

1 HOUSE BILL NO. 410

2 INTRODUCED BY D. HAINES

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR THE ACCEPTANCE OF RIGHTS-OF-WAY
5 GRANTED BY THE FEDERAL GOVERNMENT; PROVIDING FOR ACCEPTANCE BY STATUTORY
6 ACKNOWLEDGMENT OR BY USE; PROVIDING FOR PROOF OF USE OF RIGHTS-OF-WAY; AND CREATING
7 A PRIVATE RIGHT OF ACTION FOR THE PROOF OR PROTECTION OF ACCEPTED RIGHTS-OF-WAY."

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9 WHEREAS, on July 26, 1866, as part of a move to grant access to western lands to miners,
10 lumber companies, and explorers, the United States Congress enacted the 1866 Mining Act, section 8 of
11 which granted a right-of-way to all persons over unreserved federal lands when it stated "the right-of-way
12 for the construction of highways over public lands, not reserved for public uses, is hereby granted"; and

13 WHEREAS, in 1873, the 1866 grant was recodified into section 2477, Revised Statutes of the
14 United States, and rights-of-way granted by that section have since become known as the "RS 2477
15 rights-of-way"; and

16 WHEREAS, in 1871, the Montana Territorial Legislature meeting at Virginia City, Montana Territory,
17 passed section 3, Chapter 53, Laws of Montana Territory, accepting the grants of federal rights-of-way
18 by proclaiming that "All roads or highways laid out or now travelled in the various counties in the territory
19 of Montana are hereby declared public highways, excepting such roads and highways upon which
20 franchises have heretofore been granted"; and

21 WHEREAS, throughout the later half of the 19th century and the first three-quarters of the 20th
22 century, the use of RS 2477 rights-of-way over federal land in Montana and elsewhere in the western
23 United States became a standard method of legal access across federal lands for commercial, industrial,
24 and recreational pursuits to such an extent that the use of the RS 2477 rights-of-way has become an
25 inherent part of western heritage and a capital asset for the public that should be preserved for future
26 generations; and

27 WHEREAS, the use of RS 2477 rights-of-way over nearly a century has resulted in an extensive
28 body of case law in the state and federal courts, in which owners of various types of rights-of-way have
29 competed with holders of RS 2477 rights-of-way and in which the availability of those various
30 rights-of-way has been decided by the courts, including both the Montana Territorial Supreme Court and

1 the modern State Supreme Court as well as the federal Ninth Circuit Court of Appeals, in such cases as
2 Robertson v. Smith, Supreme Court Montana Terr., 1871; Butte v. Mikosowitz, 39 Mont. 350, 102 P. 593
3 (1909); Moulton v. Irish, 67 Mont. 504, 218 P. 1053 (1923); and Shultz v. Dept. of Army, 10 F.3d 649
4 (9th Cir. 1993); and

5 WHEREAS, RS 2477 rights-of-way have been given a liberal interpretation by state and federal
6 courts in those judicial decisions interpreting what constitutes a "highway" within the meaning of RS
7 2477, those judicial opinions holding that even the barest foottrail could qualify as a "highway" and that
8 no particular way across federal lands has even been identified, it being sufficient that travelers used an
9 area of federal land as a method of access between two geographic points; and

10 WHEREAS, after 110 years of public use of RS 2477 rights-of-way, the U.S. Congress repealed
11 the most recent version of RS 2477, 43 U.S.C. 932, but that repeal was, by 43 U.S.C. 1701, specifically
12 made subject to valid rights-of-way existing as of the date of repeal; and

13 WHEREAS, since the repeal of RS 2477 in 1976, federal land management agencies, such as the
14 United States Forest Service and the Bureau of Land Management, have become increasingly interested
15 in limiting public access across RS 2477 rights-of-way to the extent that those agencies have in some
16 cases barred travel across those existing rights-of-way and are now in the process of destroying some of
17 those rights-of-way by various means, including contracting with third parties to physically destroy existing
18 forest roads; and

19 WHEREAS, because RS 2477 rights-of-way are a valuable capital asset important to Montana
20 residents who use the rights-of-way to gain access to natural resources in order to make a living or enjoy
21 various recreational pursuits, those RS 2477 rights-of-way assets need to be preserved for those purposes,
22 and Montana should do what it can now to stop the destruction of RS 2477 rights-of-way before they are
23 completely destroyed and are lost forever; and

24 WHEREAS, Montana should for these purposes reaffirm the state's acceptance of the RS 2477
25 rights-of-way, establish the methods and conditions under which an RS 2477 right-of-way may be proved
26 and maintained, and create private rights of action so that individuals may resort to the courts in order to
27 adjudicate the existence of the RS 2477 rights-of-way and prevent further destruction of those
28 rights-of-way and the further loss of those rights-of-way as a highly valuable resource.

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30 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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2 NEW SECTION. Section 1. Definition -- RS 2477 right-of-way. As used in [sections 1 through 5],
3 an "RS 2477 right-of-way" is a right-of-way on land that is owned by the federal government on [the
4 effective date of this act] that was established pursuant to Revised Statutes of the United States, section
5 2477, and any of its predecessors, reenactments, codifications, or recodifications.

6

7 NEW SECTION. Section 2. Acceptance of federal land grants by statute. (1) Montana renews its
8 acceptance, previously given by section 3, Chapter 53, Laws of Montana Territory, of the grants of
9 unreserved federal lands made by Revised Statutes of the United States, section 2477, 43 U.S.C. 932.

10 (2) Montana recognizes that another form of acceptance of the RS 2477 rights-of-way given by
11 the enactments referred to in subsection (1) is use for the purposes for which the grants were made,
12 including travel upon or construction of highways, roads, trails, or paths, and that use of the RS 2477
13 rights-of-way for these purposes and the resulting grants to the public cannot be extinguished once the
14 use for those purposes has been made.

15 (3) Montana therefore accepts that neither the passage of time nor the frequency of use may be
16 asserted to deprive the users of the RS 2477 rights-of-way from the grants given by congress and that
17 the only lawful method of reverting these RS 2477 rights-of-way to the United States is through the use
18 of eminent domain proceedings that will compensate the public for the taking of the RS 2477
19 rights-of-way assets previously granted by congress.

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21 NEW SECTION. Section 3. Acceptance of federal land grants by use -- evidence of use --
22 **presumption.** (1) The RS 2477 rights-of-way accepted by Montana by use in accordance with those
23 authorities provided in [section 1] must be evidenced by documentation of that use. Evidence contained
24 in maps, surveys, books, notes, affidavits, and other written histories may be used to prove that use of
25 an RS 2477 right-of-way existed before the repeal of the authority for the RS 2477 rights-of-way passed
26 by congress in Public Law 94-579, 90 Stat. 2793 (1976). The evidence of use of an RS 2477 right-of-way
27 referred to in this section may be used to prove the existence and use of the RS 2477 right-of-way,
28 notwithstanding any other provision or rule of law to the contrary.

29 (2) The acceptance by the state of an RS 2477 right-of-way is presumed if actual use is
30 demonstrated by any of the methods provided for in subsection (1).

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2 NEW SECTION. **Section 4. Maintenance and surveys not required.** Notwithstanding any other law
3 to the contrary:

4 (1) the existence of an RS 2477 right-of-way is not dependent upon maintenance of the RS 2477
5 right-of-way at any time during or after its use, and neither the state nor a political subdivision or other
6 government entity is required to maintain a right-of-way existing pursuant to RS 2477 unless that RS 2477
7 right-of-way is colocated with a state highway or other public road maintained by the state or a political
8 subdivision for those purposes; and

9 (2) the existence of an RS 2477 right-of-way is not dependent upon a previous centerline survey,
10 and any requirement of that kind applicable to the creation or maintenance of other highways of the state
11 is considered not to apply to an RS 2477 right-of-way.

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13 NEW SECTION. **Section 5. Private right of action for proof and protection of RS 2477**
14 **right-of-way.** (1) An individual may bring a civil action pursuant to Title 27, chapter 8, Title 70, chapter
15 28, or other applicable law and this section on behalf of the state in the district court of the county in
16 which the individual resides to prove the existence of or to protect an RS 2477 right-of-way or for both
17 of those purposes.

18 (2) An action brought pursuant to this section may not include a claim for relief of damages of any
19 kind. The district court may enter any order determined appropriate by the court, except an order
20 awarding damages, for the proof or protection, or both, of an RS 2477 right-of-way.

21 (3) A cause of action accrues for the purposes of this section when the person bringing the action
22 pursuant to this section receives actual notice of the existence of the RS 2477 right-of-way that is the
23 subject of the action and actual notice of the closure or denial of that RS 2477 right-of-way by an official,
24 officer, or agent of the United States government.

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