

1 HOUSE BILL NO. 635

2 INTRODUCED BY M. BRAINARD, R. BITNEY

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; CREATING
7 CAUSES OF ACTION FOR THE PROOF AND PROTECTION OF ACCEPTED RIGHTS-OF-WAY; AND
8 CREATING AN EARMARKED FUND FOR THE PURPOSES OF FUNDING CAUSES OF ACTION."

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

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

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

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

26 WHEREAS, the use of RS 2477 rights-of-way over nearly a century has resulted in an extensive body
27 of case law in the state and federal courts, in which owners of various types of rights-of-way have competed with
28 holders of RS 2477 rights-of-way and in which the availability of those various rights-of-way has been decided
29 by the courts, including both the Montana Territorial Supreme Court and the modern State Supreme Court as well
30 as the federal 9th Circuit Court of Appeals, in such cases as Robertson v. Smith, Supreme Court Montana Terr.,

1 1871; *Butte v. Mikosowitz*, 39 Mont. 350, 102 P. 593, (1909); *Moulton v. Irish*, 67 Mont. 504, 218 P. 1053 (1923);
2 and *Shultz v. Dept. of Army*, 10 F.3d 649 (9th Cir. 1993); and

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

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

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

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

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

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

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29 **NEW SECTION. Section 1. Definition -- RS 2477 right-of-way.** As used in [sections 1 through 6], an
30 "RS 2477 right-of-way" is a right-of-way ON LAND THAT IS OWNED BY THE FEDERAL GOVERNMENT ON [THE EFFECTIVE

1 DATE OF THIS ACT] THAT WAS ESTABLISHED pursuant to Revised Statutes of the United States, section 2477, and
2 any of its predecessors, reenactments, codifications, or recodifications.

3

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

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

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

17

18 NEW SECTION. Section 3. Acceptance of federal grants by use -- evidence of use -- presumption.

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

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

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28 NEW SECTION. Section 4. Maintenance and surveys not required. Notwithstanding any other law
29 to the contrary:

30 (1) the existence of an RS 2477 right-of-way is not dependent upon maintenance of the RS 2477

1 right-of-way at any time during or after its use, and neither the state nor a political subdivision or other government
 2 entity is required to maintain a right-of-way existing pursuant to RS 2477 unless that RS 2477 right-of-way is
 3 colocated with a state highway or other public road maintained by the state or a political subdivision for those
 4 purposes; and

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

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9 **NEW SECTION. Section 5. Causes of action for proof and protection of RS 2477 right-of-way.** (1)

10 (a) The attorney general may accept as a public responsibility on behalf of the citizens of Montana the duty to
 11 bring a civil action to prove or protect an RS 2477 right-of-way ~~within this state~~. The action may be brought in
 12 the district court of Lewis and Clark County.

13 (b) An action to prove the existence of an RS 2477 right-of-way may be brought pursuant to Title 27,
 14 chapter 8, Title 70, chapter 28, this section, or other law determined applicable by the attorney general.

15 (c) An action for the protection of an RS 2477 right-of-way may be brought by the attorney general
 16 pursuant to Title 27, chapter 19, and this section or other law determined applicable by the attorney general.

17 (2) There is a private right of action for an individual who may prove the existence of an RS 2477
 18 right-of-way to bring an action on behalf of the state in the district court of the county in which the individual
 19 resides to prove the existence of or to protect an RS 2477 right-of-way. The action may be brought pursuant to
 20 this section and the authorities provided in subsection (1).

21 (3) An action brought pursuant to this section may not include a claim for relief of damages of any kind;
 22 ~~but the court may award other relief, including costs and reasonable attorney fees, as the court determines to be~~
 23 ~~proper.~~

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

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29 **NEW SECTION. Section 6. RS 2477 right-of-way account within state special revenue fund.** There
 30 is an account within the state special revenue fund to be used by the attorney general for the purposes of actions

1 brought by the attorney general pursuant to [section 5]. The attorney general shall deposit into the account all
2 money collected pursuant to [section 5], along with all gifts, donations, or appropriations made for the purposes
3 of the account. Income earned on funds within the account must be retained within the account and used for the
4 purposes of the account. The money in the account may be appropriated by the legislature only for the purposes
5 of the account.

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