

RIGHTS-OF-WAY ACROSS FEDERAL LAND

2003 GENERAL SESSION

STATE OF UTAH

Sponsor: Michael E. Noel

This act modifies the Transportation Code by amending rights-of-way across federal lands provisions. This act amends the definition of acceptance to recognize that an acceptance vests an R.S. 2477 right-of-way in the state and the applicable county. This act amends the definition of highway to recognize that a highway does not need distinguishable endpoints. This act amends the definition of public lands not reserved for public uses to include lands that are subject to subsurface coal withdrawals or mining claims. This act authorizes the governor or the governor's designee to assess whether an R.S. 2477 has been accepted. This act provides a procedure for the governor or a designee to assess whether the R.S. 2477 grant has been accepted as to any right-of way and issue a notice of acknowledgment of an R.S. 2477 grant. This act requires the governor or a designee to provide a notice of acknowledgment to the owner of the servient estate in land over which the right-of-way runs. This act authorizes an owner of the servient estate to file an action with the district court for a decision regarding the correctness of a notice of acknowledgment issued by the governor and requires that the district court make a determination without deference to the notice of acknowledgment. This act creates a presumption of acceptance of an R.S. 2477 grant if a highway existed as of the cut-off date and currently exists in a condition suitable for public use. This act provides that a proponent of the R.S. 2477 status of a road that is not presumed bears the burden of proving acceptance by a preponderance of the evidence. This act has an immediate effective date.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

72-5-301, as last amended by Chapter 324, Laws of Utah 2000

72-5-302, as last amended by Chapter 324, Laws of Utah 2000

ENACTS:

72-5-308, Utah Code Annotated 1953

72-5-309, Utah Code Annotated 1953

72-5-310, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **72-5-301** is amended to read:

72-5-301. Definitions.

As used in this part:

(1) "Acceptance," "acceptance of a right-of-way for the construction of a highway over public lands, not reserved for public uses," or "accepted" so as to vest the R.S. 2477 dominant estate in the right-of-way in the state and any applicable political subdivision of the state, means one or more of the following acts prior to October 21, 1976:

(a) by the state or any political subdivision of the state:

(i) construction or maintenance of a highway;

(ii) inclusion of the highway in a state, county, or municipal road system;

(iii) expenditure of any public funds on the highway;

(iv) execution of a memorandum of understanding or other agreement with any other public or private entity or an agency of the federal government that recognizes the right or obligation of the state or a political subdivision of the state to construct or maintain the highway or a portion of the highway; or

(v) (A) the acceptance at statehood of the school or institutional trust lands accessed or traversed by the right-of-way; or

(B) the selection and receipt by the state of a clear list, indemnity list, or other document conveying title to the state of school, institutional trust lands, or other state lands accessed or traversed by the highway;

(b) use by the public for a period in excess of [~~10~~] ten years in accordance with Section 72-5-104; or

(c) any other act consistent with state or federal law indicating acceptance of a right-of-way.

(2) (a) "Construction" means any physical act of readying a highway for use by the public according to the available or intended mode of transportation, including, foot, horse, vehicle, pipeline, or other mode.

(b) "Construction" includes:

- (i) removing vegetation;
- (ii) moving obstructions, including rocks, boulders, and outcroppings;
- (iii) filling low spots;
- (iv) maintenance over several years;
- (v) creation of an identifiable route by use over time; and
- (vi) other similar activities.

(3) "Cut-off date" means the earlier of the date the underlying land was reserved for public use or October 21, 1976.

~~[(3)]~~ (4) (a) "Highway" means:

(i) any road, street, trail, or other access or way that is open to the public to come and go or transport water at will, without regard to how or by whom the way was constructed or maintained; and

(ii) appurtenant land and structures including road drainage ditches, back and front slopes, turnouts, rest areas, and other areas that facilitate use of the highway by the public.

(b) "Highway" includes:

(i) pedestrian trails, horse paths, livestock trails, wagon roads, jeep trails, logging roads, homestead roads, mine-to-market roads, alleys, tunnels, bridges, and all other ways and their attendant access for maintenance; and

(ii) irrigation canals, waterways, viaducts, ditches, pipelines, or other means of water transmission and their attendant access for maintenance.

(c) To be a "highway" a right-of-way need not have destinations or termini that are some kind of landmarks distinguishable from other points along the right-of-way, as long as the right-of-way accommodates travelers from one point along the right-of-way to another point as often as convenient or necessary.

~~[(4)]~~ (5) "Maintenance" means any physical act of upkeep of a highway or repair of wear or damage whether from natural or other causes, including the following:

- (a) vertical and horizontal alignment alterations to meet applicable safety standards;
- (b) widening an existing road or flattening of shoulders or side slopes to meet applicable safety standards;
- (c) grooming and grading of the previously constructed road surface;
- (d) establishing and maintaining the road crown with materials gathered along the road;
- (e) filling ruts;
- (f) spot filling with the same materials of the road, or improved materials;
- (g) leveling or smoothing washboards;
- (h) clearing the roadway of obstructing debris;
- (i) cleaning culverts, including head basins and outlets;
- (j) resurfacing with the same or improved materials;
- (k) installing, maintaining, repairing and replacing rip rap;
- (l) maintaining drainage;
- (m) maintaining and repairing washes and gullies;
- (n) installing, maintaining, repairing, and replacing culverts as necessary to protect the existing surface from erosion;
- (o) repairing washouts;
- (p) installing, maintaining, repairing and replacing marker posts;
- (q) installing, maintaining, and repairing water crossings;
- (r) installing, maintaining, and repairing and replacing cattle guards;
- (s) installing, maintaining, and repairing and replacing road signs;
- (t) installing, maintaining, and repairing and replacing road striping;
- (u) repair, stabilization and improvement of cut and fill slopes;
- (v) application of seal coats; or
- (w) snow removal.

~~[(5)]~~ (6) "Public lands not reserved for public uses" means ~~[any]~~ the surface of federal

lands open to entry and location and includes the surface of lands that are subject to subsurface coal withdrawals or mining claims.

~~[(6)]~~ (7) "R.S. 2477 right-of-way" means a right-of-way for a highway constructed in this state on public lands not reserved for public uses in accordance with Revised Statute 2477, codified as 43 U.S.C. Section 932, and accepted by the state or a political subdivision of the state prior to October 21, 1976.

Section 2. Section **72-5-302** is amended to read:

72-5-302. Rights-of-way across federal lands -- Title -- Presumption -- Scope.

(1) This part applies to all R.S. 2477 rights-of-way.

(2) The state and its political subdivisions have title to the R.S. 2477 rights-of-ways in accordance with Sections 72-3-102, 72-3-103, 72-3-104, 72-3-105, and 72-5-103.

(3) (a) Acceptance of a right-of-way for the construction of a highway over public lands, not reserved for public uses, is presumed if the state or a political subdivision of the state makes a finding that the highway was constructed and the right-of-way was accepted prior to October 21, 1976.

(b) The existence of a highway in a condition suitable for public use establishes a presumption that the highway has continued in use in its present location since the land over which it is built was public land not reserved for public use.

(4) (a) Unless specifically determined prior to the cut-off date provided in Section 72-5-301 by the state or a political subdivision of the state with authority over the R.S. 2477 right-of-way, the scope of the R.S. 2477 right-of-way is that which is reasonable and necessary ~~[to ensure safe travel]~~ for all highway uses as of the cut-off date determined according to the facts and circumstances[-], including:

(i) highway drainage facilities;

(ii) shoulders adjacent to the right-of-way; and

(iii) maintenance activities defined in Section 72-5-301 that are reasonable and necessary.

(b) Unless specifically determined by the state or political subdivision of the state with

the authority over the R.S. 2477 right-of-way, an R.S. 2477 right-of-way is presumed to be at least 66 feet wide if that is the usual width of highway rights-of-way in the area.

[~~(b)~~] (c) The scope of the R.S. 2477 right-of-way includes the right to widen the highway as necessary to accommodate the increased travel associated with those uses, up to, where applicable, improving a highway to two lanes so travelers can safely pass each other.

(5) The safety standards established by the Department of Transportation in accordance with Section 72-6-102 apply to all determinations of safety on R.S. 2477 rights-of-way used for vehicular travel.

Section 3. Section **72-5-308** is enacted to read:

72-5-308. Provisions govern determinations -- Determinations effective dates.

The provisions of this part pertaining to substantive standards for acceptance of the R.S. 2477 grant shall govern the R.S. 2477 assessments of the governor or the governor's designee and the decisions of the courts to the extent that the provisions are consistent with state law, including common law, applicable as of the cut-off date.

Section 4. Section **72-5-309** is enacted to read:

72-5-309. Acceptance of rights-of-way -- Notice of Acknowledgment required.

(1) The governor or the governor's designee may assess whether the grant of the R.S. 2477 has been accepted with regard to any right-of-way so as to vest title of the right-of-way in the state and the applicable subdivision as provided for in Section 72-5-103.

(2) If the governor or governor's designee concludes that the grant has been accepted as to any right-of-way, the governor or a designee shall issue a notice of acknowledgment of the acceptance of the R.S. 2477 grant as to that right-of-way.

(3) A notice of acknowledgment of the R.S. 2477 grant shall include:

(a) a statement of reasons for the acknowledgment;

(b) a general description of the right-of-way or rights-of-way subject to the notice of acknowledgment, including the county in which it is located, and notice of where a full legal description may be viewed or obtained;

(c) a statement that the owner of the servient estate in the land over which the

right-of-way subject to the notice runs may file an action in district court for a decision regarding the correctness or incorrectness of the acknowledgment; and

(d) a statement of the time limit provided in Section 72-5-310 for filing an appeal.

(4) (a) A notice of acknowledgment may be recorded in the office of the county recorder in the county where the right-of-way or rights-of-way exist.

(b) A notice of acknowledgment recorded in the county recorder's office is conclusive evidence of acceptance of the R.S. 2477 grant upon:

(i) expiration of the 60-day period for filing an action under Section 72-5-310 without the filing of an action; or

(ii) a final court decision that the notice of acknowledgment was not incorrect.

Section 5. Section **72-5-310** is enacted to read:

72-5-310. Notice of acknowledgment -- Court determination -- Presumption of Acceptance.

(1) The governor or his designee shall provide a copy of the notice of acknowledgement by certified mail and return receipt requested to the owner of the servient estate in land over which a notice of acknowledgment runs.

(2) (a) A person with a servient estate or dominant estate ownership claim to the right-of-way may petition for a decision of the district court as to the correctness of the acknowledgment of acceptance of the R.S. 2477 grant issued under Section 72-5-309.

(b) Venue for the court action shall be the district court for Salt Lake County.

(c) The petition shall be filed no later than 60 days after the date of the notice of acknowledgment.

(d) The state, through the governor or the governor's designee, shall be named as a respondent and served with a copy of the petition in accordance with the Utah Rules of Civil Procedure.

(e) No one other than a person with a servient estate or dominant estate claim to the right-of-way may challenge the correctness of a notice of acknowledgment.

(3) The petition for a court decision of the correctness of the notice of acknowledgment

shall be a complaint governed by the Utah Rules of Civil Procedure and shall contain:

- (a) the petitioner's name and mailing address;
- (b) a copy of the notice of acknowledgment the petitioner asserts is incorrect;
- (c) a request for relief specifying the type and extent of relief requested; and
- (d) a statement of the reasons why the petitioner is entitled to relief.

(4) Except as provided under this Part 3, all pleadings and proceedings to determine the correctness of a notice of acknowledgment in the district court are governed by the Utah Rules of Civil Procedure.

(5) The court shall make its decision without deference to the notice of acknowledgment.

(6) (a) In accordance with Section 72-5-302, a rebuttable presumption that the R.S. 2477 grant has been accepted is created when:

(i) a highway existed on public lands not reserved for public uses as of the cut-off date under Section 72-5-301; and

(ii) the highway currently exists in a condition suitable for public use.

(b) The proponent of the R.S. 2477 status of the highway bears the burden of proving acceptance of the grant by a preponderance of the evidence for all decisions that are not subject to Subsection (6)(a).

Section 6. Effective date.

If approved by two-thirds of all the members elected to each house, this act takes effect upon approval by the governor, or the day following the constitutional time limit of Utah Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto, the date of veto override.