MEMORANDUM State of Alaska

TO: Honorable H. D. Scougal
Commissioner

Attention: Jack Bodine
Right-of-Way Director
Department Of Highways

FROM: Richard Svobodny
Assistant Attorney General
Department of Law
Highway Section

DATE: November 29, 1976

FILE NO:

TELEPHONE NO:

SUBJECT: Ombusman Complaint
76-0842

I am in receipt of a carbon copy of the Ombudsman's letter to Commissioner Scougal dated November 19, 1976, and I am in general accord with the tenor of the letter. However, I do not believe that the Department of Highways improperly allowed excessive clearing of a section line right-of-way across Mr. James H. Edward's property near McCarthy, Alaska. By letter dated May 8, 1975, the Department of Highways indicated its non-objection to Wrangell Mountain Enterprises utilizing a section line being between Section 27 and 26, T. 5 S., R.13 E., C.R.M. for a public access roadway. The Department merely granted this letter of non-objection and did not in any manner affirmatively allow or disallow excessive clearing of Mr. Edward's property. I think if the fault lies with the Department of Highways, it can be more properly characterized as nonfeasance rather than malfeasance. The portion of Mr. Flavin's letter concerning free issuance of letters of non-objection is well taken and the Department of Highways should strongly consider restricting the issuances of letters of non-objection without first making a determination whether the use of a section line is in the best interest of the State of Alaska and will cause minimal impact to the property owner over who's property the section line runs. In order to implement a consistent policy throughout the State of Alaska and in an attempt to eliminate instances like that which occurred in McCarthy, I would suggest that Mr. Flavin's recommendation that regulations be implemented in accordance with the Administrative Procedures Act be acted upon with due diligence by the Department of Highways.

Further, I would like to reiterate the suggestion I made to you in my memorandum of October 21, 1976, and suggest that the Department of Highways cease from issuing any letters of non-objection for the utilization of section line rights-of-way unless the letter has been approved by the Department of Law.

Mr. Flavin's letter raises a question of whether or not the Department of Highways has specific statutory authority to regulate the use of section line rights-of-way. I can find no reference to such specific statutory authority, however, I believe that it is implicit in Title 19 that the Department of Highways has such authority. AS 19.10.010, the statute dedicating section line for public highways, is founded on Title 19, the Title dealing with state highways. This statute very specifically says "a track...between each section of land...is dedicated for use as

public highways". AS 19.05.010 states that "the department is responsible for the planning, construction, maintenance, protection and control of the state highway system". AS 19.05.030 delineates the duties of the Department of Highways which includes "direct approved highway planning and construction and maintenance, protection and control of highways;". AS 19.05.040 allows the Department to acquire property, acquire rights-of-way for present or future use, control access to highways, dispose of property acquired for highway purposes and exercise any other power necessary to carry out the purposes of Chapter 5-25 of this title. AS 19.05.070 provides for the vacation or disposal of land and rights in land possessed by the Department of Highways. I believe that all of these statutes, by implication, grant to the Department of Highways the authority to issue letters of non-objection for section line rights-of-way as defined by AS 19.10.010. If you desire, however, legislation can be introduced in this session to clarify the authority of the Department of Highways. If you wish to follow this procedure, (although I believe it unnecessary) please contact me as soon as possible so that legislation can be drafted before the beginning of the session.

RS:lm

cc: Frank Flavin, Ombudsman

02-X-1B

STATE
of ALASKA

MEMORANDUM

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF LAND & WATER MANAGEMENT

TO: DON HARRIS, Commissioner
Department of Transportation
and Public Facilities

DATE: April 28, 1977

FROM: THEODORE G. SMITH
Director

SUBJECT: Cooperative Agreement on
Section Line Easement Policy

I am writing in regard to resolving problems of administering section line easements involving the Department of Highways and the Division of Lands.

In 1974 a policy for the vacation of section line easements was established between the Department of Highways and the Division of Lands, Department of Natural Resources and with the organized boroughs. The policy is to vacate section lines only when ingress and egress to state land have not been curtailed.

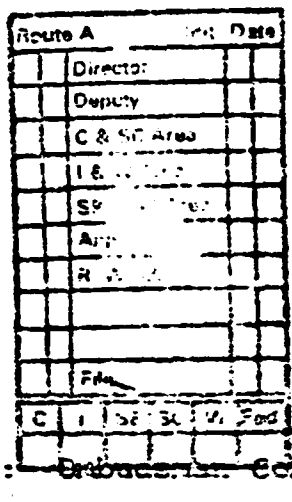
The use of section line rights-of-way has recently arisen during the discussion of the Cook Inlet Land Exchange with Don Beitinger, Right-of-Way agent for the Central Division of the Department of Highways. At this meeting a question arose: Are the interests of both Departments protected when actual use of section line easements for privately financed road construction occurs? Since the main authority over comprehensive land-use planning on state lands involves the Division of Lands and the land records which it maintains, it was agreed that the Division of Lands should undertake the responsibility of recommending legislation or regulations, with review by the Department of Highways, to manage section line right-of-way use by private applicants.

At the April 20, 1977, committee meeting among ADL personnel, the question of coordinating the private use of section line easements was proposed to be the responsibility of the Division of Lands, Department of Natural Resources. This administration and control of use could be promulgated under concurrent Highways and Division of Lands regulations. The final decision for the private use of a section line easement should require the concurrence of the Department of Transportation and the Division of Lands. It was felt that since the Division administers land disposals, leases, classifications, and planning on a statewide basis, more comprehensive input and analysis may be available at our offices. Our public records system of applications, plats, and state land records would be readily available for initial actions, recording of final status, and use by the public.

It is not contemplated that this arrangement, or the regulations adopted, which would implement this plan, would have any effect on the existing

authority of the Department of Highways to use section-line easements for public roads and highways.

If you feel this approach is desirable, we will continue by drafting proposed regulations, policy, and a working flow chart. We believe implementation of such processes could aleviate future problems arising in the organized boroughs, and also protect state interests on state lands outside the boroughs.



November 19, 1976

Henden D. Scougal
Commissioner
Department of Highways
P.O. Box 1467
Juneau, Alaska 99802

Re: [redacted] Complaint 76-0842

Dear Commissioner Scougal:

Please be advised that the above-captioned complaint has been investigated and is found to be justified. This complainant charged that the Department of Highways improperly allowed excessive clearing of a section line right-of-way near McCarthy, Alaska.

Findings:

1. In 1970, on the advice of the Attorney General's office and with concurrence from the Division of Lands, the Department of Highways asserted jurisdiction over section line rights-of-way, ostensibly to ensure consistent regulation of their use by private individuals.

2. Since that time the Department has issued letters of non-objection to persons wishing to use section line rights-of-way, if the Department has no objection to the particular use and deems it to be in the best interests of the state.

3. There are no laws or regulations concerning the issuance of these letters of non-objection or concerning acceptability of proposed uses of these easements. Opinion varies within the Attorney General's office as to the Department's statutory authority to regulate the use of section line rights-of-way.

4. On May 8, 1975, the Department issued a letter of non-objection to Wrangell Mountain Enterprises for the purpose of constructing a public access roadway on Section 27 and 26, T.5S., R.13E., C.R.M.

5. Subsequently a Mr. Anderson of Wrangell Mountain Enterprises cleared a 100 foot wide strip of this right-of-way, and constructed a roadbed approximately ten feet wide (see attached photograph).

Conclusions

We find this complaint to be justified because:

1. If the Department of Highways has no specific statutory authority to regulate the use of section line rights-of-way, letters of non-objection should not be issued.

2. If the Department does have jurisdiction over these easements, their use should be controlled so as not to allow the violation of the property rights of adjacent owners.

I can see no public purpose served by allowing one individual to needlessly destroy the esthetic and monetary value of another's property with the implied approval of state government. If one of the criteria used in issuing a letter of non-objection is that the proposed use be in the best interests of the state, some review should be made before this determination is reached. The current procedure provides for no such review, and I understand that the Department routinely approves all requests.

Recommendations:

1. The question of the Department's statutory authority to regulate the use of section line rights-of-way by private individuals should be resolved and, if need be, legislation drafted to clarify the matter.

2. Should it be concluded that the Department does have, or should have, jurisdiction in this matter, regulations should be immediately adopted under the Administrative Procedures Act to require that:

   a. public input be solicited from adjoining land owners as to the proposed use of a section line right-of-way;

   b. The Department review a proposed use to determine if it is in the best interests of the state and whether or not potential public objections have validity;

   c. if approval is given by the Department, it be for a specific use and allow for use of no more of the easement than necessary.

3. I am in agreement with an October 21, memorandum to you from the Attorney General's office that, in the interim, letters of non-objection not be issued without the approval of the Department of Law.

I will be glad to discuss this matter with you further and would very much appreciate your response to these recommendations within a month.

Sincerely,

Frank Flavin
OMBUDSMAN

FF:da

CC: Jack T. Bodine, Right-of-Way Director
Richard Svobodny, Assistant Attorney General

02-0016

STATE
of ALASKA

MEMORANDUM

TO: ALL DISTRICT R/W AGENTS

DATE: November 3, 1976

FROM: Hugh N. Williams
Deputy Director
Right of Way Division
Department of Highways
Juneau, Alaska

SUBJECT: Letters of Nonobjection for Section Line Rights-of-Way

Attached is a letter from the Attorney General's office concerning issuance of letters of nonobjection for utilization of section line rights-of-way. Please advise your personnel that no further letters will be issued until the matter is resolved. We would like your comments and suggestions on the Attorney General's letter, as well as what impact compliance will have on your operation.

Attachment: As stated

MEMORANDUM State of Alaska

TO: Jack Bodine
Right-of-Way Director
Department of Highways

DATE: October 21, 1976

FILE NO:

TELEPHONE NO:

FROM: Richard Svobodny
Assistant Attorney General
Department of Law
Highway Section

SUBJECT: Section Line Rights-of-Way and Letters of Nonobjection

Mr. James Edwards, the owner of real property near McCarthy, Alaska, has contacted Governor Hammond, Attorney General Gross, Frank Flavin, State Ombudsman and the District Attorney's office in Anchorage concerning the utilization of a section line right-of-way across his property, by a Mr. Andersen, for the construction of roadway to Mr. Andersen's property. Mr. Andersen apparently constructed the roadway in question under the color of a letter of nonobjection which he received from the Department of Highways. I have been informed by Mr. Williams that this letter of nonobjection does not appear in the files of either the Valdez or Anchorage district offices. However, I have been informed by Ms. Paddy Moriarty that the Ombudsman has a copy of the letter of nonobjection.

At the present time, there appears to be no standards or regulations concerning the issuance of a letter of nonobjection for the utilization of a section line right-of-way. It is the opinion of the Ombudsman that such letters not be given unless there is a thorough evaluation of the necessity for the utilization of a section line right-of-way.

I suggest that the Department of Highways cease from issuing any letters of nonobjection for the utilization of section line rights-of-way unless the letter has been approved by the Department of Law. In addition, I think the suggestion of the Ombudsman that regulations be promulgated, under the provisions of the Administrative Procedures Act, relating to the use of section line rights-of-way by private individuals, is a good suggestion. The proposed standard to be met by these regulations would be one of public necessity and should spell out that no permission to use a section line right-of-way would be granted unless there could be an affirmative showing, by an applicant, that there was no substantial public opposition to the granting of a letter of nonobjection.

In summary, it is the recommendation of the Department of Law, that no letter of nonobjection should be issued concerning section line rights-of-way unless approved by the Department of Law and that the Department of Highways gives substantial consideration to the promulgation of regulations relating to the issuance of letters of nonobjection.

RS:lm

02-0016

STATE
of ALASKA

MEMORANDUM

Mr Williams

TO: ALL DISTRICT R/W AGENTS

DATE November 3, 1976

FROM: Hugh N. Williams
Deputy Director
Right of Way Division
Department of Highways
Juneau, Alaska

SUBJECT: Letters of Nonobjection for Section Line Rights-of-Way

Attached is a letter from the Attorney General's office concerning issuance of letters of nonobjection for utilization of section line rights-of-way. Please advise your personnel that no further letters will be issued until the matter is resolved. We would like your comments and suggestions on the Attorney General's letter, as well as what impact compliance will have on your operation.

Attachment: As stated

BURR, PEASE & KURTZ, INC.

E. L. ARNELL 1913-1958
D. A. BURR
THEODORE M. PEASE, JR.
L. S. KURTZ, JR.
EDWARD G. BURTON
CHARLES P. FLYNN
RICHARD A. HELM
A. E. PAGE
J. W. SEDWICK
RONALD H. RUSSEY
RUSSELLYN S. CAHRUTH
R. E. DUERRE
CONNIE J. SIPE
LARRY MEYER

810 WEST EIGHTH AVENUE
ANCHORAGE, ALASKA 99501

TELEPHONE
AREA CODE 907
279-2411

August 23, 1976

Wesley M. Howe
Borough Manager
Matanuska-Susitna Borough, Inc
Box B
Palmer, Alaska 99645

Re: Section line easements,
Our file A-3038.18

Dear Wes:

BACKGROUND

Determining the validity of any particular section line easement within the State of Alaska can be quite complicated. To understand some of the problems which may arise it is necessary to consider the principals which govern the creation of such easements.

To begin with, all such easements flow from a Federal statute first enacted in 1866. Now codified as 43 U.S.C. §932 it provides:

> The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

This statute standing by itself does not create an easement across public lands. However, where there has been either:

(a) "some positive act on the part of the appropriate public authorities of the State, clearly manifesting an intention to accept a grant", or

(b) "public user for such a period of time and under such conditions as to prove that the grant has been accepted", the easement is created. Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961).

The preoccupation with section lines in Alaska flows from the fact that the appropriate governmental authorities saw fit to accept the Federal statutory grant by reference to section lines. Our research discloses that the first Territorial act dedicating public lands for road purposes

Could be not a sec-line Prblm. this went across a homestead-

was enacted in 1923.] Section 1, Ch. 19, Laws of Alaska, 1923, dedicated a tract 4 rods wide between each section of land in the Territory of Alaska for use as public highways. The section line was to be the center of the highway. Since a rod is 16 1/2' wide this particular acceptance of the Federal statutory grant would result in creation of an easement 66' wide. That statute also included the following language:

> But if such highway shall be vacated by any competent authority the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey.

The provision enacted in 1923 was codified as §1721 of the Compiled Laws of Alaska, 1933 and remained on the books until 1949. In 1949 the laws of the Territory were compiled again and inexplicably the law passed in 1923 was excluded from the 1949 compilation. More than that, a table included with the Compiled Laws of Alaska in 1949 shows that the law in question is "invalid". No reason is given. A review of the session laws between 1923 and 1949 discloses that the law was not repealed. Thus, there is at least some ambiguity as to whether or not the law remained in effect after the 1949 compilation. In any event an acceptance of the Federal statutory grant did not appear again until 1951, and the acceptance was limited to land owned by the Territory of Alaska. Section 1, Ch. 123, Laws of Alaska, 1951 provides:

> A tract 100' wide between each section of land owned by the Territory of Alaska, or acquired from the Territory, is hereby dedicated for use as public highways, the section line being the center of said highway. But if such highway shall be vacated by any competent authority the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey.

In 1953 the statute passed in 1951 was amended to include an additional dedication of a tract 4 rods wide between all other sections located within the Territory.

Recently our Supreme Court recognized the efficacy of the 1953 law, now codified as AS 19.0.010. Recognition came in the case of Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (1975). A copy of this decision was sent to Georgia Estes on February 4, 1976. However, the Girves decision was not concerned with the validity of a section line easement allegedly created prior to 1953. Of course, even in cases where the creation of the section line easement is said to have taken place subsequent to 1953 there can be difficult questions of fact involved in any determination respecting the validity of the section line easement. These questions would revolve primarily around the status of the land across which the easement was to have been created. Was it at all pertinent times "public" land not dedicated to any public use and not subject to any private entry. For example, we know that a valid entry under the Homestead laws prior to the creation of the section line easement would prevent the creation of the section line easement. Hamerly v. Denton, supra. Needless to say this can involve complicated sets of records kept by the Bureau of Land Management as well as testimony by witnesses. Wherever the section line easement is alleged to have been created prior to 1953 there is a potential for dispute over the effect of the 1949 compilation and the 1951 statute which was limited to lands owned by the Territory. The 1949 compilation may have repealed the 1923 statute. If the 1949 compilation did not effectively repeal the earlier law, there is certainly room to argue that the 1951 statute did by implication, because it limited its effect to lands owned by the Territory. Our courts have not yet been asked to decide whether the 1949 or 1951 legislation would result in the return of the section line easements created under the 1923 law to the owners of record of the parcels across which a section line easement was originally created. However, that is certainly a possible result given the language of the 1923 statute referring to the results which take place whenever the highway is "vacated by any competent authority".

In cases where the proponent of the section line easement wishes to rely upon acceptance through actual public

use rather than through acceptance of the Federal statutory grant by the act of the State or Territorial legislature, there will always be questions of fact concerning the duration and extent of the use. Was the use sufficiently "public" to justify the court in concluding that the public accepted the offer contained in 43 U.S.C. §932? There have been cases holding that the use was insufficient. Thus, there will always be risk involved in relying upon the fact that a road has been in existence and used for a considerable period of time. It is possible that the current use of the road is not representative of the use which was made of it at the time when the acceptance must have been made if it is to be effective (i.e., prior to the time that the land passed from the public domain or was segregated for some particular public use). While there is always the possibility that an easement by prescription has been created as a result of the substantial use of the road in question, that possibility also raises numerous factual questions. Your attention is directed to my letter of October 21, 1975 addressed to you. A copy is enclosed for your convenient reference.

After clarifying the request contained in your letter of August 11, 1976, I prepared a suggested amendment to MSB 16.32.030 dealing with the section line easement. A copy of the proposed amendment is enclosed.

Very truly yours

BURR, PEASE & KURTZ, INC.

J. W. Sedwick

JWS:swc
Enclosures

Section Line Dedication Opinion by: Wiles.

DELANEY, WILES, MOORE & HAYES
ATTORNEYS AT LAW
360 K STREET
ANCHORAGE, ALASKA 99501

JAMES J. DELANEY, JR.
EUGENE F. WILES
DANIEL A. MOORE, JR
GEORGE N. HAYES
JOHN K. BRUBAKER

TELEPHONE 279-35
AREA CODE 907

February 20, 1969

Mr. Karl L. Walter, Jr.
City Attorney
City of Anchorage
P. O. Box 400
Anchorage, Alaska

Re: Right-of-Way along Section Line

Dear Karl:

This is in response to your request for my opinion concerning the above subject.

As indicated in my memorandum to the Director, Alaska Road Commission dated September 12, 1956, it is my opinion that Ch. 19 SLA 1923 and Ch. 35 SLA 1953 were effective acceptances of a dedication made by the United States pursuant to the authority of the Act of July 26, 1866 (14 Stat. 254; R.S. 2477; 43 USC 932) My opinion on this matter has not changed notwithstanding Opinion No. 11 of the Attorney General of the State of Alaska dated July 26, 1962. 1/

Although it is my opinion that the foregoing laws were effective acceptances of dedications made by the Federal Government there are a number of legal principles that must be taken into consideration to determine whether or not a section line in Alaska has been effectively dedicated for highway purposes and to answer the questions set forth in your letter of January 14, 1969 These principles are:

1. The dedication by the United States pursuant to the Act of July 26, 1866, *supra*, does not take effect until the date of the acceptance of the dedication by State authority or by public use. 2/

1/ Attached hereto is previous correspondence with the Territorial Attorney General relating to this same subject. The correspondence includes: letter from the Attorney General to Mr. Roger R. Robinson dated August [illegible], 19[illegible]; memorandum from Office of the Solicitor to Operations Supervisor BLM, dated August [illegible], 19[illegible]; and letter from the Attorney General to Mr. Roger R. Robinson dated September [illegible], 19[illegible].

2/ *Koloen v. Pilot Mound Tp. of [illegible]* [illegible] N.W. 672; *[illegible] v. [illegible]*, 150 P. 183; *Lovelace v. Hightower* [illegible] P.2d 864; *[illegible] v. [illegible]*, 339 P.2d 121; *Kirk v. [illegible]* [illegible] P. [illegible] Ann.

2. The offer of the United States to dedicate public lands for highway purposes pursuant to the Act of July 26, 1866 terminates if not accepted prior to the issuance of patent by the United States. 3/

3. The dedication by the United States pursuant to the Act of July 26, 1866, relates only to public land of the United States, and does not apply to public land reserved for public uses or public lands validly entered under the public land laws. Accordingly, if public lands of the United States have been withdrawn or reserved by the United States for public uses, or entered under the public land laws by private individuals prior to the acceptance of the dedication, such lands are not subject to the dedication provided by the Act of July 26, 1866, so long as such lands remain withdrawn or reserved or are subject to a valid private right initiated prior to acceptance of the dedication. 4/

4. There can be no acceptance of the dedication provided by the Act of July 26, 1866, by virtue of Ch. 19 SLA 1923 or Ch. 35 SLA 1953 until the public lands have been surveyed and the section lines established. 5/

5. The dedication by the United States pursuant to the Act of July 26, 1866 once accepted by the State or by public use remains in effect unless vacated pursuant to applicable law. 6/

3/ Hall v. Stephens, 158 P.2d 207

4/ Korf v. Itten, 169 P. 148; Stofferman et ux v. Okanogan County, 136 P. 434; Leach v. Manhart, 77 P.2d 652; Atchison etc. R. Co. v. Richter, 148 P. 473.

5/ Cox v. Hart, 43 S.Ct. 154, 260 U.S. 427, 67 L.Ed. 332; Vincent v. Redmond, 145 P.2d 612; Carroll v. U.S., 154 F. 427; Smith v. Whitney, 74 P.2d 450; Bullock v. Boone, 27 P. 919; Webb Investment Co. v. Deep-Vun Min. Co., 230 P.2d 449; Peters v. Pacific Gas and Electric Co., 190 P.2d 297; 43 USC Sec. 771 and 772. These cases hold in effect that a survey of public land does not ascertain boundaries but creates them and that therefore section lines have no existence prior to survey and are incapable of description or conveyance prior to survey.

6/ Huffman v. Board of Sup'rs of West Bay TP, Benson County, 182 NW 459; Costain v. Turner County, 36 NW 2d 357; Peterson v. Canton TP, 34 NW 2d 172; Paxon v. Lillie Twp., 163 NW 531, Writ of Error Dismissed (39 S.Ct. 491, 250 U.S. 654; 63 L.Ed. 1182)

In order to apply these legal principles to the situation in Alaska, it will be helpful to review the Alaska law relating to rights-of-way on section lines. The pertinent legislation is as follows:

1. Ch. 19 SLA 1923
Section. A tract of four rods wide between each section of land in the Territory of Alaska is hereby dedicated for use as public highways, the section line being the center of the highway. But if such highway be vacated by any competent authority the title to the respective strips shall inure to the owner of the tract of which is formed a part by the original survey. Approved April 6, 1923. (codified as Sec. 1721 CLA 1933)

2. Ch. 1. Extraordinary Session Laws of Alaska 1949

This Act provides in pertinent part as follows:

* * * "All Acts or parts of Acts heretofore enacted by the Alaska Legislature which have not been incorporated in said compilation [i.e. ACLA 1949] because of previously enacted general repeal clauses or by virtue of repeals by implication or otherwise are hereby repealed.
* * *
Sec. 3: An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval. 7/
Approved January 18, 1949

3. Ch. 123 SLA 1951
Section 1. A tract one hundred feet wide between each section of land owned by the Territory of Alaska or acquired from the Territory, is hereby dedicated for use as public highways, the section line being the center of said highway. But if such highway shall be vacated by any competent authority the title to the resepctive strips shall inure to the owner of the tract of which it formed a part by the original survey.
Approved March 26, 1951

7/ Ch. 19 SLA 1923 as codified in Sec. 1721 CLA 1933 was not incorporated in ACLA 1949 and was therefore repealed effective January 18, 1949.

4. Ch. 35 SLA 1953
Section 1. A tract one hundred feet wide between each section of land owned by the Territory of Alaska, or acquired from the Territory and a tract four rods wide between all other sections in the Territory, is hereby dedicated for use as public highways, the section line being the center of said right-of-way. But if such highway shall be vacated by any competent authority the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey. 8/
Approved March 21, 1953.

5. A.S. 19.10.010
Sec. 19.10.010. Dedication of land for public highways. A tract 100 feet wide between each section of land owned by the state, or acquired from the state, and a tract four rods wide between all other sections in the state, is dedicated for use as public highways. The section line is the center of the dedicated right-of-way. If the highway is vacated, title to the strip inures to the owner of the tract of which it formed a party by the original survey.

As can be seen, the foregoing legislation relates to rights-of-way on section lines of lands owned by the Territory and State of Alaska as well as public lands owned by the United States.

Consideration will first be given to section line rights-of-way over public lands of the United States.

PUBLIC LANDS OF THE UNITED STATES

As held in Costain v. Turner County, 36 NW 2d 382, Ch. 19 SLA 1923 would constitute the first statutory acceptance by the Territory of Alaska of the dedication by the United States pursuant to the Act of July 26, 1866 for section lines on the public lands of the United States.

To determine if a four-rod right-of-way has been established as to a specific section line on the public lands of

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8/ This statute in effect re-enacted Ch. 19 SLA 1923 as such chapter applied to public lands of the United States.

the United States by virtue of the acceptance of the dedication contained in Ch. 19 SLA 1923 or Ch. 35 SLA 1953, one must apply the principles of law set forth above to the facts in each particular instance. As these principles and facts are not readily susceptible to a broad general discussion, I will set forth certain questions and specific situations which can exist and my conclusions as to these situations based on the foregoing principles of law.

1. What is the effect of a section line being surveyed and in existence prior to April 6, 1923, the effective date of Ch. 19 SLA 1923?

(a) If the section line was surveyed prior to April 6, 1923, and the land abutting the section line was not patented or withdrawn or reserved for public uses, or entered by private parties under the public land laws on April 6, 1923, a 4-rod right-of-way, 2 rods on each side of the section line was created. This right-of-way would still be in existence today unless specifically vacated by competent authority.

(b) If the section line was surveyed prior to April 6, 1923, and the land abutting the section line was withdrawn or reserved for public uses or entered by a private party or patented to a private party on such date, no right-of-way was created. (If a private entry existing on April 6, 1923 went to patent, the entryman patentee would take the land patented free of any section line right-of-way. Also, all public land patented prior to April 6, 1923 would not be subject to a section line right-of-way.

(c) If the section line was not surveyed as o April 6, 1923, no right-of-way was created as of that date.

2. If the section line was not established on April 6, 1923, what is the effect of a survey subsequent to April 6, 1923, the effective date of Ch. 19 SLA 1923 and prior to January 18, 1949, the date of the repeal of Ch. 19 SLA 1923?

(a) If the section line was surveyed between April 6, 1923 and January 18, 1949, and the land abutting the section line was not withdrawn or

Surveys accomplished
4-6-23 to 1-18-49 ... 33' each
1-18-49 to 3-31-53 ... 0'
3-31-53 to present ... 33' each

reserved for public uses or entered by a private party at the time of the survey, a 4-rod right-of-way, 2 rods on each side of the section line, was created. This right-of-way would still be in existence today unless specifically vacated by competent authority.

(b) If the section line was surveyed between April 6, 1923 and January 13, 1949, and the land abutting the section line was withdrawn or reserved for public uses or entered by a private party at the time of the survey, no right-of-way would be created at the time of the survey. In such circumstances, if a private entry existing on the date of survey goes to patent, the entryman patentee would take the land patented free of any section line right-of-way.

3. If the lands abutting a surveyed section line existing on April 6, 1923 were withdrawn or reserved for public uses or were entered by a private party on April 6, 1923, what would be the effect of a revokation of the withdrawal or reservation or relinquishment of the private entry made on or after April 6, 1923 and prior to January 13, 1949?

(a) Such land would become unappropriated public lands and a 4-rod right-of-way, 2 rods on each side of the section line, would be created. This right-of-way would still be in effect today unless specifically vacated by competent authority.

4. If the lands abutting a section line were withdrawn or reserved for public uses, or were entered by a private party at the time the lands were surveyed when such survey took place subsequent to April 6, 1923, what would be the effect of a revokation of the withdrawal or reservation or relinquishment of the private entry made on and after such survey and prior to January 18, 1949?

(a) Such lands would become unappropriated public lands and a 4-rod right-of-way, 2 rods on each side of the section line would be created. This right-of-way would still be in effect today unless specifically vacated by competent authority.

5. What was the effect of the repeal of Ch. 19 SLA 1923 on Jnauary 18, 1949?

(a) This repeal did not affect the rights-of-way that were previously established on section lines as set forth above. Such rights-of-way are still in existence unless specifically vacated by competent authority.

(b) The repeal of Ch. 19 SLA 1923 on January 18, 1949, however, did create a situation wherein section lines that were surveyed on the public lands in Alaska between January 18, 1949 and March 21, 1953, the date of Ch. 35 SLA 1953, may not be subject to the 4-rod right-of-way because of the repeal. An illustration of such a situation is where the right-of-way did not take effect prior to January 18, 1949 because the section lines were not surveyed prior to that time. Thereafter, subsequent to January 18, 1949, and prior to March 21, 1953, the lands were surveyed and entered by a private party and patented to such party. Such party would take patent free of any right-of-way on the section line.

A further example is where the lands were surveyed prior to January 18, 1949 but no right-of-way was created because at the time the land was surveyed, it was reserved for public uses. After January 18, 1949, the reservation was revoked and a private entry was made prior to March 25, 1953. This entryman, if he obtained patent to the land, would obtain such patent free of any section line right-of-way.

6. What is the effect of Ch. 35 SLA 1953 as now amended and codified in A.S. 19.10.010?

(a) It was in effect a re-enactment of Ch. 19 SLA 1923 as such chapter applied to public lands of the United States.

(b) It has no effect on the section line rights-of-way previously created over public lands of the United States by Ch. 19 SLA 1923. Such rights-of-way are still effective unless vacated by competent authority.

(c) If the section line was surveyed on public lands of the United States between January 13, 1949, the date of the repeal of Ch. 19 SLA 1923, and March 21, 1953, the effective date of Ch. 35 SLA 1953, and the land abutting the section line was not patented, or withdrawn or reserved for public uses or entered by a private party on March 21, 1953, a 4-rod right-of-way, 2 rods on each side of the section line was established This right-of-way would still be in existence today unless specifically vacated by competent authority.

(d) If the section line was surveyed on public lands of the United States between January 13, 1949 and March 21, 1953, and the land abutting the section line was withdrawn or reserved for public uses, or entered by a private party or patented to a private party on March 21, 1953, no right-of-way was created. In such circumstances, if a private entry existing on March 21, 1953 went to patent, the entryman patentee would take the land patented free of any section line right-of-way. Also, all public land surveyed between January 13, 1949 and March 21, 1953, which was patented prior to March 21, 1953, would not be subject to a section line right-of-way.

(e) If the section line was surveyed between January 13, 1949 and March 21, 1953, and the land abutting the section line was withdrawn or reserved for public uses, or entered by a private party on March 21, 1953 and subsequent to March 21, 1953, the withdrawal or reservation was revoked or the private entry relinquished, such land would then become unappropriated public land and a 4-rod right-of-way along the section line would be created. This right-of-way would still be in effect today unless specifically vacated by competent authority.

(f) If a section line on public lands of the United States was surveyed after March 21, 1953, and the land abutting such section line was not withdrawn or reserved for public uses, or entered by a private party at the time of the survey, a 4-rod right-of-way, 2 rods on each side of the section line was created. This right-of-way would still be in existence today unless vacated by competent authority.

(g) If the section line was surveyed after March 21, 1953, and the land abutting such section line was withdrawn or reserved for public uses or entered by a private party on the date of the survey, no right-of-way along the section line would be created. If the private entry existing on the date of the survey went to patent, the entryman patentee would take the land patented free of any section line right-of-way.

(h) If the section line was surveyed after March 21, 1953 and the land abutting the section line was withdrawn or reserved for public uses or entered by a private party on the date of the survey, and subsequent to the survey the withdrawal or reservation was revoked or the private entry relinquished, such land would then become unappropriated public land and a 4-rod right-of-way along the section line would be created. This right-of-way would remain in effect unless and until vacated by competent authority.

TERRITORY OR STATE OF ALASKA LAND

The problems relating to section line rights-of-way on lands previously owned by the Territory or now owned by the State of Alaska are not as involved as those relating to such rights-of-way on public lands of the United States. The reasons for this are two-fold.

First: Almost all of the lands owned by the Territory were granted to it by the Federal Government by Act of Congress. An example of such Act is the Act of March 4, 1915 (38 Stat. 1214, 48 USC 353) granting lands for school purposes to the Territory of Alaska. This grant of public lands by the United States to the Territory did not become effective to pass title to the Territory until the lands were surveyed and the section lines ascertained. 43 USC 751; U.S. v. State of Wyo., 67 S.Ct. 1319, 331 U.S. 440, 91 L.Ed. 1590. Accordingly, if the lands were surveyed subsequent to April 6, 1923, the effective date of Ch. 13 SLA 1923, the State would acquire title with a section line easement. If the lands were surveyed prior to April 6, 1923 and retained by the State subsequent to April 6, 1923, the lands would also be subject to such a right-of-way.

However, there are two situations where such lands acquired by the Territory from the Federal Government would not be subject to such a right of way. These are:

1. Where the land was surveyed and title passed to the Territory prior to April 6, 1923 and the Territory conveyed such land prior to April 6, 1923. (It is very unlikely that you will find such a situation.)

2. Where the land was surveyed and title passed to the Territory subsequent to January 18, 1949, the date of the repeal of Ch. 19 SLA 1923, and prior to March 26, 1951, the effective date of Ch. 123 SLA 1951 1/ and such land was conveyed by the Territory prior to March 26, 1951. (It is also very unlikely that this situation will arise.)

Second: By virtue of Ch. 123 SLA 1951 as now codified in A.S. 19.10.010, all lands acquired from the Territory or the State of Alaska on or after March 26, 1951, the effective date of such Act, are subject to a 100-foot section line easement, 50 feet on each side of the section line. Accordingly, there appears to be no section line right-of-way problems as to Territory or State lands transferred into private ownership on or after March 26, 1951.

When the foregoing conclusions are applied to the specific question asked in your letter of January 14, 1968, it can be ascertained that if a homesteader entered public lands of the United States subsequent to January 18, 1949, the date of the repeal of Ch. 19 SLA 1923, and prior to March 21, 1953, the date Ch. 19 SLA 1923 was re-enacted as to public lands of the United States, whether or not he would take the land subject to a section line right-of-way would depend upon the date of the survey of the section line in question. If the section line was surveyed prior to January 18, 1949, and the land abutting the section land was unappropriated public land at the time of the survey or any time prior to the homestead entry, the entryman would take the land subject to the section line easement. However, if the land was surveyed subsequent to January 18, 1949 and prior to March 21, 1953, the homestead entry initiated between such dates if it goes to patent would be patented free

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1/ Ch. 123 SLA 1951 re-established section line right-of-way on all lands owned by the Territory.

of any section line right-of-way. The same principles would apply to one who made entry on January 17, 1949. If the lands were surveyed any time prior to his entry and the land abutting the section line was unappropriated public land at the time of the survey or any time prior to entry, the entryman would take the land subject to a section line right-of-way. However, if the land was surveyed subsequent to his entry and his entry goes to patent, he would take the land free of the section line right-of-way. Accordingly, the date of survey in most of the cases is the determining factor as to whether or not a section line right-of-way is established.

I feel that the foregoing discussion encompasses most of the situations you will encounter, however, if you have further questions, please let me know.

Yours very truly,

DELANEY, WILES, MOORE & HAYES

Eugene F. Wiles

EFW/cs
Enclosures

R/W -

5-25-54

ADLO 2234-3
Rev. Aug. '65

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Anchorage District & Land Office
555 Cordova Street
Anchorage, Alaska 99501

ROAD RIGHTS-OF-WAY

Roads may be considered as of two classes, (1) private access roads, and (2) public roads.

1. Private access roads - There is no Federal law providing for rights-of-way for private roads as a means of ingress or egress from one's property. Such roads, which are considered roads of necessity, are usually constructed over vacant unreserved public lands without any action on the part of the Government.

Such private roads may be constructed along section lines or otherwise, if the land affected is vacant, unappropriated and unreserved. If reserved, permission should be obtained before construction from the Federal agency having jurisdiction and control over the land. In the absence of any specific Federal law, it is impossible to say what width one may claim for the right-of-way for private roads, but it would probably be held to be of such width as is reasonably necessary for the construction and maintenance of the road. Moreover, the rights of a person in and to roads so constructed, if questioned by a subsequent entryman, must be settled between the parties in controversy by an amicable agreement or by the local courts. Such roads under the common law are considered as "easements by necessity".

2. Public roads - Public roads and highways in Alaska are generally established and constructed by the Bureau of Public Roads (formerly the Alaska Road Commission) under authority of the Act of June 30, 1932 (47 Stat. 446, 48 U.S.C. Sec. 321a, seq.). These roads may or may not follow along section lines.

Public roads may also be established under Section 2477 of the Revised Statute (43 U.S.C. Sec. 932) which provides: "The right-of-way for the construction of highways over public lands, not reserved for public uses, is granted." This act constitutes a standing offer of a free right-of-way over the public lands not reserved for public uses, and becomes effective upon the construction or establishment of the road or highway, in accordance with the State or Territorial laws. Chapter 19, Session Laws of Alaska (1923), and incorporated in the Compiled Laws of Alaska, reads as follows:

> "Sec. 1721 Strip between sections reserved. A tract of four rods (66 feet) wide between each section of land in the Territory is hereby dedicated for use as public highways, the section line being the center of such highway. If such highway shall be vacated by any competent authority, the title to the respective strip shall inure to the owner of the tract of which it forms a part of the original survey (1-19-23)."

The Territorial Act of 1923 was an acceptance of the right-of-way grant made by R.S, 2477, supra.. However, the 1923 act is listed as invalid in the New Alaska Code of 1949.

The Territorial Act of March 21, 1953, was designed to reinstate and broaden the aforementioned Section 1721 which had been left out of the Alaska Code of 1949, and may be considered as the effective law as of March 21, 1953, since it appears to be enacted pursuant to Section 2477 of the Revised Statutes (43 U.S.C. 932) mentioned above.

The new act reads as follows:

> "Section 1. A tract one hundred feet wide between each section of land owned by the Territory of Alaska, or acquired from the Territory, and a tract four rods wide between all other sections in the Territory, is hereby dedicated for use as public highways, the section line being the center of said right-of-way. But if such highway shall be vacated by any competant authority the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey."

In connection herewith, attention is called to the Federal act of July 24, 1947 (61 Stat. 418, 48 USC sec. 321d), providing for a reservation of rights-of way in patents to land thereafter taken up, for roads, highways, etc., constructed or to be constructed by or under authority of the United States or of any State created out of the Territory of Alaska.

It will be noted that the reservation of rights-of-way for the construction of private access roads is not contemplated by the 1947 act. Rights-of-way for such roads over land subsequently entered or in private ownership must therefore be acquired through amicable agreement or as provided by the Territorial law (Chapter 35 - Session Laws of Alaska 1953).

The width of public highways in Alaska was fixed by Order No. 2665 of October 16, 1951 by the Secretary of the Interior.

A road or trail which has been used by the public over public land for a period of time would no doubt be held by the legal authorities to be a public highway, and to be fully protected by R.S. 2477, supra.

For further information concerning this question, see Section 932 of Title 43 of United States Code Annotated.

(Source of Information: Memo of 5/25/54 to Manager, Anchorage District & Land Office, from Area Adjudicator)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D. C.

March 15, 1960

M-36595

Memorandum

To Director, Bureau of Land Management

From: Associate Solicitor, Division of Public Lands

Subject: Appropriation of rights-of-way on public lands for government use

Your office's memorandum of July 9, 1958, called to our attention memoranda dated February 14 and 24 from the Field Solicitor to the Area Administrator, both at Anchorage, which discuss the effect of Federal appropriation of rights-of-way on entries and Indian occupancy claims. We have had additional correspondence with the Field Solicitor on this question.

The courts have zealously protected the rights of those who have made valid entries, locations, and selections on public lands. In Hastings R.R. Co. v. Whitney, 132 U.S. 357, 364 (1889), the court found in favor of an allowed homestead entry against a railroad company claiming under a Congressional grant by the act of July 4, 1860 (14 Stat. 87), stating that

> "So long as it remains a subsisting entry of record, whose legality has been passed for by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants."

See also Cornelius v. Kessel, 128 U.S. 456 (1888); United States v North American Co., 253 U.S. 330 (1920); Payne v. Central Pacific R.R. Co., 255 U.S. 228 (1921).

The Department also has long recognized the vesting of rights by those holding allowed entries, for example, against later Government withdrawals of public lands. Op. Atty. Gen., 1 L.D. 30 (1881); Nathais Ebert, 14 L.D. 589 (1892); Instructions, June 6, 1905 (33 L.D. 607, 608). In the cases of May C. Sands, 34 L.D. 653 (1906) and John L. Maney, 35 L.D. 250 (1906), cited in the Field Solicitor's memorandum, the withdrawal order appears in each case to have preceded allowance of the entry. The former case held that an entry is a contractual right against the Government. We find no clear basis moreover for the suggested distinction between "specific" and "general" reclamation withdrawals. See 43 CFR 230.15; Edward F. Smith, 51 L.D. 454

(1926). Certainly none of the cited decisions hold that the entryman could be deprived of his entry without compensation.

We cannot doubt that an appropriation of lands by a Government agency under the Instructions, January 13, 1916 (44 L.D. 513), would be subject to any valid entry existing at the time of tract appropriation. The Solicitor has said that:

> "In practice the Department has limited its authority to reserve from grants made by patent, road and other rights-of-way constructed with Federal funds to those cases where construction preceded the initiation of the right on which the patent is based. Instructions of August 31, 1915 (44 L.D. 359) and Instructions of January 13, 1916 (44 L.D. 513)."

Opinion of April 23, 1958 (65 I.D. 200, 202).

Surely an allowed entry is such an "initiation of the right" as to protect it from later appropriation by a Government agency without compensation. See Solicitor's Opinion of September 30, 1921 (48 L.D 459, 462). We find no evidence that the entries involved in either the 1915 or 1916 Instructions preceded the Government appropriation.

The Department's disinclination in the instructions to accept "a mere survey" as "an appropriation of the land to the public use", and urging "staking the area", can hardly be explained except as provision for giving notice to later entrymen that they could only enter the lands subject to the Government's appropriated rights. To be fully consistent with these instructions and the regulations (43 CFR 209.13), we should not encourage Federal agencies to rely on mere filing of a map, without staking the area on the ground sufficiently to evidence an actual appropriation of the land.

The courts have held that a mere settler, who has no allowed entry, has no rights against the Government. Yosemite Valley case, 82 U.S. 77, 87 (1872). Like allowed entries, however, we believe continued Indian occupancy in good faith would receive protection against later appropriations. See A.S. Wadleigh, 13 L.D. 120 (1891). The Congress may of course extinguish the occupancy rights of any Indians. See United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 347 (1941); Tee Hit Ton Indians v. United States, 348 U.S. 272 (1955). Indian occupancy rights are otherwise protected against later adverse claims or Government withdrawals. Cramer v. United States, 261 U.S. 219 (1923); Schumacher, 33 L.D. 454 (1905); Departmental Opinion, 56 I.D. 395 (1939).

In the Tee Hit Ton case supra, the Supreme Court held that Congress could by statute refuse to recognize Indian tribal rights of occupancy and disqualify Indians from compensation for the taking of timber under a specific statute providing for such timber cutting. The case did not hold that a Federal agency could ignore actual occupancy by an Indian, or group of Indians, without specific provision

We recognize the additional acuteness of the problem in Alaska since the repeal of the act of July 24, 1947 (48 U.S.C., sec. 321d) by Section 21(d)(7) of the Alaska Omnibus Act of June 25, 1959 (73 Stat. 146). See Associate Solicitor Memorandum, December 23, 1959, to Regional Solicitor at Juneau. However, the needs of Government agencies should not override the necessity for giving entrymen and Indian occupants every protection afforded them by previous judicial and administrative rulings in the absence of contrary legislation. The Field Solicitor's memoranda of February 14 and February 24, 1958, to the extent that they are inconsistent with this opinion, should not be followed.

C. R. Bradshaw

69844-60

Interior--Duplicating Section, Washington, D. C.

Note 120

their lands. Cubbins v. Mississippi River Commission, Miss.1916, 36 S.Ct. 671, 241 U.S. 351, 60 L.Ed. 1041.

Landowner cannot of right obstruct navigation over his lands, though with permission of state he may build a structure which is an obstruction. U. S. v. Pennsylvania Salt Mfg. Co., D.C.Pa.1926, 10 F.2d 476.

The riparian owner on a public navigable river has no right to fill the river even to low-water mark, or to place obstructions therein between high and low water marks, without express authority from the commonwealth. Black v. American International Corporation, 1919, 107 A. 737, 264 Pa. 260.

Riparian owners have absolute right to have waters of navigable stream, at their properties, continued in their natural condition, free from any interference or obstruction. Little Falls Fibre Co. v. Henry Ford & Son, 1926, 217 N.Y.S. 534, 127 Misc. 834.

Board of supervisors was unauthorized to grant permission to riparian owners to build bridge from island to shore of navigable lake. Morgan v. Kloss, 1928, 221 N.W. 113, 244 Mich. 192.

In so far as the structures erected by the riparian owner on an inland navigable meandered lake interfere with the public rights of navigation and its incidents, the riparian owner takes and holds such rights subject to the public rights. Doemel v. Jantz, 1923, 193 N.W. 303, 180 Wis. 225, 31 A.L.R. 909.

121. Water power

A riparian owner may make such reasonable use of the water of a navigable river for power or other purposes as does not materially interfere with navigation. Bissell Chilled Plow Works v. South Bend Mfg. Co., 1916, 111 N.E. 932, 64 Ind.App. 1.

122. Wharves, piers, docks, etc.

Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in, see Notes of Decisions under section 403 of Title 33, Navigation and Navigable Waters.

§ 931a. Authority of Attorney General to grant easements and rights-of-way to States, etc.

The Attorney General, whenever he deems it advantageous to the Government and upon such terms and conditions as he deems advisable, is hereby authorized on behalf of the United States to grant to any State, or any agency or political subdivision thereof, easements in and rights-of-way over lands belonging to the United States which are under his supervision and control. Such grant may include the use of such easements or rights-of-way by public utilities to the extent authorized and under the conditions imposed by the laws of such State relating to use of public highways. Such partial, concurrent, or exclusive jurisdiction over the areas covered by such easements or rights-of-way, as the Attorney General deems necessary or desirable, is hereby ceded to such State. The Attorney General is hereby authorized to accept or secure on behalf of the United States from the State in which is situated any land conveyed in exchange for any such easement or right-of-way, such jurisdiction as he may deem necessary or desirable over the land so acquired. May 9, 1941, c. 94, 55 Stat. 183.

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

Historical Note

Section, Act July 24, 1946, c. 596, § 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. 3022.

§ 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

Derivation. Act July 26, 1866, c. 262, § 8, 14 Stat. 253.

Columbia River Highway. Act Mar. 4, 1921, c. 164, 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 Colum 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, 1906, 96 P. 278, 78 Kan. 830; Van Wanning v. Deeter, 1907, 112 N.W. 902, 76 Neb. 284; Wallowa County v. Wade, 1903, 72 P. 793, 43 Or. 253; Wells v. Pennington County, [illegible] 48 N.W. 305, 2 S.D. 1; Smith v. Pennington County, 1891, 48 N.W. 308, 2 S.D. 14; Riverside Tp. v. Newton, 1896, 75 N.W. 809, 11 S.D. 120; City of Deadwood v. Whittaker, 1900, 81 N.W. 906, 12 S.D. 515; Peterson v. Baker, 1905, 81 P. 661, 39 Wash. 275; Stofferan v. Okanogan County, 1913, 136 P. 484, 76 Wash. 205.

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. § 1504, 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.

Note 4

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, 1934, 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. 205.

This section was a grant in praesenti, and when accepted by the public it took effect as of the date of the grant. Thoil 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, 1907, 71 N.W. 544, 6 N.D. 382; Rolling v. Emrich, 1904, 99 N.W. 464, 122 Wis. 134; Walbridge v. Russell County, 1906, 86 P. 473, 74 Kan. 341; Molyneux v. Grimes, 1906, 96 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. 202, 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. 519, 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.1807, 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. Stainaker, 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 652, 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. 51[illegible] 25 Wyo. 109, rehearing denied 171 I [illegible], 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, 96 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, 1900, 60 P. 473, 74 Kan. 341.

Note 9

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.

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. 536.

8. 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 804, 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 St Co. v. Churnos, 1930, 285 P. 646, 75 [illegible] 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 804, 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. 1202.

Where no legal entry on Federal public lands was filed of record by plaintiff'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.

13. 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.

18. 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.

Note 14

14. Homestead entryman

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 [illegible] issued and no act of

Note 14

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. 3.

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, 1915, 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 tion 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 26, 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.

Note 26

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. 1919, 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. Roxman 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 864, 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 813.

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, 1950, 247 P.2d 831, 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 813.

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 portion 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 50.

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.