

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL  
Anchorage Branch

360 "K" STREET, SUITE 105  
ANCHORAGE 99501

*King Cove*  
*11/19/67*  
WALTER J. HICKEL, GOVERNOR

September 26, 1967

Department of Aviation  
4510 International Airport Road  
Anchorage, Alaska 99504

ATTENTION: Miss Margery McCormick

Re: Right of State to acquire right  
of way across public lands not  
~~reserved~~ reserved for public uses, pursuant  
to R.S. §2477, USCA Title 43 §932

Gentlemen:

The initial consideration as to acquisition by the State of a right of way across public lands involves a determination of the type of right of way necessary and proper under all the circumstances.

Our research has led us to the conclusion that a right of way pursuant to R.S. 2477, rather than a fee simple, is all that is necessary in order to secure to the Department of Aviation, and the public generally, a right to egress and ingress to King Cove air facilities. The State of Alaska, by accepting the offer of the Federal government, precludes a subsequent homesteader or patentee from interfering with the use of the right of way to the public for as long as the right of way is not abandoned by the State.

Before commencing with the construction of the highway, you should make sure that the proposed right of way will cross public lands not reserved for public uses. If you find that there are no patents or homesteads presently existing and the land is not set aside for some public use, then there should be no problem, and the recommendations set forth herein may be followed with confidence.

Section 932 of Title 43 is a standing offer by the Federal Government of a free right of way over 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. Streter v. Stalnaker, 85 N.W. 47 (Neb., 1901).

To constitute acceptance of congressional grant of right of way for the highways across public lands, there must be either user sufficient to establish highways under the laws

-- continued

  
NORTH TO THE FUTURE IN 1967!

of the state, or some positive act of proper authorities manifesting intent to accept. Koloen v. Pilot Mound Tp., 157 N.W. 672 (N.D., 1916).

Where a highway validly exists over land covered by a land patent at time patent is issued, the patentee takes title subject to the right of way for highways. Ball v. Stephens, 158 P.2d 207 (Cal. 1945). See also Nicholas v. Grassle, 267 P. 196 (Colo., 1928), which holds that homestead entrymen take with the same reservation as the patentee.

The foregoing digest of the case law sets out the existing interpretation of Title 43, Section 932, USCA. It is clear that there are two methods by which a right of way can be established: either by use, or by some positive act. Since user is not involved, the only question is what will constitute "a positive act" within the meaning of the statute.

In Schwerdtle v. Placer County, 41 P. 448 (Cal., 1895), a declaration by the legislature of the state was held a sufficient act to constitute acceptance of the grant under the section. However, the Court found in Kirk v. Schultz, 119 P.2d 266, (Ida. 1941) that the "public authority" failed to do some positive act manifesting an intention to accept a trail as a public highway. Use was merely casual and insufficient to establish the highway.

Clearly, then, a mere declaration of the intention to accept can be sufficient in some cases, providing the declaration is followed by construction. However, casual use without more appears to be an insufficient manifestation of interest.

The solution, therefore, which presents itself is rather simple. That is the accepting authority should make an open declaration of the intent to accept, followed by construction of the road.

The following steps should constitute acceptance of the offer, pursuant to Section 932:

- (1) Stake out the roadways; and
- (2) Post notices of the acceptance at the beginning of the right of way and at various intervals in open and obvious places along the route of the right of way. The notice may be worded substantially as follows:

#### NOTICE OF ACCEPTANCE

The construction, use and maintenance of this right of way constitutes acceptance of the congressional grant of right of way across public lands, pursuant to Title 43, USC R.S. 2477; USCA 43, §932.

By the Authority of the  
STATE OF ALASKA  
Department of Aviation

Department of Aviation  
Anchorage, Alaska

September 26, 1967  
Page three

It must be noted that a subsequent patentee or homesteader may attempt to obstruct the right of way created by the State. The State's remedy in that case would be to enjoin such acts. There is nothing which may be done to prevent the attempt, however.

Immediate attention will be given any questions you may have concerning this, or any other matter. Feel free to contact me if explanation is needed on any point, or if supplemental research seems necessary.

Sincerely yours,

EDGAR PAUL BOYKO  
ATTORNEY GENERAL

By: *Dorothy Awes Haaland*  
Dorothy Awes Haaland  
Assistant Attorney General

DAH:kz

