher v. Peck, 10 U.S. 87 (1810).

h. "*A grant is a contract executed*," Blackstone, Fletcher v. Peck, 10 U.S. 87 (1810).

Interior Department Policy: Interior Department policy once affirmed much of what is said above about the RS2477

grant. Though the grant is said to "*become effective*" upon the construction of a highway, its potential for effect remains in perpetuity unless given up by the grantee. The granted authority to construct highways does not need to have "*effect*" in order to be a power "*hereby granted*." The power exists though it may not be used: :

"*This grant p[RS2477] becomes effective upon the construction or establishing of highways, in accordance with the state laws, over public lands not reserved for public uses. No application should be filed under this act, as no action on the part of the Federal Government is necessary*." 56 I.D. 533 (May 28, 1938).

"*No application should be filed under RS2477 as no action on the part of the Government is necessary ... Grants of rights-of-way referred to in the preceding section become effective upon the construction or establishment of highways, in accordance wit the State laws, over public lands, not reserved for public uses*." 43 C.F.R. 2822.1-1, 2822.1 (October 1, 1974) See also, 43 C.F.R. 244.54, (1938); 43 C.F. R 244.58 (1936).

Departmental Policy on RS 2477
(Commonly referred to as the Hodel Policy)

This policy was adopted in response to questions and issues raised by public land States, which questioned not only the BLM policy but also the management actions by other bureaus within the Department. The Secretary in adopting this policy was providing clarification and consistent direction to those agencies within the DOI who had responsibility for public land management.

Section 8 of the Act of July 26, 1866, Revised Statute 2477 (43 U.S.C. 932) Repealed October 21, 1976 by virtue of the passage and adoption of the Federal Land Policy and Management Act.

Section 8 of the Act of July 26, 1866 provided:

"*The right of way for the construction of highways over public lands not reserved for public uses, is hereby granted*."*

(*Editorial note: It is important to note that Section 509 of FLPMA says "*Nothing in this title shall have the effect of terminating any right-of-way or right-of -use hereto for issued, granted or permitted*.")

Acceptance of a right-of-way is conditioned on the following:

1. The lands involved must have been public lands, not reserved for public uses, at the time of acceptance.
2. Some form of construction of the highway must have occurred.
3. The highway so constructed must be considered a public highway.

Public lands not reserved for public uses are defined as:

1. Those lands that were open to the operation of the various public land laws enacted by Congress.
2. Public lands not reserved for public uses do not include public lands reserved or dedicated by Act of Congress, Executive Order, Secretarial Order, or, in some cases, classification actions authorized by statute, during the existence of that reservation or dedication. **(Note: This statement denies the sovereign claims of the states to territorial jurisdiction and the exercise of municipal eminent domain throughout the extent of their territory under the Equal Footing Doctrine.)**

Construction is defined as:

1. A physical act of readying the highway for use by the public according to the available or intended mode of transportation - foot, horse, vehicle, etc. Removing high vegetation, moving large rocks out of the way, filing low spots, etc., may be sufficient as construction for a particular case.
2. Survey, planning, or pronouncement by public authorities may initiate construction, but does not by itself, constitute construction. Construction must have been initiated prior to the repeal of RS 2477 and, actual construction must have followed within a reasonable time.
3. Road construction over several years may equal actual construction.
4. The passage of vehicles by users over time may equal actual construction.

(Note: As the roads are a matter and instrumentality of state sovereignty, their construction is a matter of state concern.)

Definition of a Public Highway:

A public highway is a definitive route or way that is freely open for all to use. It need not necessarily be open to vehicular traffic for a pedestrian or pack animal trail may qualify.

The inclusion of a highway in a State, county, or municipal road system constitutes being a public highway.

Expenditure of construction or maintenance money by an appropriate public body is evidence of the highway being a public highway.

Ancillary uses or facilities usual to public highways:

Facilities such as roads, ditches, back and front slopes, turnouts, rest areas, and the like, that facilitate use of the highway by the public are considered part of the public highway RoW grant.

Widths:

The width of an RS2477 RoW is as specified for the type of highway under State law, if any, in force at the time the grant could be accepted.

(Note: the grant of right of way was accepted at the moment it was "hereby granted" by Congress in 1866.)

Consequences of the Federal Land Policy and Management Act: By virtue of the Federal Land Policy and Management Act, provision for permanent retention of public lands in federal ownership we have also committed the following violence upon original constitutional principles. By permanent federal ownership, we have:

a. Violated, *"ties as strong as can be invented to secure the faith of nations*." Jackson
b. Violated the "*irrevocable*" ordinances upon which States are founded.
c. Terminated grants which, by law, we are estopped from recalling.
d. Established within the confines of States extra-constitutional, federal territorial law which was voided by law at statehood as evidenced by sec. 303 wherein search and seizure of person or property is authorized without warrant or process in violation of the Fourth of the Bill of Rights.

FLPMA denies the constitutional equality of the western "public land" states by denying to them their equality of territorial sovereignty and jurisdiction:"

> *Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the Union on an equal footing with the original states, the Constitution, laws, and compact to the contrary notwithstanding*," Coyle v. Smith, 221 U.S. 559, 1911, citing Pollard v. Hagen, 1845.

> *"Upon admission of Arkansas to statehood in 1836 upon an equal footing with the original states, Act of June 15, 1836, the legislative authority of the state extended over the federally owned lands within the state, to the same extent as over similar property held by private owners, save that the state could enact no law which would conflict with the powers reserved to the United States by the Constitution."* Ft. Leavenworth R. Co. v. Lowe, 114 U.S. 525; Utah Power & Light Co. v. United States, 243 U.S. 389. Wilson v. Cook, 327 U.S. 474, 1946.

Time to Reaffirm the Distinction Between What Is National and What Is Local: This is to say that it is time that we reaffirmed federalism. The alternative is to forsake our fundamental law for the law of expediency and the rule of m en. Liberty as won by the American Revolution will vanish and the shame of it will be ours.

"*We have seen that in the new government, as in the old, the general powers are limited; and that the States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction. The truth is, that the great principles of the Constitution proposed by the convention may be considered less as absolutely new, than as the expansion of principles which are found in the articles of Confederation.*" James Madison, Federalist No. 40.

It is the observation of this Ex-Commissioner that the Ballooning interpretation of the property Article 4 Sec. 3 clause 2. Has placed a cancer on the state sovereignty and every state in the entire nation that has not as yet been recognized-lets radiate it now and get back to original property principals and claims of the state