





## SENATE STANDING COMMITTEE REPORT

March 10, 2005

Page 1 of 1

Mr. President:

We, your committee on **Natural Resources** recommend that **House Joint Resolution 13** (third reading copy -- blue) be concurred in.

Signed:

A handwritten signature in cursive script, appearing to read "Glenn Roush".

*Senator Glenn Roush, Chair*

To be carried by Senator Mike Wheat

- END -

**Committee Vote:**  
Yes 9, No 0.

531317SC.ssc

Handwritten initials, possibly "KJ", in the bottom right corner.



## SENATE STANDING COMMITTEE REPORT

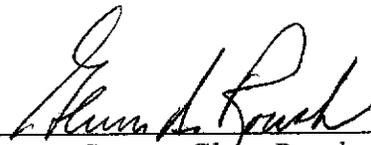
March 10, 2005

Page 1 of 1

Mr. President:

We, your committee on **Natural Resources** recommend that **House Bill 612** (third reading copy -- blue) be concurred in.

Signed:

  
\_\_\_\_\_  
*Senator Glenn Roush, Chair*

To be carried by Senator Aubyn Curtiss

- END -

**Committee Vote:**  
Yes 9, No 0.

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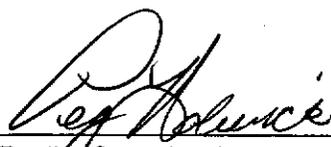
14

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**COMMITTEE FILE COPY**

**TABLED BILL**

The **SENATE NATURAL RESOURCES COMMITTEE** TABLED **SB 336**, by motion, on **Wednesday, March 9, 2005**.

  
\_\_\_\_\_  
(For the Committee)

  
\_\_\_\_\_  
(Secretary of Senate)

9:20, 3-10  
(Time) (Date)

March 10, 2005

Peg Holwick, Secretary

Phone: 444-4783

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# Montana State Senate



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**SENATOR DAN W. HARRINGTON**  
PRESIDENT PRO-TEMPORE  
SENATE DISTRICT 38

COMMITTEES:  
TAXATION  
NATURAL RESOURCES  
ENERGY  
AUDIT

*The Big Sky Country*

Ken Toole  
has my vote  
on all issues  
Dan Harrington

**MONTANA STATE SENATE  
2005 LEGISLATURE**

**VISITOR REGISTER**

**NATURAL RESOURCES**

DATE 3/9/05 BILLS BEING HEARD TODAY HB612, HJ13  
HJ18  
HJ21

PLEASE PRINT

NAME	PHONE	REPRESENTING	BILL #	SUPPORT	OPPOSE
GARY E HALL	881-2345	MONTANANS FOR MULTIPLE USE	HJ13	✓	
"	"	"	HJ18	✓	
"	"	"	HJ21	✓	
DAVE SKINNER	662 0058	MEMU	13	X	
"			18	X	
BOGA ABELIN	448 9353	MTUFA	21	X	
BOGA ABELIN	448 9353	MTUFA	21-18	✓	
GEORGE CICHENSKI	492-9151	MT STATE PARKS FOUND <sup>HERITAGE</sup>	HJ13	✓	
HERRO WHITE	587-3653	CITIZENS FOR BALANCED USE	13, 18, 21	✓	
TERRY CHUTE	444 5516	Forest Service	HJ13, 18, 21		X
TIM BAKER	443-7351	MT WILDERNESS ASS'N	HJ13	✓	
"	"	"	HJ18	✓ (w/ amendments)	
"	"	"	HJ21		X
ELI EDENSTADT		MT Wood Prod. ASSO.	HJ13, 18, 21	✓	
Tom Schmitt		DMPL	HB612	In Committee	
Ed Melcher	656-1452	Families for outdoor	HJ18 HJ21	✓	
Sue McCombs	248-7265	FFOR, BMC, HITA motor sports	HJ18 HJ21	X	
Bob Raney	222-0588	MT state park fdn	HJ13	X	
Doug Kary	259-4490	SELF	HJ18, 21	X	
Hal Harper		Gov. Office	HJ13	✓	
Kate Brown	444-3161	OPI	HB612	✓	

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

**MONTANA STATE SENATE  
2005 LEGISLATURE**

**VISITOR REGISTER**

**NATURAL RESOURCES**      **HJ 18**

**DATE** 3/9/05      **BILLS BEING HEARD TODAY** HJ 13, HB 612, HJ 21

**PLEASE PRINT**

NAME	PHONE	REPRESENTING	BILL #	SUPPORT	OPPOSE
<del>Harold Battie</del>	4-4360	MAC	HJ 21	X	
Paul Edwards		SELF	HJ 13	X	
Don Judge	459-1708	MT Chapter Sierra Club	HJ 13 HJ 21	X	X
Rick Maedje		HOUSE DISTRICT 2	HB 612	X	
Ronda Carpenter-Wiggins	899-5659	MT Snowmobile Assoc	HJ 18/21	X	
John Sincub		HD 67	HJ 21	X	
Jana Oll	443-5541	WETA (HB 612)	HJ 18, 21	X	
Jason Tothunter	253-3806	MT Logging Assoc.	HJ 13	X	
"	"	"	HJR 18	X	
"	"	"	HJR 21	X	
"	"	"	HB 612	X	
Greg Howell	881-2345	MONTANANS FOR MULTIPLE USES	HB 612	X	

**PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY**

## **A BRIEF EXPLANATION OF RS 2477**

[www.rs2477roads.com](http://www.rs2477roads.com)

RS 2477 is a statute adopted in 1866 to facilitate the settlement of the West by encouraging the development of a system of roads and trails. The name "RS 2477" is an abbreviation of "Revised Statute 2477." That name, in turn, comes from the placement of the original law in a reorganized version of the U.S. Code.

RS 2477 is a very short law, consisting of only one sentence. It states, in its entirety, that "the right of way for the construction of highways across public lands not otherwise reserved for public purposes is hereby granted." That right-of-way is a legitimate property right, and, consequently, carries with it a bundle of associated rights, including the right to maintain the roads and upgrade them under certain circumstances.

Once the grant was made, the federal government's interest in the land actually containing the right of way became that of the servient estate. That means that its rights as owner of the underlying land are still protected against undue or unnecessary damage, but it cannot interfere with the owner of the right-of-way exercising its bundle of rights.

These property rights are held on behalf of the public, usually by the counties. In accepting the property right-of-way, the local governmental unit also accepted a legal obligation (and the consequent legal liability) to maintain those rights-of-way to ensure safe passage by the public.

RS 2477 was a self-executing law, meaning that when the requirements of the law were met, the property right was automatically conveyed from the federal government to the county. Indeed, there was never even a requirement that the county inform the federal government when it accepted the grant of a particular right-of-way. The specific actions which local governments took in accepting the grant vary from state to state and have been determined by each state's law.

State law can also determine such things as the width of the right of way.

RS 2477 was repealed in 1976 by a law establishing a more comprehensive resource management framework for the Bureau of Land Management, the Federal Land Management and Policy Act, commonly referred to as "FLPMA." However, FLPMA specifically and clearly stated that all existing 2477 rights of way were not affected by the repeal of RS 2477 and remained valid. It contained in its Title V a new mechanism for granting rights-of-way from 1976 to the present.

So, while no new grants were made after 1976, all of those made prior to that time were still valid property rights of the counties.

The federal land management agency cannot determine whether the claim is valid or not except for its administrative purposes. Under our Constitution, only the courts can do that. Much of the recent controversy surrounding the 2477 issue has been sparked by draft regulations issued by the U.S. Department of Interior which local governments and others claim try to exceed the authority of the Executive Branch under the Constitution as well as suffering from a number of other serious shortcomings as well. (Click [here](#) for an introduction to the draft regulation issue.)

If, based on the documentation the county provides, a federal agency recognizes the validity of a 2477 right of way claim, then it is bound by the right of the local governmental unit to exercise its bundle of rights. If it does not recognize the validity, then the right-of-way holder can still exercise its right. Where a dispute cannot be resolved, the issue goes to federal court for a decision.

Counties can abandon 2477 rights-of-way, but usually must go through formal procedures specified in state law to do so. The lack of maintenance of the road over a right-of-way has no bearing on the continuing validity of the right-of-way. One of the bundle of rights of the local governmental unit is to maintain a safe right-of-way and even to upgrade it within limits.

### **1. RS 2477 is a simple and straightforward law.**

This is the entire text of RS 2477: "The right-of-way for the construction of highways across public lands not reserved for public purposes is hereby granted."

### **2. Congress specifically and clearly reaffirmed the validity and intent of RS 2477 in 1976.**

Because RS 2477 became law in 1866, anti-access extremists argue that it is now somehow inconsistent with modern public land management policy. But just 22 years ago, when Congress repealed RS 2477 and replaced it and many other laws with the Federal Land Policy and Management Act, it specifically and explicitly reaffirmed all RS 2477 grants previously made.

### **3. RS 2477 was a self-executing law.**

**When the conditions were met, the right-of-way grant was made. No further action by the grantee or by Congress was necessary to validate it.**

#### **4. Congress specifically by-passed the Executive Branch of the Federal Government in making RS 2477 grants.**

**Under our Constitution, Congress has the exclusive power to manage and dispose of public lands and property (Article IV, Section 3: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States;"). In 1976 when Congress reaffirmed the RS 2477 right-of-way granting process established 110 ten years earlier, it had the total power to do so. The federal land management agencies have no independent power or authority over RS 2477 roads (or anything else to do with public lands). Their only authority over public lands is what Congress delegates to them.**

#### **4. The RS 2477 right-of-way grant is a property right.**

**Therefore, it enjoys the same constitutional and legal protections as any other property. Legally, when the grant was made, the federal government's interest in the land underlying the right-of-way became the "servient estate" and the interest of the right-of-way grantee became the "dominant estate." That means that while the federal government is protected against unnecessary or undue damage to the land underlying the right-of-way, it cannot interfere with the grantee's exercise of its rights.**

#### **5. The RS 2477 grant also conveyed a bundle of associated rights.**

**These include the right to maintain the road and even upgrade the road. This federal law also is unusual because state law plays a major role. It can partially determine the scope of these associated rights, how the requirements of the grant offer were met, and the width of the right-of-way granted.**

#### **6. It is legally incorrect to call RS 2477 assertions "claims."**

**The term "claim" suggests that there is some process which must still be followed before the RS 2477 right-of-way is fully granted and valid. In reality, the grant was either validly made before RS 2477 was repealed in 1976 or it was not. If it was, then it is not a claim but a valid grant, and the grantee asserts its validity. If it was not, then it cannot be asserted under a repealed law. The anti-access activists and some federal bureaucrats like to talk about "claims" to confuse the issue. When someone talks about RS 2477 "claims," they are either confused or deceptive.**

**7. Congress granted a right-of-way, not a road.**

In fact, RS 2477 rights-of-way can host a number of things besides roads. The legal definition of "highway" in the law means not only the frequently-traveled, periodically-maintained roads commonly associated with it, but also other kinds of public ways, including carriage-ways, bridle-ways, footways, trails, bridges, and even railroads, canals, ferries and navigable rivers. The essential element in defining "highway" is that whatever the means of transport, the public has the right to come and go at will.

**8. The present physical condition of a road is totally irrelevant to whether a valid RS 2477 right-of-way exists.**

This should be obvious, but this is the point on which the anti-access folks are spreading the most misinformation. Whether a road is barely visible on the ground or even has been obliterated for any other reason, the legal status of the right-of-way is not affected. The grantee can legally re-establish the road even if it has totally disappeared. It follows, then, that it also is impossible to determine whether a valid right-of-way exists simply by looking at it. A right-of-way can only be relinquished or abandoned in accordance with state law.

**9. A valid RS 2477 road can be established merely by the passage of vehicles.**

The case law and federal policy for over a century are clear: construction by machinery is not required to do so. Anti-access forces are frantically trying to convince the public otherwise. Don't be misled.

**10. No federal land management agency can determine the validity of an RS 2477 assertion.**

The agency can only determine for its own administrative purposes whether or not it will recognize the assertion as valid. Constitutionally, only a court can determine the validity.

**11. No federal agency has the authority to close an RS 2477 road for any reason, period.**

This follows logically, but many federal bureaucrats think they have this authority and try to act accordingly. When next you run into one, outline the points listed here

**and ask them to cite the legal authority by which they claim they can close an RS 2477 road. Ties them in knots.**