

Testimony of Tess Davis
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Senate Energy & Natural Resources Committee
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2:30 PM

Chair Cortez Masto, Ranking Member Lee, and Members of the Subcommittee, thank you for the opportunity to participate in this hearing.

My name is Tess Davis, and I am an Assistant Attorney General for the State of Utah. I have been representing Utah’s Public Lands Policy Coordinating Office for almost seven years, and I have overseen the State’s R. S. 2477 litigation efforts for the last three.

Revised Statute 2477 (R. S. 2477) is the lifeblood of our public lands. It is how Utah’s rural counties, some of which are comprised of more than 95 percent federal public lands, are able to sustain their economies and the livelihoods of the families who live and work there. The principles of multiple use and sustained yield can only be achieved through access to public lands, and R. S. 2477 provides that means of access. These roads are not just lines on a map; they connect communities, they enhance economic opportunity through access to our natural resources, and they allow people of all types, ages, and abilities to visit and enjoy some of the most incredible natural wonders our state has to offer.

R. S. 2477 was a provision contained in the Mining Act of 1866. Meant to encourage the settlement of the West, R. S. 2477 stated simply that “the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” Beyond this single sentence, there were no administrative or procedural requirements for acceptance of a right-of-way grant under R. S. 2477. People were free to — and in fact did — build roads across unreserved federal public land throughout the West for over a hundred years. In Utah alone, nearly 13,000 roads were built pursuant to the right-of-way grant contained in R. S. 2477.

In 1976, R. S. 2477 was repealed by the Federal Land Policy & Management Act (FLPMA). Despite this shift in federal policy, however, FLPMA specifically preserved all R. S. 2477 rights-of-way existing as of the date of its repeal (October 21, 1976). While the preservation of these rights was important and necessary, FLPMA provided no additional clarification as to how these rights were to be proven.

Despite this lack of clarity, Utah and its public lands counties have been working steadfastly for decades to resolve their R. S. 2477 claims, pursuing numerous avenues for resolution. The federal courts have ultimately held that the sole avenue for resolving R. S. 2477 claims is to adjudicate them under the federal Quiet Title Act,

and the U.S. District Court for the District of Utah has borrowed from state law to require proof of continuous public use of these roads for at least ten years prior to 1976. On this basis, the State of Utah and 22 of its counties have been litigating these claims under the QTA since 2012.

This litigation has been lengthy, difficult, and costly, and this long and drawn-out process is highly disruptive to our rural transportation systems. A small number of R. S. 2477 claims have been individually adjudicated to date, but both Utah and the United States recognize that trying these claims on a road-by-road basis is a practical impossibility. A Bellwether trial was held in the U.S. District Court for the District of Utah in February of 2020, in which fifteen roads in Kane County, Utah were chosen as representative of the remaining legal issues to be resolved with respect to processing R. S. 2477 claims. The case has been fully briefed and is awaiting a decision; in the meantime, however, discovery is ongoing in all 22 lawsuits.

As a result of the “ten years of continuous use” requirement, the State’s discovery process relies heavily on the testimony of witnesses who are familiar with R. S. 2477 roads, and who have traveled them since before the passage of FLMPA in 1976. By necessity, our witnesses tend to be elderly; the Case Management Order requires that they be at least 60 years old on the date of their depositions, but many are much older, and their age is often accompanied by infirmities or other physical limitations.

As part of the process of preparing for R. S. 2477 depositions, counsel for the State arranges to travel these roads by vehicle with each witness. This process helps to refresh the witness’s recollection, and allows the State to verify the accuracy of its maps and GIS data. In its Travel Management Planning process, however, the Bureau of Land Management (BLM) is closing, or proposing to close, many miles of R. S. 2477 roads. These closures impede the State’s established discovery process by preventing the State and its witnesses from motorized travel on certain R. S. 2477 roads, but they also lead to degradation of the roads themselves as they become overgrown by vegetation and fall into disrepair. If these roads are allowed to remain closed, the State and its counties suffer permanent harm not just to their roads, but also to their ability to establish the validity of their R. S. 2477 rights-of-way.

S. 3148, the Historic Roadways Protection Act, is vital to safeguarding the status quo until Utah’s R. S. 2477 claims can be fully and finally adjudicated, and will allow people of all ages and abilities ongoing access to these spectacular places. The State of Utah strongly supports this legislation. We are grateful to Senator Lee for introducing the bill, and to the Subcommittee for the opportunity to testify on its behalf.

Thank you.