

Just what are RS 2477 rights-of-way?

(The following information is from the Western Counties' Resources Policy Institute of Utah, web site <http://www.rs2477roads.com/>.)

An RS 2477 Primer:

A brief analysis of a one sentence law.

RS 2477 (which is an abbreviation of "Revised Statutes 2477") was passed in 1866 and is a very short law, only one sentence long. It states, in its entirety, that "the right\_of\_way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

Defining some of the terms and phrases in this law clarifies the intent of Congress in passing this law which was designed to facilitate the settlement of the western frontier.

"Right\_of\_way"

"Right\_of\_way" means a bundle of rights widely recognized in common law and explicitly in many statutes and court decisions which govern access across a piece of property. In the case of 2477 rights\_of\_way, the rights are usually held by county government and apply to travel to and across federally\_managed lands. The bundle of rights include the ability to travel freely, maintain and improve the road under certain conditions, and otherwise manage its use.

"Construction"

The courts have interpreted "construction" to include a broad array of activities, from constructing a road or trail merely by the periodic passage of foot or animal traffic to more specific and formal road building activities. These interpretations make it clear that the definition was not limited only to actually altering the land by a mechanical device. Indeed, some of the "interstate highways" of the 19th century, such as the Oregon Trail, the Santa Fe Trail, the Mormon Trail and others were created only by the continuous passage of wagons and animals and not by mechanical means. It is obvious that Congress clearly intended to grant a right\_of\_way for such roads to local government as an aid to opening the West for settlement.

"Highway"

Similarly, the definition of the term "highway" is broad ranging. Several legal dictionaries and court decisions dating from the 19th century make it clear that the term "highway" not only included frequently\_traveled, periodically\_maintained roads but also included numerous other kinds of public ways, among them carriage\_ways, bridle\_ways, footways, bridges, turnpike roads, and even railroads, canals, ferries, or navigable rivers. The

essential element of the definition is that whatever the transportation mode, the public has the right to come and go at will.

### "Public Lands"

The term "public lands" used in the law was defined very similarly to what we understand it to mean today. It meant, simply, land owned by the federal government. A 2477 right\_of\_way could be established only over land owned by the federal government which was not otherwise restricted or "reserved."

### "Reserved"

The term "reserved" is commonly understood to mean setting aside a portion of public land as a national park, national forest, military reservation or for a similar facility. If the right\_of\_way grant predated the reservation of the land for one of these uses, it still remained a valid property right.

### "Is hereby granted"

The term "is hereby granted" is particularly crucial to understanding this law and the 2477 rights\_of\_way controversy. By including this phrase, Congress made 2477 a self\_executing law. When the minimal conditions were met, the right\_of\_way grant occurred. That grant is a legitimate property right, held by the state or local government for the public.

Because RS 2477 was a self executing law, it was not necessary to apply for the right\_of\_way. Its transfer to the local governmental unit required no action by any land management agency. Congress did not even require that any paperwork be sent to the federal management agency specifying what right\_of\_way grants were accepted by local governments. The grant by Congress was nonetheless valid.

### What is constructing a highway?

The specific requirements for "constructing a highway" and the specific details of the grant, such as the width of the right-of-way, were defined by the laws of the state in which the right-of-way was located.

This method of granting rights-of-way across federal land was in effect from passage of RS 2477 in 1866 until the passage in 1976 of the Federal Land Policy Management Act (FLPMA) which repealed RS 2477. In FLPMA, Congress provided a new mechanism for the granting of rights-of-way across public lands from 1976 onward. However, in passing FLPMA, Congress made it absolutely clear that all pre existing rights-of-way which had been granted during the preceding 110 years under RS 2477 were still valid and were in no way were affected by the passage of FLPMA. This meant that while no new rights-of-way grants would be made under 2477 after 1976, all the thousands of grants previously

made were still valid.

Much of the recent controversy over RS 2477 rights-of-way stems from efforts — initially by environmental activists but joined more recently by the Department of Interior — to alter after the fact or otherwise try to infringe on the property rights granted to state and local governments in trust for the public.

(The following information is from the Alaska Department of Natural Resources or “DNR”)

### 1998 Legislation

In May 1998, the Alaska State Legislature passed a new law (AS 19.20.400) entitled "An Act Relating to State Rights\_of\_ Way," that declares that more than 600 routes have been accepted as RS 2477 rights\_of\_ way by public use and mandates that DNR record them in the respective recording districts. This bill was signed into law as Chapter 26, SLA 1998 (AS 19.30.400).

In general, this statute:

- identifies DNR as manager of these routes, unless transferred to DOTPF;
- acknowledges that there may be other qualifying routes not yet identified by the project;
- indemnifies the state from liability resulting from a person's use of an RS 2477 right\_of\_ way;
- outlines procedures and restrictions for vacating RS 2477 rights\_of\_ way.

In addition, the legislative act mandated the recordation of the 602 routes listed in the bill as qualifying RS 2477 rights-of-way.

Whether or not an RS 2477 route is recorded, the right-of- way still exists and encumbers the property it crosses. The original RS 2477 route may be re\_routed or eradicated only through an easement vacation process. By statute, the Legislature must approve an application to vacate an RS 2477 if no reasonable, comparable alternate right-of-way or means of access exists. However, if an alternate means of access exists, then the state may approve the vacation.

One example of a well-documented RS 2477 route within the WRST boundaries is the McCarthy-Green Butte Trail. This is listed officially as “RST 135—McCarthy-Green Butte Trail.”

DNR describes it this way:

“Situated in the Wrangell Mountains, the McCarthy\_Green Butte Trail heads northeast from McCarthy, following McCarthy Creek roughly 15 miles to the Mother Lode Mine. The route is shown on the USGS McCarthy B\_5, B\_6 and C\_5 map. It was referenced in early ARC documents as 57E. The DOT Trails Inventory depicts RST 135 on map 67

(McCarthy quadrangle) as trail 16.”

“Constructed by a mining firm, the route was flooded in 1927, after which the ARC took over repairs and maintenance. According to ARC documents, the route was passable by motor vehicles. Other documentation includes ARC annual reports, USGS bulletins, a DNR map, and mining history.”

Of course many of us here in McCarthy have seen actual photos of cars driving the route, back when it was maintained with bridges and tunnels. There is no question as to its validity under RS 2477.

Another well documented RS 2477 route is the “Jake’s Bar” trail, which is part of the much longer Nizina\_Bremner Sled Road (RST 155).

This trail begins approximately 8 miles southeast of McCarthy, just south of the Nizina River, near the Baultoff Lakes. It runs southwest roughly 35 miles to the historic settlement of Bremner on Golconda Creek, the former site of mining activity and the current site of an airstrip. The route is shown on USGS McCarthy A\_5, A\_6, A\_7, B\_5 and B\_6 maps. In ARC documents, it is referenced as 61F.

Dating from the early 1920s, miners used this tractor trail to access the Bremner region. Historical documentation includes ARC annual reports, USGS bulletins, and a National Park Service publication.

There is much interest in this trail, as it gives winter access to routes leading to a number of places of interest in the Chitina Valley. The trail has suffered in recent years from the early snowfalls which caused many of the trees along the trail border to bend or break, effectively blocking the trail. DNR has a program by which snowmachine registration fee money is distributed for trail work. The Jake’s Bar portion of this trail is a likely candidate for a trail grant.

Just the day after Christmas, the Department of the Interior announced new regulations which may make it easier to validate RS 2477 claims. If so, what a nice gift to the people who live in or visit WRST!