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Testimony
Before the Committee on Resources
United States House of Representatives

Subcommittee on National Parks, Recreation, and Public Lands
Oversight Hearing on Impact of Revised Statute 2477

My name is Randy Johnson. I am here in behalf of the State of Utah. Thank you for the opportunity to testify on this important subject.

The problem of unresolved R.S. 2477 Rights of Way has gone on far too long, and I have been pleased to be part of a process which, at last, has been aimed at a scientific, pragmatic resolution to this issue.

I must admit to some bewilderment over the unrelenting and, if I may add, untruthful attacks made by certain special interest groups against Utah's statewide R.S. 2477 project. I appreciate the opportunity to get the facts out in this hearing, and hope that it will help to dispel the misinformation and overcome the lack of understanding about this project.

One of the problems that we have faced is an apparent attitude that certain ideals rise above legal rights. There are those who propose huge areas of wilderness and who believe that their ideals are so lofty that they warrant ignoring the legal rights of the citizens of the State, County and Nation. I am troubled by such ideas, and I'm wondering where it might lead. Further, no amount of philosophical debate, quota setting, boundary proposing, or political positioning will resolve this problem. Either these rights-of-way exist or they don't. And if they exist, they ought to be identified and protected, and as we carefully clarify, through reliable research and evidence gathering, where these R.S. 2477 rights-of-way do lay, we also bring into focus the entire public lands management picture. This is the goal of the State of Utah's R.S. 2477 Statewide Project.

R.S. 2477 was originally Section 8 of the Mining Act of 1866. Combined with the Homestead Act, it provided for the settling of the vast western United States. It read in its entirety, "the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Section 8 was later recodified as Section 2477 of the Revised Statutes. From 1866 to its repeal in 1976, states and counties throughout the United States – and particularly in the West – constructed roads across public lands under this grant. These roads became the foundation of the West's current transportation infrastructure, and still provide public access to the public lands, and in some cases are the only thoroughfares between cities and towns.

The R.S. 2477 grant was self-executing, meaning that once the terms of the grant had been fulfilled, the right-of-way grant was perfected and the valid property interest was automatically vested. State law governed the acceptance of the grant, and in most cases the property interest was vested jointly in the state and the county within which the right-of-way was constructed. Neither R.S. 2477 nor any federal regulations required notice or application to accept the grant.

Simply put, once the terms of the grant were fulfilled, the property interest automatically vested, even without authorization by the federal agency responsible for the land management.

In 1976, the Federal Land Policy and Management Act ("FLPMA") repealed the R.S. 2477 grant. But FLPMA Section 509(a) specifically recognized previous R.S. 2477 right-of-way grants: "Nothing in this title shall have the effect of terminating any right-of-way [...] heretofore issued, granted, or permitted." Thus, although the original grant was withdrawn, the states and counties still held a valid property interest in every road they had constructed under R.S. 2477. This is still true today. However, after the repeal of R.S. 2477,

conflicts arose over the status of R.S. 2477 rights-of-way, and (in the words of the Department of the Interior) caused a continuing cloud on federal agencies' ability to manage federal lands. This was due largely to the fact that at the time of FLPMA, there was no adequate inventory of grandfathered rights-of-way, since no recording action had been required.

This confusion has escalated as special interest groups, whose number and size have grown exponentially since 1976, have focused increased attention on these lands. Unfortunately, rather than helping to bring the problem to a point of solution, it has made it even more contentious. R.S. 2477 rights-of-way have become the symbol of stakeholder groups on all sides of the issue, forcing us to a point where two people can stand in a disturbance on a section of public land and one will say, "This is a road," while the other will say, "This is not a road." It has become a very emotional and contentious problem.

And, who is right? Can philosophical debating resolve the matter? The State of Utah believes not. We believe that there is needed a scientific, practical, evidence based approach to identifying where R.S. 2477 right-of-way may exist, and which ones should be part of a statewide public land transportation infrastructure. To that end we began our statewide project, and have been actively gathering data for several years. The Utah Statewide R.S. 2477 Project ("Project") has two goals: (1) use science, technology, and history to identify all valid and existing R.S. 2477 rights-of-way in Utah; and (2) based on that identification, create a sensible and workable public lands transportation system that best fits the needs of the lands and the people who love and use them. Toward these ends, Utah has invested many years and millions of dollars cataloguing, photographing, documenting, and verifying the history and use of many roads in the state.

In 2001, Utah filed a Notice of Intent to sue the Department of the Interior ("DOI") through the Quiet Title Act to resolve in federal court the ongoing R.S. 2477 disputes. The state, however, expressed its desire to avoid litigation through a more collaborative means and to allow for public participation in the process. Early in 2003, when the Department of Interior issued new regulations governing recordable disclaimers of interest, Utah saw the first opportunity in decades to resolve the R. S. 2477 issue with finality. To that end, the State of Utah and DOI signed a Memorandum of Understanding ("MOU") on April 9, 2003. The MOU allows the parties to focus limited resources on the acknowledgment of R.S. 2477 rights-of-way that are unquestionably part of the state's transportation infrastructure.

The MOU outlines seven touchstones, or areas of agreement, that the Department of the Interior and the State of Utah will use to determine the acceptability of a particular road. The road must: (1) have existed before 1976; (2) be accessible by cars or trucks; (3) not be within units of the National Park Service; (4) not be within a federally designated Wilderness area; (5) not be within a federally designated Wilderness Study Area; (6) not be within a unit of the National Wildlife Refuge System; and (7) be recognized "as-is, where-is, within the existing disturbed surface. The MOU clearly defines the scope of the work to be done. Where the road satisfies each of these seven touchstones, the State of Utah will apply for a recordable disclaimer of interest.

A recordable disclaimer of interest (RDI) is a legal document through which the United States disavows ownership of specified land. As stated earlier, the State of Utah, together with the counties, acquired a property interest in the road when the R.S. 2477 grant was perfected. When the federal government issues a recordable disclaimer of interest, then, it is not giving away federal land, but rather simply acknowledging that it does not own the identified land. This lifts the cloud on the state and county property interests, and will minimize management conflicts on the road because the true owner is not in question. The State of Utah will include on all applications for recordable disclaimers of interest a detailed description in meets and bounds of each valid existing R.S. 2477 right-of-way, confined to the existing disturbed surface. FLPMA Section 315 authorizes the Department of Interior to issue the recordable disclaimers of interest. And, while a recent General Accounting Office ruling questioned the validity of the MOU, it verified the authority, under Section 315 to issue recordable disclaimers of interest.

There are those who propose huge areas of wilderness who oppose this project on the grounds that it is designed to "prevent' or "destroy" wilderness by creating new roads inside these supposed wild areas. But again the MOU prevents any consideration of roads inside WSA's and nothing in this project allows for the creation of new roads or the expansion of existing ones.

To be clear, no new roads can or will be constructed under the MOU. As mentioned above, valid R. S. 2477 rights-of-way must have been established prior to the law's repeal in 1976. If the road did not exist before then, it simply cannot be recognized under the MOU. Thus, recognition will be confined to pre-existing

roads, not new ones. Further, the as-is where-is principle confines the scope of the R.S. 2477 right-of-way to its existing disturbed surface, thus limiting expansion of the road. As required under current law, if the state or a county wishes to expand a road, they must obtain a FLPMA Title V permit and complete the appropriate documentation as required by the National Environmental Policy Act. This is in stark contrast to claims that we are poised to “pave the parks” and “bulldoze historic trails and pathways” into 100 foot rights-of-way.

Further, it is important to understand that R.S. 2477 allowed for construction of roads over Public Lands not reserved for other purposes. It did not allow for roads to be built across private land. Thus, any valid R.S. 2477 right-of-way across private land must have existed before the land came into private hands. The State feels that this is a matter best left to the state courts, and does not lay within the scope of the MOU. Thus, no R.S. 2477 rights-of-way that cross private land will be pursued under the MOU without complete support of the private landowner involved.

While there has been some recent challenge to the strength of the MOU between the State of Utah and the Department of Interior, the State will continue to obtain and process data and to make application for RDI’s under the spirit of the MOU. It is our hope to succeed with our goal to resolve the issue of R.S. 2477 rights-of-way, and to that end, we remain firmly committed.

Opponents of this project have referred to R.S. 2477 as an “antiquated law”. However, the fact that a law is old does not make it bad law. Our Constitution is over 200 years old, after all. Legitimate, important, and necessary rights-of-way were created under R.S. 2477 and either they still exist or they don’t. No amount of philosophizing will determine the facts, and to imply that one viewpoint is so lofty that we should ignore legal rights-of-way is simply unacceptable.

It is the intent of the State of Utah and the counties in Utah to continue this important fact-finding project with great conviction as we continue our effort to resolve R.S. 2477 once and for all.
Thank you Mr. Chairman.