



Senate Natural Resources Committee
House Joint Resolution 21
Testimony of Tim Baker, Executive Director
Montana Wilderness Association
March 9, 2005

SENATE NATURAL RESOURCES
COMMITTEE NO. 8
DATE 3/9/05
BILL NO. HJ 21

Chairman Roush, and members of the Senate Natural Resources Committee:

My name is Tim Baker, I am the Executive Director of the Montana Wilderness Association, and I appear before you today on behalf of the 6,000 members of MWA. Thank you for this opportunity.

We oppose HJ 21 for several reasons. First, it is unnecessary. Second, it is an unbalanced and narrow perspective on this very complicated and contentious issue. Third, its effects on ongoing private litigation are unclear. Fourth, the "whereas" clauses are inappropriate.

Ten years before Custer ambled into the Little Bighorn, the 1866 Mining Act was passed, including Revised Statute 2477, which stated simply: "The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." The acknowledged purpose of this provision was the settlement of the West, to permit highway construction and help commerce move from town to town over federal public lands. While this provision has been repealed, valid claims under this provision were preserved.

Fast forward to 2005:

- Motorized users are using RS 2477 in an attempt to convert cow paths, traditional pack and saddle trails, or two-tracks on public land into ATV motorways.
- Folks challenging Forest Service road closures in federal court are using RS 2477 to argue that the county, not the federal government, has jurisdiction over forest service roads.
- Developers of a proposed ski resort on public lands on Lolo Peak near Missoula are making RS 2477 claims in federal court, claiming a right-of-way for motorized use on trails inside of the Selway-Bitterroot Wilderness.

And, in Utah government authorities are making RS 2477 claims against private landowners and on private lands, seeking to open motorized routes for ATVs and other motor vehicles. Attached to my testimony is a letter to *The Salt Lake Tribune* from landowners who had to go to court to protect their private property rights against government-sponsored RS 2477 claims.

That's the dirty little secret behind RS 2477: if your private land was public land after the 1866 Mining Act, then it is subject today to RS 2477 claims, even though it is now in private ownership.

HJ 21 doesn't mention, or even infer, that any of these scenarios are now playing out.

It makes no mention of the private litigation that is ongoing to further private economic interests, against public rights.

It makes no mention of the RS 2477 claims that are made today against private lands and private landowners.

In fact, HJ 21 doesn't even describe a problem for which a formal resolution is necessary.

Instead of providing a balanced view of this complicated issue, HJ 21 begins with a strange "Whereas" clause, that, read literally, states that it is unconstitutional for the federal government to "govern land," presumably challenging the validity of public treasures like Yellowstone and Glacier National Parks, or the Gallatin and other National Forests. (page 1, lines 8-10).

The next "Whereas" clause is just as awkward, suggesting that somehow the federal government has no legitimate interest in the state road system. I wouldn't want the feds to hear this, lest they take away all of our highway and road funding! (page 1, lines 11-13).

Finally, and looking at the one sentence resolution, it appears to merely "affirm" rights that might otherwise exist, except, of course, that the language also makes claim to some kind of power to then determine the types of uses allowed on RS 2477 roads and right-of-ways. (page 2, lines 7-9).

So in other words, and thanks to that old horse trail across your private or public land, the State of Montana can now allow ATVs and pickups to cross your private or public land, spreading weeds and scattering wildlife or stock.

Given the complicated and contentious background to RS 2477, and the existence of private litigation over public and private property rights and RS 2477, this Committee should be cautious about now weighing in on these matters with such a vague and incomplete resolution.

For the foregoing reasons, the Montana Wilderness Association opposes HJ 21, and asks that this Committee recommend a DO NOT PASS, and table this resolution.

Thank you for this opportunity and for your attention.

The Salt Lake Tribune

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Beware the consequences of RS 2477 right-of-way claims

By Jana and Ron Smith

RS 2477, or the Mining Law of 1866, has been a controversial issue in the news recently. Most discussions have focused on the use of this obsolete law, written decades before the automobile was invented and repealed in 1976, to claim road rights of way in national parks, BLM wilderness-study areas and other public lands.

An aspect of RS 2477 that few have spoken out about is the potential this statute has to deprive private landowners of their property rights.

More than 25 years ago, we bought a ranch in Kane County. Before doing so we carefully researched the history of the property as it was important to us that we could maintain its remote and wild character, which included very limited access. We had never heard of RS 2477 and had no concerns about public roads through our property. Until 1997, that is, when we came home from a trip to find that our county attorney had taken the liberty to drive through our property, cut a chain off our locked gate and remove half a dozen "Private Property" signs.

With no notification, no explanation of the county's position, and certainly in violation of our constitutional right to due process, Kane County was claiming RS 2477 "highways" through our property.

For the next two and a half years we tried to settle this issue with county officials -- some of whom were sympathetic and helpful -- outside of a courtroom. We attended county commission meetings, wrote letters to county officials and the governor, provided complete documentation of our property rights -- all the time thinking that someone would realize the mistake that had been made.

We got nothing but a run-around.

As a result of having our roads declared open to the public, local citizens were confused about whether or not we could control access. Some hunters and ORV users, believing that we were denying access, became angry and cut our fences, tore down signs and left our gates open.

After Kane County ran a road grader through our property in 1999, it was painfully clear that further efforts to avoid litigation were useless. We were forced to hire an attorney and file a lawsuit. One year later the courts permanently stopped the RS 2477 proponents, awarding us the rights and title to our property that we knew we had in the first place.

RS 2477 is potentially a serious threat to other western land owners. Utah state and county officials pushing RS 2477 claims in an effort to gain control over federal land, particularly wilderness, are also asserting that if a wagon, a horse or a motorized vehicle made a trail years ago across land that is now privately owned, the owner may unknowingly have a public road through his property.

As we discovered, a very ambiguous statute is being interpreted to declare trails and two-track roads that begin and end nowhere and serve no purpose to the public as RS 2477 public highways. Proponents claim that once these rights of way are established, they cannot be abandoned.

In light of what we experienced regarding RS 2477, we are extremely troubled at the recent memorandum of understanding signed between Utah Gov. Mike Leavitt and

Interior Secretary Gale Norton. The memorandum states there will be no RS 2477 right-of-way claims in some areas, such as national parks and wilderness, yet it is not at all clear if such claims can be made in the future, leaving the long-term protection of public lands in question.

The governor claims the memorandum works toward resolving the roads issue, but much is left open to interpretation and potential abuse. While the memorandum states that it will settle the roads debate by focusing only on "real roads," these "real roads" are not defined. Without clear and sensible criteria by which RS 2477 claims can be established, all western lands, private and public, will remain subject to right-of-way claims, legitimate or not.

In our dispute with Kane County, no one could define clearly for us what constitutes a public road. Evidence of construction and maintenance? The mere existence of tire tracks, regardless of how old and how overgrown by sagebrush? The fact that a road leaves private property and enters public land? Do legitimate public roads include creek bottoms and wagon trails?

These are questions that must be answered before RS 2477 claims are processed. We urge Gov. Leavitt to set the needed standards. Just as importantly, a process should be in place that allows public input on each RS 2477 claim asserted to ensure that all of us who enjoy the spectacular and beautiful landscape we call Utah have a say in the future of our public lands, and in the protection of our private property rights.

Ron and Jana Smith live on the ranch they operate outside Kanab.

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