#19.5

§ 931b. Repealed.—Aug. 10, 1956, c. 1041, § 53, 70A Stat. 641

Historical Note

Section, Act July 24, 1946, c. 566, § 7, 60 Stat. 643, authorized the Secretary of War to grant easements and rights-of-way to States, etc., and is now covered by section 2668 of Title 10, Armed Forces.

§ 931c. Permits, leases, or easements; authorization to grant; payment; limitation

The head of any department or agency of the Government of the United States having jurisdiction over public lands and national forests, except national parks and monuments, of the United States is authorized to grant permits, leases, or easements, in return for the payment of a price representing the fair market value of such permit, lease, or easement, to be fixed by such head of such department or agency through appraisal, for a period not to exceed thirty years from the date of any such permit, lease, or easement to States, counties, cities, towns, townships, municipal corporations, or other public agencies for the purpose of constructing and maintaining on such lands public buildings or other public works. In the event such lands cease to be used for the purpose for which such permit, lease, or easement was granted, the same shall thereupon terminate. Sept. 3, 1954, c. 1255, § 1, 68 Stat. 1146.

Historical Note

Legislative History: For legislative history and purpose of Act Sept. 3, 1954, see 1954 U.S.Code Cong. and Adm.News, p. 3522.

§ 931d. Same; additional authority

The authority conferred by section 931c of this title shall be in addition to, and not in derogation of any authority heretofore conferred upon the head of any department or agency of the Government of the United States to grant permits, leases, easements, or rights-of-way. Sept. 3, 1954, c. 1255, § 2, 68 Stat. 1146.

§ 932. Right-of-way for highways

The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted. R.S. § 2477.

Historical Note

Legislative History: Act July 26, 1866, c. 262, 14 Stat. 253.

Columbia River Highway. Act Mar. 4, 1907, c. 2534, 41 Stat. 1437, authorized the Secretary of War to grant to the State of Oregon, for the construction, etc., of the Columbia River Highway, a right of way over certain lands acquired and held by the United States in connection with the improvement of the Dalles-Celilo section of the Columbia River.

Note 1

Submerged Lands Act As Not Affecting Provisions. Provisions of this section as not amended, modified or repealed by the Submerged Lands Act, see section 1303 of this title.

Cross References

Provisions for transfer of rights of way by settlers, see section 174 of this title.

Notes of Decisions

Library references

Highways ⊂⊃44(1).
C.J.S. Highways § 64 et seq.

1. Grant of right-of-way

By this section the United States grants a right of way for the construction of highways over public lands not reserved for public use. Van Brocklin v. Anderson, Tenn.1886, 6 S.Ct. 672, 117 U.S. 151, 29 L.Ed. 845. See, also, U. S. v. Rindge, D.C.Cal.1913, 208 F. 611; Duffield v. Ashurst, 1909, 100 P. 820, 12 Ariz. 360; Town of Red Bluff v. Walbridge, 1911, 116 P. 77, 15 Cal.App. 770; Molyneux v. Grimes, 1908, 98 P. 278, 78 Kan. 830; Van Wanning v. Deeter, 1907, 112 N.W. 902, 78 Neb. 284; Wallowa County v. Wade, 1903, 72 P. 793, 43 Or. 253; Wells v. Pennington County, 1891, 48 N.W. 305, 2 S.D. 1; Smith v. Pennington County, 1891, 48 N.W. 300, 2 S.D. 14; Riverside Tp. v. Newton, 1896, 75 N.W. 899, 11 S.D. 120; City of Deadwood v. Whittaker, 1900, 81 N.W. 908, 12 S.D. 515; Petersen v. Baker, 1905, 81 P. 681, 39 Wash. 275; Stofferan v. Okanogan County, 1913, 136 P. 484, 76 Wash. 265.

All section lines, under the grant of Congress in this section, having been accepted by Laws Dak.Ter.1871, c. 33, became public highways from the time of the congressional grant. Hillsboro Nat. Bank v. Ackerman, 1922, 189 N.W. 657, 48 N.D. 1179.

Under this section, and the Act of the Legislative Assembly of Dakota Territory (Laws 1871, c. 33) declaring all section lines in the Territory of Dakota to be public highways as far as practicable, public highways were located and established upon all section lines within the Territory where it was practicable to construct highways. Huffman v. Board of Sup'rs of West Bay Tp. Benson County, 1921, 182 N.W. 459, 47 N.D. 217.

Sections of land granted to a railroad before this section was made applicable by Pol.Code S.D. § 1594, were not public lands on which lines highways could thereby be opened. Sample v. Harter, 1916, 156 N.W. 1016, 37 S.D. 150.

This section is operable in Alaska and constitutes congressional grant of right of way for public highways across public lands. Hamerly v. Denton, Alaska 1961, 359 P.2d 121.

If way for highway was granted public by this section, and road was laid out before Nov., 1872, when government survey was made dividing tract into sections, this section applied to give public right of way, despite Colo. Organic Act, providing a temporary government for Territory of Colorado, approved Feb. 28, 1861, section 14 reserving sections 16 and 36 in each township for support of schools, though one of sections involved was section 16. Greiner v. Board of Com'rs of Park County, 1918, 173 P. 719, 64 Colo. 584.

2. Nature of grant

This section, granting rights-of-way for construction of highways over public lands, not reserved for public use, was a grant in praesenti which became effective upon construction of road across public lands to valid mining claim, and title to right-of-way vested in mining claim owners. U. S. v. 9,947.71 Acres of Land, More or Less, in Clark County, State of Nev., D.C.Nev.1963, 220 F.Supp. 328.

Where owners of valid mining claim built access road over public domain in accordance with local custom, title to right-of-way vested in mining claim owners and subsequent toll road and eminent domain proceedings did not diminish rights of owners to right-of-way so far as United States was concerned. Id.

This section was intended to grant merely an easement and railroad could not acquire title to property thereunder. Oregon Short Line R. Co. v. Murray City, 1954, 277 P.2d 798, 2 Utah 2d 427.

This section does not operate to grant rights of way and establish highways contrary to the local laws. Tucson Consol. Copper Co. v. Reese, 1909, 100 P. 777, 12 Ariz. 226.

The grant remains in abeyance until a highway is established and takes effect from that time. McAllister v. Okanogan County, 1909, 100 P. 146, 51 Wash. 647, 24 L.R.A.,N.S., 764. See, also, Stofferan v. Okanogan County, 1913, 136 P. 484, 76 Wash. 265.

This section was a grant in præsenti, and when accepted by the public it took effect as of the date of the grant. Tholl v. Koles, 1902, 70 P. 881, 65 Kan. 802. See, also, Butte v. Mikosowitz, 1909, 102 P. 503, 39 Mont. 350; Walcott Tp. of Richland County v. Skauge, 1897, 71 N.W. 544, 5 N.D. 282; Rolling v. Emrich, 1904, 99 N.W. 464, 122 Wis. 134; Walbridge v. Russell County, 1906, 86 P. 473, 74 Kan. 141; Molyneux v. Grimes, 1908, 98 P. 278, 78 Kan. 830; Wallowa County v. Wade, 1903, 72 P. 793, 43 Or. 253; Montgomery v. Somers, 1907, 90 P. 674, 50 Or. 259; Okanogan County v. Cheetham, 1905, 80 P. 262, 37 Wash. 682, 70 L.R.A. 1027.

3. Effect of grant

Where right of way existed over public land by public use, obtaining patent took land subject to public easements. Sullivan v. Condas, 1930, 290 P. 954, 76 Utah 585.

The grant severs the land from the public domain and after an entry and appropriation under the provisions of this section and the proper designation of the right of way granted thereby, the way so appropriated ceases to be a portion of the public domain. Estes Park Toll Road Co. v. Edwards, 1893, 32 P. 549, 3 Colo.App. 74.

4. Acceptance of grant

The effect of Laws Dak.1870–1871, c. 33 declaring all section lines to be public highways as far as practicable was to accept dedication by this section of right of way for highways over public lands and to make every section line a public highway subject to the qualifications therein contained. Pederson v. Canton Tp., 1948, 34 N.W.2d 172, 72 S.D. 332.

Laws 1870–71, c. 33, accepting right of way for highways on public lands granted by this section, related back to date of grant, and was not revoked by subsequent use of part of land as Indian reservation, nor by Laws N.D.1897, c. 112, §§ 3, 22, and Laws 1879, c. 97, § 3. Faxon v. Lallie Civil Tp., 1917, 163 N.W. 531, 36 N.D. 634, error dismissed 39 S.Ct. 491, 250 U.S. 634, 63 L.Ed. 1182.

To constitute acceptance of congressional grant of right of way for highways across public lands, there must be either user sufficient to establish highway under laws of state or some positive act of proper authorities manifesting intent to accept. Koloen v. Pilot Mound Tp., 1916, 157 N.W. 672, 33 N.D. 529, L.R.A.1917A, 350.

This section is a standing offer of a free right of way over the public domain, and as soon as the offer is accepted in an appropriate manner by the agents of the public or by the public itself, a highway is established. Thus, evidence of user, general and long continued, and proof that the county authorities had assumed control over the road and had worked and improved a portion of it, is competent evidence as tending to show an acceptance of the offer of this section. Streter v. Stalnaker, 1901, 85 N.W. 47, 61 Neb. 205. See, also, Rolling v. Emrich, 1904, 99 N.W. 464, 122 Wis. 134.

This section is an offer to dedicate any unreserved public lands for the construction of highways which offer must be accepted to become effective. Lovelace v. Hightower, 1946, 168 P.2d 864, 50 N.M. 50.

Period in which offer of Federal Government to dedicate government land for highway purposes could be accepted by public use of a road ended when patent covering land in question was issued. Ball v. Stephens, 1945, 158 P.2d 207, 68 Cal.App.2d 843.

Note 4

This section pertaining to highways was an offer of rights of way in general and operated as a grant of specific rights of way upon selection of routes and establishment of roads over public lands, acceptance of which offer could be manifested and dedication could be effected by selection of a route and its establishment as a highway by public authority, or by the laying out of a road and its use by public sufficient in law to constitute an acceptance by public of an offer of dedication. Id.

Generally, in order to constitute an "acceptance" of the congressional grant of right of way for public highway across public lands, there must be either use by the public for such a period of time and under such conditions as to establish a highway under state law, or there must be some positive act or acts on part of the proper public authorities clearly manifesting an intention to accept the grant with respect to the particular highway. Kirk v. Schultz, 1941, 119 P.2d 266, 63 Idaho 278.

This section is express dedication of rights of way, acceptance of which by public results from use of roads by those for whom necessary or convenient, without any work thereon or action by public authorities being required, and such use by only one person is sufficient. Leach v. Manhart, 1938, 77 P.2d 662, 102 Colo. 129.

Terms of grant of right of way by Federal Government for construction of highways over public lands could not be enlarged by Legislature, but acceptance by state must be unequivocal and in praesenti. Frank A. Hubbell Co. v. Gutierres, 1933, 22 P.2d 225, 37 N.M. 309.

Grant of right of way for highway does not become operative until accepted by construction of highway. Warren v. Chouteau County, 1928, 265 P. 676, 82 Mont. 115.

This section merely grants a right of way for highways, and does not become operative until accepted by the public by constructing a public highway according to the provisions of the laws of the particular state in which the lands are located. Moulton v. Irish, 1923, 218 P. 1053, 67 Mont. 504.

Under this section a highway grant may be accepted by the public without action by the public authorities and continued use of the road under circumstances clearly indicating an intention to accept is sufficient. Hatch Bros. Co. v. Black, 1917, 165 P. 518, 25 Wyo. 109, rehearing denied 171 P. 267, 25 Wyo. 416.

For county commissioners to accept on state's behalf grant of right of way over public domain expressed in this section, it must conform to Rev.Codes Idaho, § 916 et seq., and its order of record declaring certain section lines to be public highways, was not substantial compliance with law. Gooding Highway Dist. of Gooding County v. Idaho Irr. Co., 1917, 164 P. 99, 30 Idaho 232.

Where, in ejectment by a city to recover possession of land for a street, the evidence was sufficient to establish a highway by prescription if the land over which it passed had been subject to private ownership, it is sufficient to show an acceptance of the dedication of the right to use public land over which the street passed for street purposes, made by this section, and such an acceptance relates back to the date of the dedication. Butte v. Mikosowitz, 1909, 102 P. 593, 39 Mont. 350.

A resolution of the board of supervisors accepting a right of way for the construction of highways over public lands as far as the grant related to a certain road described, which resolution was recorded in the office of the county recorder, does not make the road described a public highway, where it did not appear that the resolution was made on petition of taxpayers, nor that the road as laid off was recorded. Tucson Consol. Copper Co. v. Reese, 1909, 100 P. 777, 12 Ariz. 226.

An order of a board of county commissioners, otherwise regular, undertaking to establish a highway across public land of the United States, operates as an effectual acceptance of the congressional grant of a right of way for the construction of a highway, and one deriving title to such land through a settlement subsequently made takes it subject to the easement so created. Molyneux v. Grimes, 1908, 98 P. 278, 78 Kan. 830.

This section is an express dedication of a right of way, and an acceptance of the grant while the land is a part of the public domain may be effected by public user alone, without an action of the public highway authorities, and, when an acceptance thereof has once been made, the highway is legally established, and is thereafter a public easement upon the land, and subsequent entrymen and claimants take subject to such easement. Montgomery v. Somers, 1907, 90 P. 674, 50 Or. 259.

This section becomes effective in a particular county as of the date of the grant, upon the passage of a local law declaring all section lines in that county public

roads; such legislation being, in effect, an acceptance of the grant. Walbridge v. Russell County, 1906, 86 P. 473, 74 Kan. 341.

5. Establishment under state law

Under this section authorizing establishment of highways over public lands not reserved for public uses while they remained in ownership of government, it is necessary, in order that a road become a public highway, that it be established in accordance with law of state in which it is located. Ball v. Stephens, 1945, 158 P.2d 207, 68 Cal.App. 2d 843.

Prior to July 1, 1895, a public highway could have been established either by public authorities, or by public use, for the period of limitation as to land, of the exact route claimed confined to the statutory width, or by dedication, or on partition, and on that date it was declared by Rev.Codes, § 1340, then first adopted, that no route used over lands of another should become a public highway except as provided by the statute, and so whether a road over public land claimed to have been offered by this section, and accepted by Rev.Codes, Mont. § 1337, was established in any manner before or since July 1, 1895, it must have been under some legal authority. State ex rel. Dansie v. Nolan, 1920, 191 P. 150, 58 Mont. 167.

6. Abandonment

Where a public highway existed across land at time patent covering land was issued, in action to declare existence of such highway, the extent of public use of highway after patent was issued, or whether it was used at all, is immaterial so long as highway was not legally abandoned. Ball v. Stephens, 1945, 158 P.2d 207, 68 Cal.App.2d 843

7. Dedication

Road running to a quicksilver mine over federal public lands and which was not laid out by the public became a highway, if at all, by dedication. Ball v. Stephens, 1945, 158 P.2d 207, 68 Cal.App. 2d 843.

Public use is sufficient to constitute dedication of highway over public land. Wilson v. Williams, 1939, 87 P.2d 683, 43 N.M. 173.

This section was express "dedication," and use of way was "acceptance." Nicolas v. Grassle, 1928, 267 P. 196, 83 Colo.

Grant of highway right of way over public lands by this section is a "dedication," effective on acceptance by construction of highway or establishment thereof by public user. Bishop v. Hawley, 1925, 238 P. 284, 33 Wyo. 271.

This section grants only a right of way for construction of a highway across lands, and does not extend to the entire tract and cannot constitute "dedication by the owner" as contemplated by Rev. Codes, § 1340, and the grant is but an offer of a way for the construction of a highway on some particular strip of public land and can only become fixed when a highway is definitely established in one of the ways authorized by the laws of the state where the land is located. State v. Nolan, 1920, 191 P. 150, 58 Mont. 167.

A dedication of public land for highways, under this section, is a grant to the public as a continuing body, so that, so long as the roadway remains a rural one, it is under the supervision of the county as trustee for the public; and as soon as the territory comes within the limits of an incorporated city, is passed to the city as trustee for the same public. Butte v. Mikosowitz, 1909, 102 P. 593, 39 Mont. 350.

8. Prescription

This section is an unequivocal grant of the right of way for highways over public lands, without any limitation as to the manner of their establishment, and therefore authorizes the establishment of highways over public lands by prescription whenever prescription is recognized as a mode for the establishment of highways in the state wherein the public lands are situated. Smith v. Mitchell, 1899, 58 P. 667, 21 Wash. 536, 75 Am.St.Rep. 858.

9. User

A settler on public lands on which there is a road in common use as a highway takes subject to the public easement of such way as a road, though it was never established by the public authorities under the general road laws. Van Wanning v. Deeter, 1907, 110 N.W. 703, 78 Neb. 282, affirmed 112 N.W. 902, 78 Neb. 284.

The desultory use for a few months by private persons of a logging road over public lands with no action by the public is not sufficient to make the road a highway under this section. Rolling v. Emrich, 1904, 99 N.W. 464, 122 Wis. 134.

Note 9

Desultory use of dead-end road or trail running into wild, unenclosed, and uncultivated country, does not create a public highway. Hamerly v. Denton, Alaska 1961, 359 P.2d 121.

Before a highway may be created, there must be either positive act on part of appropriate public authorities of state clearly manifesting intention to accept grant, or there must be public user for such period of time and under such conditions as to prove grant has been accepted. Id.

Evidence of public use of road during periods that land was not subject of homesteaders' claims was insufficient to justify finding that public highway was created across homestead. Id.

If highway can be established over public lands by public user alone without some action by the public authorities, continuous use of the road by general public for such time and under such circumstances as to clearly prove acceptance of offer of Federal Government to dedicate right of way for highways over unreserved public lands will suffice to establish a highway regardless of length of time of such user. Lovelace v. Hightower, 1946, 168 P.2d 864, 50 N.M. 50.

Public use for ten years was not necessary to effect acceptance of offer contained in this section to dedicate right of way for highways over unreserved public lands. Id.

Under this section and decision to establish a highway upon public domain, no particular time is necessary for use, nor is an acceptance of use or dedication by public authority generally a necessary requisite. Wilson v. Williams, 1939, 87 P.2d 683, 43 N.M. 173.

Under this section the construction of a highway or establishment thereof by public user is sufficient. Id.

The public and landowner, having access to public highways only by roads through lands of another, who attempted to close roads over 60 years after entry on portion of such lands by one who traveled roads, as did public generally, thereafter, were entitled to continue using them with gates eliminated. Leach v. Manhart, 1938, 77 P.2d 652, 102 Colo. 129.

Use of road as public thoroughfare for 18 years was sufficient acceptance of congressional grant constituting road a public highway by dedication. Lindsay Land & Live Stock Co. v. Churnos, 1930, 285 P. 646, 75 Utah 384.

An offer by this section of a way by user over public land accepted under state law, must be shown to have been continued over the exact route claimed for the statutory period prior to enactment of the law accepting the same. State ex rel. Dansie v. Nolan, 1920, 191 P. 150, 58 Mont. 167.

A roadway used by the public over public land does not become a public highway from mere user for 20 years, or by prescription. Cross v. State, 1906, 41 So. 875, 147 Ala. 125.

10. Subsequent legislation

Highways established on section lines under this section, and under Act of the Legislative Assembly of Dakota Territory (Laws 1871, c. 33) declaring all section lines to be highways as far as practicable, were not vacated nor the rights of the public surrendered therein by subsequent legislation. Huffman v. Board of Sup'rs of West Bay Tp., Benson County, 1921, 182 N.W. 459, 47 N.D. 217.

11. Subsequent conveyances

Persons filing on public lands take the same subject to the right of way along section lines for highway purposes. Wells v. Pennington Co., 1891, 48 N.W. 305, 2 S.D. 1, 39 Am.St.Rep. 758. See, also, Keen v. Fairview Tp., 1896, 67 N.W. 623, 8 S.D. 558.

Under this section a patent is not necessary, the offer and its acceptance by the construction of the road are equivalent to a grant that is good as against the government, and also as against a subsequent patentee, unless the latter's patent antedates the grant by relation, or unless his equities preclude the acquisition of adverse rights. Flint & P. M. Ry. Co. v. Gordon, 1879, 2 N.W. 648, 41 Mich. 420.

The rights acquired by public by its acceptance of offer contained in this section to dedicate right of way for highways over unreserved public lands will not be affected by passing into private ownership of land over which a public highway has been thus established. Lovelace v. Hightower, 1946, 168 P.2d 864, 50 N.M. 50.

The status of the highway is not changed by the subsequent establishment of a forest reserve. Duffield v. Ashurst, 1909, 100 P. 820, 12 Ariz. 360, appeal dismissed 32 S.Ct. 838, 225 U.S. 697, 56 L.Ed. 1262.

Where no legal entry on Federal public lands was filed of record by plain-

tiff's predecessor at time city appropriated right of way over land for building of streets, that Federal Government subsequently permitted predecessor to apply for and receive title on account of having entered into possession and made improvements thereon did not authorize plaintiff to recover value of land appropriated by city, since at time of appropriation plaintiff's predecessor was nothing more than a squatter and his subsequently acquired title was subject to city's claim. City of Miami v. Sirocco Co., 1939, 188 So. 344, 137 Fla. 434.

A grant of right of way under this section is valid as against a subsequent conveyance by the Government of the land by metes and bounds to a private person. Verdier v. Port Royal R. Co., 1881, 15 S.C. 476. See, also, Sams v. Port Royal & A. Ry. Co., 1881, 15 S.C. 484.

12. Charges

The Commissioner of Public Lands of New Mexico could charge the State Highway Commission of New Mexico for rights of way or easements for state highways across lands which had been granted and confirmed to the State of New Mexico in trust for various state institutions and agencies by the Enabling Act when New Mexico was admitted to statehood, and for sand and gravel removed from such lands for use in constructing public highways across the lands. State ex rel. State Highway Commission v. Walker, 1956, 301 P.2d 317, 61 N.M. 374.

13. Condemnation

United States by taking absolute possession of road across public domain to mining claims indicated that road was not a "public highway" and was not excluded from taking by its complaint excluding public road easements from taking. U. S. v. 9,947.71 Acres of Land, More or Less, in Clark County, State of Nev., D.C.Nev.1963, 220 F.Supp. 328.

To determine if road built to mining claims over public domain constituted a "public highway" within meaning of United States' condemnation complaint excluding from taking existing easements for public roads and highways, court would look to common sense of transaction and to acts of parties and public authorities in connection with matter. Id.

Where condemnation proceedings had been filed over 11 years previously and it appeared that an early trial could be had on merits, court would decline to certify for appeal its decision that road to mining claims had been taken and that it constituted a compensable property interest. Id.

14. Homestead entrymen

A settler who had entered public land under the Homestead Law, though no patent had been issued, had an inchoate title to the land, which is property; this is a vested right, which could only be defeated by the settler's failure to comply with the conditions of the law; if he complied with these conditions, he became invested with full ownership and the absolute right to a patent; the patent, when issued, related back to the date of his settlement; and as against such a homesteader a railroad company had not, under this section, a right of way over the land homesteaded unless such right was acquired before the homesteader's settlement. Red River, etc., R. Co. v. Sture, 1884, 20 N.W. 229, 32 Minn. 95.

A homesteader is entitled to compensation for improvements made on land over which a railroad company after the homestead entry, but before patent, obtained a right of way under this section. Flint & P. M. Ry. Co. v. Gordon, 1879, 2 N.W. 648, 41 Mich. 420.

Under this section a railroad company, by constructing its line over public lands after they had been entered as a homestead, but before the homestead title had been perfected, acquires title to the right of way. Id.

A right of way perfected by a railway company under this section cannot be defeated by mere relation back from a homesteader's subsequent patent to the time of his antecedent entry on the land. Id.

Portion of land covered by valid entry under Homestead Laws is segregated from public domain until such time as entry may be cancelled by Government or relinquished and is not included in congressional highway right of way grants. Hamerly v. Denton, Alaska 1961, 359 P.2d 121.

Where a highway validly exists over land covered by land patent at time patent is issued, patentee takes title subject to right of way for highway. Ball v. Stephens, 1945, 158 P.2d 207, 68 Cal. App.2d 843.

Where road across public land became a public highway by dedication prior to defendant's acquisition of title to land by patent, defendant's title was subject to highway right of way as it existed when patent was issued and no act of

defendant could divest right which public had acquired. Id.

Where public lands, over which right of way for highway was granted by this section, were entered as homesteads before board of county commissioners declared section line public highway, subsequent relinquishment of such entries does not make board's declaration effective. Leach v. Manhart, 1938, 77 P. 2d 652, 102 Colo. 129.

That there were two roads did not forbid conclusion that one in use when homestead entrymen entered was granted under this section and accepted. Nicolas v. Grassle, 1928, 267 P. 196, 83 Colo. 536.

Homestead entrymen took title to land subject to right of way dedicated by this section and accepted by users. Id.

Under this section and Rev.St.Colo. 1908, § 5834, highway cannot be declared established over section or township lines on public domain where it interferes with rights of entryman thereon. Korf v. Itten, 1917, 169 P. 148, 64 Colo. 8.

Under this section and Rev.St.Colo. 1908, § 5834, declaration of highway over public domain does not establish same as to lands on which there has been homestead or pre-emption entry though entries have been subsequently abandoned. Id.

"When a valid entry has been made by a citizen, that portion of the public land covered by the entry is segregated from the public domain, and is appropriated to the private use of the entryman, and is not subject to further entry, and is not included in subsequent grants made by Congress." Atchison, etc., R. Co. v. Richter, 1815, 148 P. 478, 30 N.M. 278, L.R.A.1916F, 969.

15. Local authorities

Road constructed over public domain to provide access to valid mining claims was not a public highway where public authority, whose duty it was to construct, maintain and repair public roads, did not consider it public road and filed a disclaimer in state court proceedings. U. S. v. 9,947.71 Acres of Land, More or Less, in Clark County, State of Nev., D.C.Nev. 1963, 220 F.Supp. 328.

Town supervisors were within rights in removing trees within right of way of public highway dedicated by this section. Gustafson v. Gem Tp., 1931, 235 N.W. 712, 58 S.D. 308.

16. Obstruction of highway

One legitimately using a highway established under this section may recover damages for the obstruction. Cottman v. Lochner, 1929, 278 P. 71, 40 Wyo. 378.

17. Parks

Under sections 191 to 194 of Title 16 Superintendent of Rocky Mountain National Park has neither control of highways within Park constructed by state and counties under this section, nor right to regulate motor vehicle traffic thereof to exclusion of state. State of Colorado v. Toll, Colo.1925, 45 S.Ct. 505, 268 U.S. 228, 69 L.Ed. 927.

18. Railroad right-of-way

See, also, Notes of Decisions under section 934 of this title.

Congressional grant of right of way to railroad was subject to easement in county's favor to maintain highway previously laid out within boundaries of grant. Central Pacific Ry. Co. v. Alameda County, 1932, 52 S.Ct. 225, 284 U.S. 463, 76 L. Ed. 402.

Railways, though not strictly "highways" like plank and macadamized roads, are highways within this section. Flint & P. M. Ry. Co. v. Gordon, 1879, 2 N. W. 650, 41 Mich. 420. See, also, Oregon Short Line R. Co. v. Murray City, 1954, 277 P.2d 798, 2 Utah 2d 427.

In order for a railroad to acquire the benefit tendered by this section, nothing more is necessary than the construction of its road; no patent is required; the offer and acceptance, taken together, are equivalent to a grant. Estes Park Toll Road Co. v. Edwards, 1893, 32 P. 549, 3 Colo.App. 74.

A railroad is a "highway," within the meaning of this section. Tennessee & C. R. Co. v. Taylor, 1893, 14 So. 379, 102 Ala. 224. See, also, Burlington, K. & S. W. R. Co. v. Johnson, 1887, 16 P. 125, 38 Kan. 142.

19. —— Effect on railroad lands

This section granting a right of way for the construction of highways over public lands not reserved for public use, attached to and created a superior title therein to the grant of such lands to the Northern Pacific Railroad Company under Act July 2, 1864, c. 217, 13 Stat. 365, because the certified plat of definite location of said road containing the tract afterwards deeded to plaintiff was not filed with the Commissioner of the General Land Office until May 20, 1873, and did not apply to any interest in said lands previously granted to the public by the United States Government. Wenberg v. Gibbs Tp., 1915, 153 N.W. 440, 31 N.D. 46.

20. Reservation of right-of-way

In the absence of a reservation in a grant of public land, there is no implied reservation of a right of way over the land granted to afford access by the public to other land belonging to the government. U. S. v. Rindge, D.C.Cal.1913, 208 F. 611.

21. - Indians, reservation for

A reservation of public lands for Indians is a reservation for public use within this section. Stofferan v. Okanogan County, 1913, 136 P. 484, 76 Wash. 265.

22. Taxation of right-of-way

When a part of the public domain is severed therefrom by virtue of an appropriation as a right of way by a toll-road company under the provisions of this section, it is subject to taxation by the county in which it is situated. Estes Park Toll Road Co. v. Edwards, 1893, 32 P. 549, 3 Colo.App. 74.

23. Width of highway

Under this section, granting right of way for construction of highways over public lands, and Dakota Territory Laws 1870-1871, declaring all section lines public highways, and providing that such highways shall be 66 feet wide and taken equally from each side of section line, an area two rods wide on each side of section line running through land subsequently acquired by individuals under patent from United States was burdened with public easement for highway purposes. Costain v. Turner County, S.D. 1949, 36 N.W.2d 382.

Highway established by public user under grant of undefined easement over public lands by this section, must be only of reasonable width necessary for use of public generally by way of well-defined line of travel. Bishop v. Hawley, 1925, 238 P. 284, 33 Wyo. 271.

To support judgment fixing width of highway established by public user over unfenced public lands under grant by this section, finding that highway "was and is of no greater width than 100 feet" was a conclusion of fact or finding on mixed question of law and fact sufficient to support decision as to width in absence of finding requiring different conclusion, though consideration of questions of law was necessary to reach finding. Id.

The word "highways," as used in this section, should be construed in accordance with recognized local laws, customs, and usages, so that a highway dedicated thereby is not limited to the beaten path or track, but is sixty feet wide, when so provided for the establishment of ordinary highways by the local law. Butte v. Mikosowitz, 1909, 102 P. 593, 39 Mont. 350.

24. Pleadings

Allegation in defense to action for injunction against obstruction of road across defendant's stock-raising homestead that stock driveway was established by Secretary of Interior in lieu of all routes or trails previously used was not conclusion of law, but allegation of ultimate fact, which defendant was entitled to prove. Rozman v. Allen, 1937, 68 P.2d 440, 100 Colo. 503.

Allegations of answer in action to enjoin obstruction of road across defendant's stock-raising homestead that Secretary of Interior withdrew certain lands from entry to establish stock driveway under section 300 of this title on petition of cattle growers association of which plaintiff was member, and that driveway established by him was in lieu of all routes or trails previously used in vicinity of defendant's lands, stated good defense. Id.

25. Judicial notice

Court took judicial notice that it was common custom throughout mining regions in Nevada to build roads over most easily traversed public domain for mining purposes. U. S. v. 9,947.71 Acres of Land, More or Less, in Clark County, State of Nev., D.C.Nev.1963, 220 F.Supp. 328.

An act of the state legislature declaring that all roads within a certain county which had been used as highways for two years or more before the passage of the act, should be considered highways, operated as an acceptance of the grant of this section and established the status of such highways over the public land, so that when it passed into private ownership it was taken subject to the easement of the highways; but it was necessary to prove that the particular land in controversy was a part of the public domain until the passage of the state statute, as court could not take judicial notice of such fact. Schwerdtle v. Placer County, 1895, 41 P. 448, 108 Cal. 589.

26. Burden of proof

Board of county commissioners in relying upon adverse use of defendants' lands for road purposes had burden of proving such usage by clear and convincing testimony. Board of County Com'rs of Ouray County v. Masden, Colo. 1963, 385 P.2d 601.

Note 26

Party claiming that road became public highway under this section granting highway right of ways over public lands by virtue of public use had burden of proving that highway was located over public lands and that character of use was such as to constitute acceptance by public of the grant under this section. Hamerly v. Denton, Alaska 1961, 359 P.2d 121.

In action for damages by abatement of, and injunction against, obstruction of highway established over public lands pursuant to grant of right of way by this section, burden was on plaintiff to prove legal establishment of highway along definite line of travel for width claimed by him, by evidence sufficient to enable court to determine width reasonably necessary to carry out purpose of grant. Bishop v. Hawley, 1925, 238 P. 284, 34 Wyo. 271.

27. Evidence—Admissibility

The time of user as well as amount and character thereof and other evidence tending to prove or disprove acceptance is competent evidence on question of acceptance by public of Federal Government's offer to dedicate right of way for highways over public lands. Lovelace v. Hightower, 1946, 168 P.2d 804, 50 N.M. 50.

In action to declare the existence of a public highway over lands which defendant acquired from government by patent in 1928, testimony of witnesses of development of route over such lands from a trail to a road suitable for automobiles and trucks over a period of years, its use since 1928, maps made both before and after 1928 and aerial photographs taken in 1939 which showed gradual extension of roads including one in question, farther back into mountain country were competent to prove that route followed by road was route used by public before defendant received his patent. Ball v. Stephens, 1945, 158 P.2d 207, 68 Cal.App.2d 843.

In action to declare the existence of a public highway across defendant's land and running to a quicksilver mine, evidence of user of mine road while land over which it ran was still public land was properly received for purpose of determining whether there had been sufficient use to prove acceptance by public of government's offer of dedication. Id.

In action to restrain park commissioners from occupying land for road purposes, county's evidence to support its claim, not specifically pleaded, of right to road under this section, was admissible, not constituting variance. Greiner v. Board of Com'rs of Park County, 1918, 173 P. 719, 64 Colo. 584.

28. —— Sufficiency

Evidence showed that no agreement for abandonment of easement in land for section line highway proposed to be opened by county was ever authorized, made, or ratified by or on behalf of county, so that it had right to build highway without compensation to owners of land. Costain v. Turner County, S.D.1949, 36 N.W.2d 382.

Evidence was insufficient to sustain contention of board of county commissioners that road over land of defendants, who were obstructing road at various points, was a public highway. Board of County Com'rs of Ouray County v. Masden, Colo.1963, 385 P.2d 601.

Evidence was insufficient to show that trail through grazing land constituted public highway under this section providing that right of way for construction of public highways over public lands was granted. Cassity v. Castagno, 1959, 347 P.2d 834, 10 Utah 2d 16.

Abandonment of section line highway right of way by county is not established solely by evidence that highway was never opened, improved or travelled. Id.

Evidence that road over public land came into existence by its use as a road by hunters, vacationists, miners and oil operators before defendant secured a patent to land over which road ran established a public use of a substantial amount considering the locality and was sufficient to prove public acceptance of Government's offer of a right of way and to constitute road a highway by dedication under state laws. Ball v. Stephens, 1945, 158 P.2d 207, 68 Cal.App.2d 843.

In action to establish a public highway, evidence sustained judgment for defendant on ground that there were no positive acts on part of public authority clearly manifesting an intention to accept trail as a public highway as required by this section, and that use of the trail by the public was merely casual and was insufficient to establish the highway. Kirk v. Schultz, 1941, 119 P.2d 266, 63 Idaho 278.

The trial court's finding, in suit to enjoin defendant from using two roads through plaintiffs' lands, that such roads were not established while lands were part of public domain, was erroneous, where all testimony indicated that roads existed before entry on any of such lands except portion not traversed by either road; mode of entry on such por-

tion being unimportant. Leach v. Manhart, 1938, 77 P.2d 652, 102 Colo. 129.

29. Limitations

Acceptance of offer contained in this section to dedicate right of way for highways over unreserved public lands by public authorities or by user is sufficient to establish a highway and ten-year statute of limitations, 1941 Comp. § 58-101, as applied to ways, established by prescription is not applicable to fix the time of such user necessary to constitute acceptance. Lovelace v. Hightower, 1946, 168 P.2d 864, 50 N.M. 50.

§ 933. Repealed. Aug. 10, 1956, c. 1041, § 53, 70A Stat. 641

Historical Note

Section, Act July 5, 1884, c. 214, § 6, 23 Stat. 104 authorized the Secretary of War to permit extension of roads across military reservations, landing of ferries, erection of bridges, and driving of livestock, and is now covered by sections 4777 and 9777 of Title 10, Armed Forces.

§ 934. Right-of-way through public lands granted to railroads

The right of way through the public lands of the United States is granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road. Mar. 3, 1875, c. 152, § 1, 18 Stat. 482.

Historical Note

Short Title. Sections 934–939 of this title are popularly known as the "General Railroad Right of Way Act."

Oklahoma. Rights of way for railway, telegraph, and telephone lines in Indian Territory, reservations, etc., in Oklahoma, were granted to railway companies by Act Feb. 28, 1902, c. 134, §§ 13 to 23, 32, 32 Stat. 47 to .

Cross References

Alaska Right of Way Act, see sections 411–419 of Title 48, Territories and Insular Possessions.

Arkansas oil or gas pipe line rights of way, see sections 966–970 of this title.

Electrical poles and lines over public lands, national parks, forests, and reservations of United States, grants of rights of way for, see section 961 of this title and sections 5, 420 and 523 of Title 16, Conservation.

Indian reservations and other Indian lands, grants of rights of way for pipe lines for conveyance of oil and gas, see section 321 of Title 25, Indians.

Indian reservations, lands, or allotments, rights of way to railroads and telegraph and telephone lines, see sections 312–318 of Title 25.

Lands excepted, see section 938 of this title.