

1 HOUSE BILL NO. 418

2 INTRODUCED BY S. GUNDERSON

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4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING LAWS RELATED TO PROVIDING FOR
5 THE ACCEPTANCE OF RIGHTS-OF-WAY GRANTED BY THE FEDERAL GOVERNMENT; PROVIDING FOR
6 ACCEPTANCE BY STATUTORY ACKNOWLEDGMENT OR BY USE; PROVIDING FOR PROOF OF USE OF
7 RIGHTS-OF-WAY; CREATING CAUSES OF ACTION FOR THE PROOF AND PROTECTION OF ACCEPTED
8 RIGHTS-OF-WAY; CREATING AN EARMARKED FUND FOR THE PURPOSES OF FUNDING CAUSES OF
9 ACTION; PROVIDING A DEFINITION; AND PROVIDING AN APPROPRIATION."

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

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

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

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

28 WHEREAS, the use of RS 2477 rights-of-way over nearly a century has resulted in an extensive body

1 of case law in the state and federal courts in which owners of various types of rights-of-way have competed
2 with holders of RS 2477 rights-of-way and in which the availability of those various rights-of-way has been
3 decided by the courts, including both the Montana Territorial Supreme Court and the modern State Supreme
4 Court as well as the federal 9th Circuit Court of Appeals, in such cases as Robertson v. Smith, Supreme Court
5 Montana Terr., 1871; Butte v. Mikosowitz, 39 Mont. 350, 102 P. 593 (1909); Moulton v. Irish, 67 Mont. 504, 218
6 P. 1053 (1923); and Shultz v. Dept. of Army, 10 F.3d 649 (9th Cir. 1993); and

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

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

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

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

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

1 those rights-of-way and the further loss of those rights-of-way as a highly valuable resource.

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

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5 NEW SECTION. **Section 1. Definition.** As used in [sections 1 through 6] unless the context clearly
6 indicates otherwise, an "RS 2477 right-of-way" is a right-of-way pursuant to the Revised Statutes of the United
7 States, section 2477, 43 U.S.C. 932, and any of its predecessors, reenactments, codifications, or
8 recodifications.

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

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

18 (3) Montana therefore accepts that the passage of time or the frequency of use may not be asserted
19 to deprive the users of the RS 2477 rights-of-way from the grants given by congress and that the only lawful
20 method of reverting these RS 2477 rights-of-way to the United States is through the use of eminent domain
21 proceedings that will compensate the public for the taking of the RS 2477 rights-of-way assets previously
22 granted by congress.

23
24 NEW SECTION. **Section 3. Acceptance of federal grants by use -- evidence of use --**
25 **presumption.** (1) The RS 2477 rights-of-way accepted by the state by use in accordance with those authorities
26 provided in [section 1] must be evidenced by documentation of that use. Evidence contained in maps, surveys,
27 books, notes, affidavits, and other written histories may be used to prove that use of an RS 2477 right-of-way
28 existed before the repeal of the authority for the RS 2477 rights-of-way passed by congress in Public Law 94-

579. The evidence of use of an RS 2477 right-of-way referred to in this section may be used to prove the existence and use of the RS 2477 right-of-way, notwithstanding any other provision or rule of law to the contrary.

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

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

(1) the existence of an RS 2477 right-of-way is not dependent on maintenance of the RS 2477 right-of-way at any time during or after its use, and the state or a political subdivision or other government entity is not required to maintain a right-of-way existing pursuant to RS 2477 unless that RS 2477 right-of-way is colocated with a state highway or other public road maintained by the state or a political subdivision for those purposes; and

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

NEW SECTION. Section 5. Causes of action for proof and protection of RS 2477 right-of-way.

(1) (a) The attorney general may accept as a public responsibility on behalf of the citizens of the state the duty to bring a civil action to prove or protect an RS 2477 right-of-way. The action may be brought in any district court of this state having jurisdiction.

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

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

(2) There is a private right of action for an individual who may prove the existence of an RS 2477 right-of-way to bring an action on behalf of the state in the district court of the county in which the individual resides to prove the existence of or to protect an RS 2477 right-of-way. The action may be brought pursuant to

1 this section and the authorities provided in subsection (1).

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

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

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10 **NEW SECTION. Section 6. RS 2477 right-of-way account within state special revenue fund.**

11 There is an account within the state special revenue fund to be used by the attorney general for the purposes of
12 actions brought by the attorney general pursuant to [section 5]. The attorney general shall deposit in the
13 account all money collected pursuant to [section 5], along with all gifts, donations, or appropriations made for
14 the purposes of the account. Income earned on funds within the account must be retained within the account
15 and used for the purposes of the account. The money in the account may be appropriated by the legislature
16 only for the purposes of the account.

17
18 **NEW SECTION. Section 7. Transfer of funds.** By July 15, 2021, the state treasurer shall transfer
19 \$50,000 from the state general fund to the RS 2477 right-of-way account established in [section 6].

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21 **NEW SECTION. Section 8. Appropriation.** There is appropriated \$50,000 from the RS 2477 right-of-
22 way account established in [section 6] to the attorney general for the purposes of actions brought by the
23 attorney general pursuant to [section 5].

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