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DATE: August 31, 1977

FROM: Ruth Malman
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RE: Effect of 1976 BLM Organic Act on Section Line Rights of Way Under the R.S. Section 2477 Highway Grant.

INTRODUCTION

The "Federal Land Policy and Management Act of 1976", Pub. L. 94-579, 90 Stat. 2493, Oct. 21, 1976 (herein also cited as the 1976 BLM Organic Act) provides a comprehensive plan for the management of the public lands of the United States. Title V of that Act contains provisions for obtaining rights of way "over, upon, under or through" the public lands and national forest system. Title VII of the Act recites the effect on existing rights and lists those statutes which were repealed upon the October 21, 1977 effective date of the Act. One such statute repealed in its entirety was R.S. §2477. That statute provided that: "the right of way for the construction of highways over public lands, not reserved for public uses, is granted". 43 U.S.C. §932, Act of July 26, 1866, ch. 262, § 8, 14 Stat. 253. The statute has been construed as an offer by the Federal government for a right of way for public highways across public lands, said offer being effective upon acceptance by the State or by public use. The case law interpreting the effect of this statute was concerned with such issues as:

a. What constitutes "acceptance" of the grant;
b. What effect acceptance had on mining homstead and other claims;
c. The date used in determining what constitutes "public lands, not reserved for public use" and;
d. The width of the public highway.

These issues will necessarily be important to the issue which is the subject of this memorandum. That issue is

whether or not the repeal of R.S. §2477, effective upon the enactment of the 1976 Federal Land Policy and Management Act, has any effect upon the rights granted and accepted before the repeal. Title VII of the 1976 Act provides that: "Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act". Sec. 701(a), Title VII, 90 Stat. 2793. Moreover, Section 509(a) of the 1976 Act states that "nothing in this title shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted. However, with the consent of the holder thereof, the Secretary concerned may cancel such a right-of-way or right-of-use and in its stead issue a right-of-way pursuant to the provisions of this title." [emphasis added.] The main issue of this memorandum can therefore only be resolved through an examination of the character and extent of the rights which were granted and existed under R.S. § 2477 prior to its repeal in 1976.

I.

AN OVERVIEW OF THE NATURE OF THE OFFER AND THE ACCEPTANCE OF THE R.S. § 2477 HIGHWAY GRANT

A. Nature of the Grant

R.S. §2477 was an offer to dedicate any unreserved public lands for the construction of highways. The offer has been generally recognized as a present grant of an easement over public lands for highways. E.G. Wallowa County v. Wade, 72 P. 793 (Ore. 1903). It is also generally held that the grant becomes effective upon the date of acceptance. That a grant does not become effective until accepted by the grantee was said to be "almost elementary" by the Court in Ramstad v. Carr, 154 N.W. 195 (N.D. 1915). Similarly, the Court in Lovelace v. Hightower, 168 P.2d 864 (N.M. 1946), recognized that an offer to dedicate land must be accepted to become effective. Before looking at what

constitutes acceptance and the effect of such acceptance on the grant, it is important to inquire into the nature of the grant itself. This will be the scope of the following section.

1. R.S. § 2477 WAS A PRESENT, ABSOLUTE GRANT OF A RIGHT-OF-WAY OVER THE PUBLIC LANDS.

In reviewing plaintiff's claim for damages for the appropriation of his property lying along section lines for use as a public highway, the Court in Wells v. Pennington County, 48 N.W. 305 (S.D. 1891) construed the R.S. § 2477 grant as follows:

> Its words . . . import an immediate transfer of interests, not a promise of a transfer in the future . . . The object of the grant was to enable the citizens and residents of the states and territories where public land belonging to the United States were situated to build and construct such highways across the public domain as the exigencies of their localities might require, without making themselves liable as trespassers. And when the location of the highway and roads was made by competent authority or by public use, the dedication took effect by relation as of the date of the Act; the Act having the same operation upon the lines of the road as if specifically described in it.

48 N.W. at 306. [emphasis added.] The Court further recited the opinion of Justice Field in his decision in Railroad Co. v. Baldwin, 103 U.S. 426 (1880) which concerned a right-of-way grant to the railroad company in a similar type of congressional grant R.S. §2477. Quoting Justice Field, the Court in Wells stated:

> The language of the Act here, and of nearly all congressional acts granting lands, is in terms of a grant in praesenti. The Act is a present grant. 'There is hereby granted' are the

words used, and they import an immediate transfer of interests, so that, when a route is definitely fixed, the title attached from the date of the Act. The grant of the right-of-way . . . is a present absolute grant, subject to no conditions except those necessarily implied, -- such as that the road shall be constructed and used for the purposes designated. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby . . . we see no reason, therefore, for not giving to the words of present grant, with respect to the right-of-way, the same construction . . . [as] to the grant of lands . . . (emphasis added.)

The Court then addressed the contention that the grant was not an absolute grant but only a general offer effective when accepted under the theory that a grant "like any other contract" must have a grantor and grantee and an offer not accepted is not a contract. In the words of the Court, it was held that:

> It may, however, be admitted that the right acquired by the territory or the public was necessarily imperfect until the land accepted for highways was surveyed, and capable of identification; but when the land was surveyed, and the various section lines were designating it to be public highways as far as practicable, the right of the territory attached to them for that purpose, and took effect as of the date of the territorial law . . . The Act of Congress giving the right-of-way for the construction of highways over public lands, and the territorial law declaring all such lines, as far as practicable, to be public highways, and designating such highways to be 66 feet

wide, are noticed to all persons filing on public lands subsequent to the passage of these laws that they take them subject to the right-of-way for highway purposes . (The territorial law located the highways upon all public lands upon the section lines, and this public grant or dedication was so accepted, and became valid as against the government, and therefore valid as against its subsequent grantee . . .

[48 N.W. at 307-308.] (emphasis added:)

It can thus be concluded that, according to this opinion of the South Dakota Supreme Court, the R.S. §2477 was an absolute, present grant effective upon acceptance, acceptance in that case being the territorial law declaring all section lines to be rights-of-way.

The courts have generally followed the opinion of the Wells Court. Thus, the Nebraska Court in Streeter v. Stalnaker 85 N.W. 47 (Neb. 1901), stated that R.S. §2477 "was a standing offer of a free right-of-way over the public domain, and as soon as it was accepted in an appropriate manner by the agents of the public, or the public itself, the highway was established". 85 N.W. at 48. Accord, Tholl v. Koles, 70 P. 881 (Kan. 1902). See also, McRose v. Bottyer, 22 P. 393 (Cal. 1889). In Town of Rolling v. Emrich, 99 N.W. 464 (Wis. 1904), the Court said that R.S. § 2477 "is doubtless a present grant of a right-of-way over public lands, but it does not become effective until accepted by the public". 99 N.W. at 465. Accord, Hillsboro Nat. Bank v. Ackerman, 189 N.W. 647 (N.D. 1922). Moreover, the Court in Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), cert. den. 411 U.S. 917, concerned with the rights-of-way and special land-use permits for the trans-Alaska oil pipeline, stated that R.S. §2477 "acts as a present grant which takes effect as soon as it is accepted by the State". 479 F.2d at 882.

2. THE MEANING OF "PUBLIC LANDS NOT RESERVED FOR PUBLIC USE" UNDER R.S. §2477.

The above-cited cases stand for the principle that the highway grant was a present, absolute grant for rights-of-way across any public lands not reserved for public use which were owned by the United States at the time of the grant. (The effect of the grant being a "present" one is that upon acceptance, the acceptance will relate back and become effective from the date of the grant.) Faxon v. Lallie Civil Tp., 36 N.D. 634, 163, N.W. 531 (1917), citing, Township v. Skauge, 6 N.D. 388, 71 N.W. 544; Wells v. Pennington Township, to S.D. 6, 48 N.W. 305, 39 Am. St. Rep. 758; Railway Co. v. United States, 92 U.S. 733, 23 L.Ed. 634; Railway Co. v. Baldwin, 103 U.S. 426, 26 L.Ed. 578; Wright v. Roseberry, 121 U.S. 506, 7 S.Ct. 985, 30 L.Ed. 1042; French v. Fyan, 93 U.S. 169, 23 L.Ed. 8812; Northern Pac. Ry, Co. v. Barlow, 26 N.D. 159, 143 N.W. 903. That is to say that if the lands granted belonged to the United States at the time of the grant in 1866, or upon subsequent acquisition of lands by the United States, the 1866 Highway Act was made to apply to those lands. The acceptance, as long as the lands remain unreserved public lands at the date of acceptance, would relate back to the date of the grant. This is important in determining whether or not lands subject to a right-of-way were "public lands not reserved for public use" at the time of the grant and the acceptance of the grant. "The Federal Government's Section 932-type [R.S. §2477] offer to dedicate unreserved lands for highway purposes clearly does not become ripe until the government assumes ownership." Hayes v. Government of Virgin Islands, 392 F.Supp. 48 (D.Ct. Virgin Islands 1975). In that case the Court concluded that R.S. §2477 was made applicable to the Virgin Islands with the enactment of R.S. §1891, 48 U.S.C. §1490, enacted in 1875. R.S. §1891, repealed in 1933, related to the application of the United States Constitution and laws to all organized territories and to every territory subsequently organized. The c...

reasoned that the repeal of that statute before the acquisition of the Virgin Islands by the United States in 1935 did not affect the applicability of the laws of the United States, including R.S. §2477, to the territory, having found no intention by the Congress to indicate a contrary conclusion. Rather, the Court found that the objective of the repeal statute was a wholesale repeal of many statutes determined to be "obsolete" and noted that newer laws had replaced the statutes at least for the territories of Alaska and Hawaii. Moreover, Section 3 of the 1933 repeal statute provided that no rights or liabilities already existing before the appeal would be affected. Thus, upon acquisition of the lands by the United States in 1935, the highway grant was "ripe" for acceptance. The Court in United States v. Rogge, 10 Ak. 130 (D.Ct., 4th Div. Fairbanks, 1931), reached a similar result in finding that R. S. § 1981, effective when Alaska became an organized territory in 1884, allowed for the operation of R. S. §2477 to be ripe for acceptance in Alaska. Therefore, upon acquisition for public lands by the United States, the highway grant could be accepted as to those lands. However, the acceptance could only be effective, by the terms of the grant, as to "public lands, not reserved for public use".

In Faxon v. Lallie Civil Tp., 36 N.D. 634, 163, N. W. 531 (1917), writ of error dism. 250 U.S. 834 (1919), the plaintiff contended that the R. S. §2477 grant could not be accepted as to lands which have been part of an Indian reservation, reasoning that once the reservation was set aside for the Indians, the land was no longer public lands and the prior grant was therefore forever repealed by the congressional action. The Court disagreed. It held that the highway rights were vested rights where, prior to the establishment of the Indian reservation, the Highway Act had been in effect

for eight years and had been accepted by the territory for three years through enactment of a law declaring all section lines to be public highways. Act of Jan. 12, 1871, ch. 33 of Session Laws of Territory of Dakota of 1870-71. The Court stated that:

> It is also clear that the right granted to the State was not in the nature of a license, revocable at the pleasure of the grantor, but that highways once established over the public domain under and by virtue of the act became vested in the public, who had an absolute right to the use thereof which could not be revoked by the general government and whoever thereafter took the title from the general government took it burdened with the highways so established.

[163 N.W. at 533.] The Court believed that even though an Indian reservation was created that there was no intention by Congress in establishing the reservation to divest the public of highways rights already accepted. In 1915, the township had declared, as highways, four miles of section lines over these lands which were once reserved as an Indian reservation. In holding that the township need not compensate the owners for the 33-foot strip on either side of the section line, the Court reasoned that, since the highway rights were vested rights upon the opening of the reservation for settlement in 1904, the rights for the highways reverted to the original grantee, that being the State. The Court was of the opinion that if the public lands, after acceptance of the statutory grant, are then reserved for public use, once the use is abandoned the rights in the lands revert back to the grantee just as the right-of-way of a railroad company would revert to the property owners or the State if the railroad use discontinued. Thus, while the lands had not been surveyed until after the reservation was established, the Court held that the right of the Territory attached as soon as the section lines were identified as far as practicable for public highways and took effect as of the date of the territorial law. Therefore ~~that~~ the plaintiff had no rights in the dedicated land upon his settlement of the lands in 1904.

The Court in Faxon v. Lallie, supra, held that the grant to the State under the Highway Act had vested prior to the establishment of the Indian reservation, so that subsequent grantees of the land could not claim the lands were not subject to the Act. The Court stated that the determinative time of deciding whether the lands are "public lands" is whether or not at the time of the grant and the subsequent acceptance, the lands belonged to the United States.) The Court in Bird Bear v. McLean Cty., 513 F.2d 190 (8th Cir. 1975) agreed with the Faxon holding. In Bird Bear, the Indian trust-patentees brought an action for trespass and unlawful diminishment of their allotment. The issue was whether the Highway Act of 1866, 43 U.S.C. §932 (1970) granted an easement for section line roads over their property even though that property was held pursuant to a trust patent issued by the United States. The two roads in question were constructed along section lines in accordance with the N.D. Code, [C.C. §24-07-03 (1970), derived from ch. 330 of SL of Territory of the Dakota, 1870-71], said statute being an acceptance of the right-of-way grant of 43 U.S.C. §932. The Court in Bird Bear distinguished Bennett Cty., S.D. v. United States, 394 F.2d (8th Cir. 1968). In that case, it was held that the county could not maintain a road within the Pine Ridge Reservation without permission from the United States government for condemnation proceedings because the Treaty of 1851 was a recognition of Indian title. Thus, even though the Treaty had not spoken of the "reservation", land was in fact reserved for the use of the tribes and so these lands were not public lands upon the passage of the 1866 Highway Act. In Bird Bear, the Court held that the allotment of the Indian patentees was not part of the Reservation until 1880, so that in 1866, when the grant of the right-of-way initially attached, the land was still public land. Upon acceptance of the grant in 1871 by the Territory of Dakota, the grant became effective

as to these lands. In concluding that a right-of-way of individually-allotted land was not inconsistent with the congressional Indian policy, the Court affirmed the decision that the land allotted was subject to the prior statutory grant of right-of-ways to the State.

Other cases have dealt with public lands being subject to individual claims, so as to effectively withdraw the public lands from the terms of the R.S. § 2477 grant. If land was patented to an individual by the United States before acceptance of the grant, the public would have no right to assert over such lands. Ball v. Stephens, 158 P.2d 207 (Calif. 1945). Thus, if lands have been reserved, withdrawn, or subject to individual entry or patent prior to acceptance of the highway grant, the grant is ineffective as to these lands because the grant is only for "public lands not reserved for public uses." However, if these lands again become part of the unreserved public domain lands, according to Faxon, supra, they were again subject to acceptance as public lands under the R.S. § 2477 grant.

3. Summary

The R.S. § 2477 grant was a present transfer of interest in the public lands of the United States for highway purposes. Wells v. Pennington County, 2 S. D. 1, 48 N. W. 305 (1891); Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), cert. den. 411 U.S. 917 (1973). Upon acceptance, a highway right-of-way was established. Streeter v. Stalnaker, 61 Neb. 205, 85 N.W. 47 (1901). The grant was ripe for acceptance at any time the government acquired ownership of the lands. Hayes v. Government of Virgin Islands, 392 F. Supp. 48 (D.Ct. Virgin Is. 1975). As long as the grant was accepted while the lands were public lands, the acceptance was effective against the federal government

and its subsequent grantees. Ball v. Stephens, 158 P.2d 207 (Calif. 1945). Moreover, the rights of the public, upon acceptance, became vested rights. Faxon v. Lallie Civil Tp., 26 N.D. 634, 163 N.W. 531 (1970). In light of these foregoing premises, it can then be concluded that the repeal of R.S. §2477 can have no effect as to properly accepted right-of-ways for highway purposes. Since the grant was a present transfer, it is necessary to inquire if the lands were unreserved public lands as of the date of acceptance of the grant. In Alaska, the grant has been held to be ripe for acceptance in 1884 when Alaska became an organized territory, the United States having acquired the territory in 1867. United States v. Rogge, 10 Ak. 130 (D.Ct. Ak. 1941). If it can be shown that the lands were public lands not reserved for public uses and were therefore ripe for acceptance, the grant will vest the highway rights in the public upon appropriate acceptance.

B. Nature of Acceptance.

1. ACCEPTANCE OF THE FEDERAL GRANT UNDER R.S. § 2477 CONSISTS OF ACTION BY THE PUBLIC OR THE PUBLIC AUTHORITIES SUFFICIENT TO MANIFEST THE INTENTION TO ACCEPT.

It has been held that R.S. §2477 created a standing offer of a free right-of-way over public lands and that as soon as it is accepted in an appropriate manner by the agents of the public or by the public itself, a highway is then established. Streeter v. Stalnaker, 61 Neb. 205, 85 N.W. 47 (1901). In that case, the Supreme Court of Nebraska held that there was sufficient evidence of a general and long continuous user as well as proof that the public authorities had exercised control over the road to establish an acceptance of the dedication of a public highway across plaintiff's lands. The claim was not based on adverse possession, but rather that the road became a public highway by dedication and acceptance

by the public use. Since the public authorities had not followed the "appropriate manner" in establishing a road under the general road laws, the Court relied more heavily on the evidence establishing continuous use by the public of the road since 1877. This rather concise opinion points out the various problems in proving that an acceptance of the offer of R.S. §2477 has been made. (Acceptance made "in the appropriate manner" by public authorities means according to state or local laws and regulations.) Thus, if the acceptance is to be so made, there must be inquiry into the laws of the State governing the establishment of roads within the state. For instance, the Board of County Commissioners is often given the jurisdiction over the roads within its jurisdiction and, to constitute a valid acceptance, the Board must have acted within its regulations as well as any applicable state law. Acceptance can also be found where the public has claimed to accept the federal grant. Proof of such acceptance is shown by evidence of continued use of the land as a "public highway". The cases diverge as to how long the use must continue in order to claim the right-of-way. Some courts have relied on the easement by prescription time period, while others, like Streeter, recognize that the use need only be enough to show the intent to accept, and need not be for a period of time sufficient to ripen the use into a right by prescription, there being no adverse claim but rather a claim to unreserved public land dedicated to the public by the federal government.

Under the laws of the Territory of Dakota, enforced since 1884, public highways could be established in one of three ways:

(1) Section lines, whether traveled or not, were already highways by virtue of legislative declaration and might be traveled and subjected to such use as far as practicab Sec. 1, ch. 29, Pol. Code. 1877;

(2) Roads, other than on section or quarter lines, established by the Board of County Commissioners on the petition of twelve freeholders; and

(3) by user for 20 years.

Koloen v. Pilot Mound Tp., 33 N.D. 529, 157 N.W. 672 (1916). In that case, the highway ran across the plaintiff's quarter-section of land. The Court first noted that the 1871 legislative enactment involving highways established on section lines was an acceptance by the territory of the federal grant and had remained in force in the territory and state ever since. It was the public act by the public authorities necessary to constitute acceptance. Here, however, the Court was not concerned with a section line highway. Therefore, the Court looked at whether there had been appropriate action by the Board or sufficient user to constitute acceptance. It was found that the county officials never exercised control over the alleged highways and that the highways surveyed by the county had been abandoned. Moreover, the public use had been obstructed so that the use could not be found to be continuous for the statutory 20 years. No highway was then found to be established in accordance with the State law.

As discussed previously, the Court in Faxon v. Lallie Civil Tp., supra, also held that the section line legislation of the Territory of Dakota constituted acceptance of the R.S. §2477 grant. There the court found that the 1881 acceptance was sufficient to deny plaintiff's claims for compensation on lands which had once been part of an Indian reservation. The Court held that, when the public use was abandoned, the right to maintain a highway on section lines revested in the public. While the legislative enactment of the Act of 1871 declaring that "all section lines in this territory shall be and are hereby declared public highways as far as practicable" was the necessary action to manifest the intention to accept the grant, a survey was necessary to perfect the right-of-way into a highway. However, the court found that

the effective date of the survey would relate back to the date of the original acceptance of the right-of-way.

In the case of Walcott Tp. v. Skauge, 6 N.D. 382, 71 N.W. 544 (1894), cited with approval in Faxon, supra, the township brought suit to enjoin the defendant from obstructing an alleged highway. The highway was claimed as such by virtue of continuous user for 20 years. The defendant claimed that the lands were part of the public domain and could not therefore be subject to adverse user which is ineffective as against the government. The Court pointed out that highways by user are based either upon legal establishment or dedication, the continuous user for a period of 20 years being regarded only as conclusive evidence of either an original legal establishment or of a dedication. The other major argument of the defendant concerned the fact that the site in issue was upon an even-numbered section within the limits of the grant of odd-numbered sections to the Northern Pacific Railroad Company made in 1864. The Court held that if the Railroad Grant removed the odd-numbered sections from the operation of the highway grant, the highway grant could still be effective as to the even-numbered sections. A highway by prescription could certainly be established over the privately-owned railroad lands and thus the highway by prescription could run over the entire length of the road.

In the subsequent North Dakota case of Hillsboro National Bank v. Ackerman, 48 N.D. 1179, 189 N.W. 657 (1922), the Court reclaimed the principles stated above. It was further noted by the court that the statutory right of establishing a highway by prescription had been repealed in 1897, and that since that time a highway by prescription could only be established by virtue of the common law. Later cases

then apply the common law to conclusively find that a highway grant had been accepted by the public. The court in Hillsboro National Bank further observed that section lines are public roads in accordance with the North Dakota statutes, and they may be open for use upon compliance with the relevant laws relating thereto by persons having the jurisdiction to do so. This could be done "without any survey being had", except where necessary by variations caused by natural obstacles." 189 N.W. at 659.

The plaintiff in Ball v. Stephens, 158 P.2d 207 (Calif. 1945), sought declaration of the existence of the public road across defendant's land which was necessary to the plaintiff for access to his mine. The Court first addressed the ways in which highways might be established under the federal highway grant in R.S. §2477. The Court noted that Congress had not specified or limited the methods to be followed and that it was then only necessary that a highway be established in accordance with the state in which it is located. The method of selection of a route and establishment as a public highway by public authorities was not involved in the case. The alternative method of public use was found to be the method whereby a public road had been established over the defendant's land. The Court stated that "dedication could also be effected without action by the state or county, by the laying out of a road and its use by the public sufficient and long to constitute an acceptance by the public of an offer of dedication. Evidence of user was properly received for the purpose of determining whether there had been sufficient use to prove acceptance . . . " 158 P.2d 208. The Court held that the defendant took its patent in 1928 subject to the right-of-way if the evidence substantiated that the road had been used by the public before patent had issued. The evidence noted by the Court included use of the road over the mountainous terrain as a trail, then for horse-drawn vehicles and later as one suitable for automobiles and

trucks. It was found that in about 1905 mining claims were located in the area and oil companies had moved in. The evidence, however, was unclear as to whether the road used by these people went as far down as the defendant's present land. But the Court was convinced that from 1910 the road was used for travel and that by 1918, when another oil development was undertaken, automobiles were driven over the road. The court concluded that while the travel over the road prior to patent in 1928 was irregular due to the terrain, and that only a limited number of people had occasion to go that route, the use of the road by hunters, vacationers, miners, and oil operators was sufficient to constitute acceptance of a federal grant for public use. The Court then held that if the road existed before patent, it was immaterial whether the route was used by the public after that time so long as it had not been legally abandoned. The Court held that the act of the defendant in constructing a gate across the road could not divest the right which the public had acquired before patent. It should be noted that the case did not turn on the length of time of use, but rather stands for the proposition that the existence of the dedication is a conclusion of fact to be made in each case based on sufficiency of evidence; that time is only one element involved in such evidence.

The time element for dedication by public use was also discussed in Lovelace v. Hightower, 168 P.2d 864 (N.M. 1946). Defendant claimed that the plaintiff had to show that the road was used for the 10 year statute of limitations time as applied to ways established by prescription. The New Mexico court held that the 10-year time period is not a factor in establishing highways by dedication. Rather, acceptance of the federal offer

to dedicate public lands for highways could be shown by general use for a long enough period to constitute acceptance. Therefore, each state may determine whether dedication is founded upon a prescriptive time period or merely by a factual continued use sufficient according to the trier of fact to constitute acceptance. Thus, in Brown v. Jolley, 387 P.2d 278 (Colo. 1963), the court found that a highway over public lands had been established over the defendant's land by use of the public for the statutory 20-year period. The fact that the roads had been removed from the county road system did not destroy the right of the public to use the road by virtue of their adverse continuous use.

The cases heretofore cited stand for well accepted principles relating to the acceptance of the highway grant under R.S. §2477. The grant constitutes an offer by the federal government to dedicate unreserved lands for highway purposes, said offer becoming effective upon acceptance by the public. Ball v. Stephens, supra; Lovelace v. Hightower, supra. Whether such offer is accepted is an issue to be determined under state law. Ball v. Stephens, supra. Acceptance can be made either by some positive act on the part of the public authorities authorized to establish or maintain highways or by public use sufficient to constitute acceptance. Streeter v. Stalnaker, supra; Koloen v. Pilot Mount Tp., supra; Ball v. Stephens, supra. It has been held that a legislative enactment to the effect that all section lines are declared public highways is sufficient to constitute acceptance by the public authorities. Faxon v. Lallie Civil Tp., supra; Koloen v. Pilot Mound Tp.; Hillsboro National Bank v. Ackerman, 48 N.E. 1179, 189 N.W. 657 (1922). The sufficiency of use by the public to constitute a highway by dedication has been held to be a factual determination made on a case-by-case basis, e.g., Lovelace v. Hightower, supra; based on a statutory prescriptive time period, e.g., Brown v. Jolley, supra;

or by the prescriptive period based on the common law, e.g., Hillsboro National Bank v. Ackerman, supra. These general principles from other jurisdictions as to what constitutes acceptance of the federal highway grant have been followed in Alaska.

2. IN ALASKA, THERE MUST BE SOME "POSITIVE ACT" BY THE PUBLIC AUTHORITIES CLEARLY MANIFESTING AN INTENTION TO ACCEPT THE GRANT, OR PUBLIC USER UNDER CONDITIONS SUFFICIENT TO PROVE ACCEPTANCE OF THE GRANT.

Clark v. Taylor, 9 Ak. 298 (D.Ct. 4th Div. 1938), involved an action to restrain the employees of the Alaska Road Commission from completing a bridge and constructing approaches to connect to the old road on plaintiff's placer mining claim. The Alaska Road Commission claimed that it had a right to maintain a road and bridge across the placer mining claim by virtue of the act of May 14, 1906, 34 Stat. 119, 48 U.S.C.A. §322, which authorized construction and maintenance of wagon roads and pack trails between mining or industrial camps to further the mining industry. It also claimed, under R.S. §2477, a right-of-way for the construction of highways over public lands. However, the Court held that no such right existed in 1917 because the locators of the mining claim had been granted by the Congress the exclusive right of possession and enjoyment, and thus R.S. §2477 was ineffective as against the plaintiff. While a road could be maintained it could only be the road already established by public use. The court discussed acceptance by the public of the R.S. §2477 dedication by adverse user, citing Bishop v. Hawley, 33 Wyo. 271, 238 P.274, Marchand v. Town of Maple Grove, 48 Minn. 271, 51 N.W. 606, Montgomery v. Somers, 50 Or. 259, 90 P.274 as authority for acceptance of the R.S. §2477 dedication by public user. The Court stated

that since the original bridge had been used for 20 years by the public, under conditions creating a prescriptive right, the right became vested in the public. The court declined to decide whether the length of time required in Alaska for prescriptive rights-of-way is 20 years (as recognized by other courts in determining the creation of highways by adverse user) or 10 years (the local statute fixing the time for bringing an action for land). The remainder of the case dealt with the width of the right-of-way. Since the right-of-way was established by public user, the court held that the extent of the servitude is to be determined by the character and the extent of the user, and that the Commission had no right to extend the road beyond the width so established.

In Berger v. Ohlson, 911 Ak. 389 (D.Ct. 3rd Div. 1938), plaintiff alleged that the Alaska Railroad, through the defendant, had obstructed the public roadway leading to the City Dock. The railroad filed a demurrer, which was overruled, claiming that the railroad had been given the right-of-way to maintain a railroad over the road. The Court merely noted in this proceeding that the allegations of the plaintiff that the road existed before the railroad was established, must be taken as true and thus two mutual right-of-way easements existed. The court cited Hatch Bros. Cos. Co. v. Black, 25 Wyo. 109; 165 P. 578 as authority for the acceptance of the R.S. §2477 highway grant by the public without acceptance by public authorities, through continued use of the road under circumstances clearly indicating their intention to accept. The court held that the railroad, coming in after the highway had been established under the grant, took the right-of-way subject to the public use.

The court in United States v. Rogge, 10 Ak. 130 (D.Ct. 4th Div. 1941), discussed the right-of-way provisions of R.S. §2477 in great detail. The action was brought by the United States to establish its rights to

collect tolls on freight transported over the Richardson Highway pursuant to the regulations set out by the Secretary of the Interior. Defendant, as a ferry owner affected by the tolls, claimed that the highway had been used by the public from 1903 through 1906, before the government took charge of the maintenance of said highway, and that therefore, a right-of-way for a free highway was vested in the public under the grant. The government claimed that R.S. §2477 did not apply in the Territory of Alaska until 1912. R.S. §1891 provided that all the laws of the United States which were not general land laws but were locally applicable would be made applicable to the Territory of Alaska. The government claimed that since R.S. §1891 was not included in the 1900 Act, providing for various provisions for the territorial civil government, but was included in the 1912 Act, R.S. §1891 would not have applied to Alaska between 1900 and 1912. The court held that the 1900 Act did not purport to be a comprehensive codification of all the laws of Alaska and that the statute did not impliedly repeal R.S. §1891. The court concluded that the laws of the United States which were not locally inapplicable and were not general land laws were thus in effect in Alaska from 1903 and thereafter. The court then looked at whether R.S. §2477 was a general land law. It stated: "Clearly, a right-of-way is not the land itself, though it is classified as incorporeal hereditament. Section 2477 seems not to have been a general land law, but more of a law incident to the land laws." 10 Ak. at 149. The court found that owners of the mining claim and homesteaders had a right under R.S. §2477 for a right-of-way incident to their claims. The court stated:

> That Congress considered §2477, R.S.U.S. in effect is shown in the act approved May 14, 1898, wherein it mentioned that public highways now located should not be lost where railroads took rights-of-way under said act. Again, in the same act, it mentioned that the toll roads provided for in the act to be constructed by private individuals or corporations should not injuriously affect the public in its use of a road or trail in common use. If section 2477 was not in force, there was no possible way for there to have been public highways or roads in common use in Alaska at the time the act approved March 14, 1898 was enacted.

10 Ak. at 150. The court decided that R.S. §2477 was not a general land law because the right-of-way could be obtained without any public record and without procedures for filing applications and maps as required under the general land laws. The court further cited Nicholas v. Grassle, 83 Colo. 536, 267, P.196, and Leach v. Manhart, 1020 Colo. 129, 77 P.2d 652, as authority that R.S. §2477 was an express dedication of a highway and that acceptance was accomplished by use by those for whom it was necessary or convenient. The court upheld the defendant's contention that the right-of-way for a highway by public use between 1903 and 1906 was vested in the public but that the Congress was still free to impose toll regulations in the public interest.

Hamerly v. Denton, 359 P.2d 121 (Alaska 1961) involved an action to enjoin the obstruction of a road. The road crossed Hamerly's property and gave access beyond to Denton's homestead. Denton claimed that the road was a public highway. The court, in discussing R.S. §2477, 43 U.S.C.§ 932, stated:

> The operation of the statute in Alaska has been recognized. [Berger v. Ohlson, D.C.D. Ak., 1938, 9 Ak. 389, Clark v. Taylor, D.C.D. Ak. 1938, 9 Ak. 298, U.S. v. Rogge, D.C.D. Ak. 1941, 10 Ak. 130] The territorial district court and the highest courts of several states have construed the act as constituting a congressional grant of right-of-way for public highways across public lands. But before a highway may be created, there must be either some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention

> to accept a grant, or there must be public uses for such a period of time and under such conditions as to prove that the grant has been accepted. [See Berger v. Ohlson and Clark v. Taylor, supra; Kirk v. Schultz, 1941, 63 Idaho 278, 119 P.2d 266; Leach v. Manhart, 1938, 102 Colo. 128, 77 P.2d 652; Lovelace v. Hightower, 1946, 50 N.M. 50, 168 P.2d 864; Hatch Bros. Co. v. Black, 1917, 25 Wyo. 107, 165 P.518; State ex rel. Dansie v. Nolan, 1920, 58 Mont. 167, 191 P.150; Montgomery v. Somers, 1907, 50 Cr. 259, 90 P.674]. 359 P.2d at 123.

Since there was no claim of establishment of the highway by public authority, the court held that the defendant then had the burden of proving that the road was "over public lands" and that the character of the use was sufficient to constitute acceptance. The court stated that "public lands" did not include lands which are subject to valid and existing homestead claims. During the period when the land in question was not so subjected to the homesteaders' claims, the court found that its use was infrequent, sporadic, and not necessary or convenient for public use. The court concluded that no public highway existed, for there had been no showing of dedication by the homesteaders to the public, nor an acceptance by public user.

The width of a proposed highway along the existing Farmers' Loop Road near Fairbanks was in issue in State v. Fowler, 1 A. L. J. No. 4, 7, Superior Ct., 4th dist, Civil Action No. 61-320, Sept. 26, 1962. The opinion by the Honorable Judge (now Justice) Rabinowitz cited Hamerly, supra for the proposition that the State had the burden of proving that the Farmers Loop Road was located over the public lands and that the character of the use constituted acceptance by the public under the 43 U.S.C. §932 grant. The extent of the user was held to be the applicable measure by which to determine the allowable width the State could claim rather than reliance on local laws and customs applicable to highways established by the public authorities.

STATE Exhibit

Mercer v. Yukon Construction Co., 420 P.2d 323 (Ak. 1966), was primarily concerned with the Access Roads Act, AS 19.30.010-19.30.100, by which the State could contract for low standard, low-cost roads in areas rich in natural resources in order to promote development. The appellant contended that his grazing permit precluded a right-of-way road for public access. The court disagreed, holding that the lands under lease were public lands and that the State's contract with the Yukon Construction Co. to build a road under the Access Roads Act was a valid acceptance of the grant under 43 U.S.C. §932. Hamerly was held to be inapplicable here because in that case the homesteaders' rights would ripen into title, whereas the plaintiff in Mercer had only leasing rights. Moreover, Section 4(f) of the appellant's grazing lease stated that "nothing herein shall restrict the acquisitio granting, or use of permits or rights-ofways under applicable law." The grazing rights were thus subordinated to the right-of-way.

The section line legislation in Alaska, under the provisions of AS 19.10.010, came under attack in Gibbs v. Campbell, No. 72-462, Superior Ct. 3d Jud. Dist., Jan. 8, 1973. The plaintiffs sought compensation for the State's taking of property through the construction of a pioneer access road along the section line of plaintiff's property pursuant to a petition of the local landowners. The State claimed it had title under color and claim of title for more than seven years in accordance with AS 09.25.050, that the action was barred because it had not been brought within 10 years after the cause of action accrued, and that the right for a 33-foot easement over plaintiff's property became vested in the State under 19.10.010. Plaintiff urged that the language of AS 19.10.010 did not meet the test of "clearly manifesting an intention to accept a grant" as required by the Alaska Supreme Court in Hamerly, supra. The court found

three separate reasons, "any of which is sufficient", to defeat plaintiff's claims. First, the court held that the plaintiff took his patent subject to the right of the State to construct a roadway along the section lines. The court, relying on the 1969 Opinion of the Attorney General No. 7 (December 18, 1969), held that the Territory of Alaska had accepted the R.S. §2477 highway grant by enactment of Ch. 19, S.L.A. 1923, and that such acceptance was being continually effective from 1923 until 1949 when the acceptance was repealed. The court then found that the federal grant was again accepted by Ch. 35, SLA 1953. Since the plaintiff had not entered the property until 1955, and only received patent in 1961, he took his land subject to the right of the State to construct a public highway along the section line without compensation therefor. The court also stated that the plaintiff was estopped to claim compensation because of his involvement in trying to get the road constructed, and further concluded that the action was barred by the statute of limitations.

While Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), cert. den., 411 U.S. 917, involved many issues relating to the granting of right-of-ways and special land use permits for the Trans-Alaska oil pipeline, those will not be discussed herein except insofar as the opinion was concerned with the operation of the highway grant under 43 U.S.C. §932. The environmental groups challenged the Secretary's authority to issue a right-of-way to the State for a State highway. Alyeska Pipeline Service Company was to build the highway primarily for pipeline purposes but ultimately for use by the public. The Honorable Judge J. Skelly Wright held that the State only needed to manifest its intention to accept the highway grant by some positive act. Such intention had been so manifested by the passage of AS 19.40.010(a) declaring a need for a public highway from the Yukon River to the Arctic Ocean. 43 U.S.C. §932 was found to act "as a present grant

which takes affect as soon as it is accepted by the State". 479 F.2d at 882. In the footnote to this holding, the court recognized that, since R. S. § 2477 acts as a present grant, it is not generally necessary for the builder of the highway to apply for a right-of-way; however, the lands involved here were lands reserved for public use. Thus the section was not applicable and it was necessary for the State to request revocation or modification of the reservation in order to build the highway. The court concluded that an intention to build is all that is needed to accept the highway grant. Since the proposed highway was found to be needed by the public, according to State officials, the issuance of the right-of-way was properly within the authority of the Secretary, necessary only because of the prior public reservation of the lands in question.

The most recent Alaska Court opinion on the applicability of 43 U.S.C. §932 is Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Ak. 1975). In that action, the appellant contested the right and power of the borough to construct a road on homesteaded property without any compensation to her. Appellant received a "notice of allowance" from the Department of Interior in 1958 to the property, and in 1961, received patent. The northern boundary of her property was the section line. Subsequent to 1961, the borough had constructed a junior high school adjoining the land on the northern boundary. Redoubt Drive, which ran along the section line prior to the school's construction, terminated one-quarter mile east of the boundary line between the boundary and the school site. That road was extended by the City of Soldotna in 1967 to provide access to the school. The borough subsequently extended Redoubt Drive by constructing a "pad" which rested partly on Girves' property, and as a result of which she

brought this trespass action. The court held that the Kenai Peninsula Borough implicitly possessed the power to establish access to the school site through its powers to "establish, maintain and operate schools". Moreover, although no express reservation of the easement was included in Girves' patent, the court held that this did not preclude the borough from showing that a right-of-way had been established before Girves entered onto the property. The court accepted the borough's argument that Ch. 35, SLA 1953 constituted an acceptance of the 43 U.S.C. §932 highway grant, the enactment of Ch. 35 being the "positive act" needed under Hamerly v. Denton, 359 P.2d 121 (Ak. 1961) to manifest an intention to accept. The 1953 dedication of section lines as public highways was said to have been an implied acceptance of the highway grant, for the legislature could not dedicate something to which it had no right.

These Alaska cases reiterate the general legal principles concerning acceptance of R.S. §2477, the federal highway grant. The public may accept the grant by continued use, although it is not clear from the cases whether a specific time period of use be proved, or whether mere use manifesting an intention to accept is sufficient. Compare Clark v. Taylor, 9 Ak. 298 (D.C. D. Alas. 1938) and United States v. Rogge, 10 Ak. 130 (D.C.D. Alas. 1941). The State may accept the grant through legislation, which would constitute the necessary "positive act" indicating the intention to accept the grant. It has been held that the State accepted the grant through the legislation concerning access roads, Mercer v. Yukon Construction Co., 420 P.2d 323 (Ak. 1966), and with the enactment of Ch. 19 SLA 1923 and Ch. 35 SLA 1953 concerning highways along section lines, Gibbs v. Campbell, No. 72-462, Superior Court, Third Judicial District, January 8, 1973 and Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Ak. 1975).

3. SUMMARY

R.S. §2477 was a dedication by the United States of unreserved public lands for the establishment of highways. A showing of acceptance of the highway grant is all that is necessary in order to establish a highway under the grant. The acceptance can be shown by legislative acts or by continued public user. Once there has been an acceptance, the dedication is affective as of the date of acceptance. Koloen v. Pilot Mound Township, 33 N.D. 529, 157 N.W. 672 (1916), Lovelace v. Hightower, 168 P.2d 864 (N.M. 1946), Hamerly v. Denton, 359 P.2d 121 (Ak. 1961). This is true even if no survey has as yet been made, for the right takes effect on the date of acceptance. Faxon v. Lallie Civil Tp., N.D. 634, 163 N.W. 531 (1917). If acceptance of the grant is made before patent, the owner takes the land subject to the right-of-way. Ball v. Stephens, 158 P.2d, 207 (Ca. 1945). The width and extent of the right-of-way is determined according to State law. State v. Crawford, 441 P.2d 586 (Ariz. App. 1968). Thus when acceptance is made by public use, the easement is no greater than that which was reasonably necessary for the public use. Clark v. Taylor, 9 Ak. 298 (D.C.D. Alas. 1938), State v. Fowler, 1 ALJ No. 4, 7 Superior Ct. 4th Jud. Dis., C.A. No. 61320, September 26, 1962. If the right-of-way was established by the legislature, the applicable laws would apply in determining the extent of the right-of-way. State v. Crawford, supra. Moreover, upon acceptance, the rights of the public become vested rights for use of the designated public lands under the grant for highway purposes. Faxton v. Lallie Civil Tp., supra.

II

THE EFFECT OF THE REPEAL OF THE R.S. §2477

R.S. §2477 was a present, absolute grant of right-of-way for construction of highways over public lands not reserved for public uses. Wells v. Pennington County, 2 S.D. 1 48 N.W. 305 (1891); Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), cert den. 411 U.S. 917 (1973); 1976 U.S.C.C.A.N. 6175, 6204. The grant became effective upon acceptance as long as the acceptance related to lands which were public lands of the United States and thus subject to acceptance. Faxon v. Lallie Civil Tp., 36 N. D. 634, 163 N.W. 531 (1917); Bird Bear v. McLean County, 513 F.2d 190 (8th Cir. 1975). Acceptance of the grant could be evidenced by some positive act on the part of the appropriate public officials. The declaration by the legislature that all section lines are public highways has been held to fulfill the requirement that public officials must demonstrate an intention to accept the highway grant. Wells, supra; Cirves v. Kenai Peninsula Borough, 536 P.2d 1221 (Ak. 1975). Acceptance could also be made by public use, the character and extent of which could prove that the grant is accepted. Hamerly v. Denton, 359 P.2d 121 (Ak. 1961).

According to the 1976 Federal Land Policy and Management Act, all rights-of-way granted under statutes superceded or repealed by the provisions of the Act are protected. 1976 Federal Land Policy and Management Act, Pub. L. 94-579, 90 Stat. 2793, Oct. 21, 1976; 1976 U.S.C.C.A.N. 6175, 6197. An acceptance by the public authorities, or by the public, of the highway grant under R.S. §2477 should therefore be protected as an existing right-of-way for highway purposes, and would be unaffected by the repeal. This is in accordance with the general principle that the dedication of land for public use can be withdrawn prior to acceptance, or may be rejected by revocation, or may be abandoned, by the grantee. See 23 Am. Jur. 2d Dedication, cited in 1969 Op. of the Attorney General, No. 7 (Alaska,

Dec. 18, 1969). Thus, after a proper acceptance of the offer, the withdrawal of the grant is immaterial.

In Alaska, the legislature accepted the R.S. §2477 grant first in 1923 and again in 1953. In 1923, the territorial government enacted ch. 19 SLA 1923 which read as follows:

> Section 1. A tract of four rods wide between each section of land in the Territory of Alaska is hereby dedicated for use 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 strip shall inure to the owner of the tract of which it formed a part of the original survey. Approved April 6, 1923.

Therefore, all lands acquired from either the United States or the Territory after April 6, 1923, the effective date of the statute, was burdened with a 66-foot (one rod equals 16 1/2 feet) section line right-of-way. The law was codified in the 1933 Compiled Laws of Alaska, Section 1721. When the territorial laws were again compiled in 1949, the table of statutes indicated that Section 1721 was "invalid". No reason has been found for this apparent misconception. It has ready been seen that an organized territory could accept the highway grant. United States v. Rogge, supra; Hayes v. Government of Virgin Is., 392 F.Supp. 48 (D.Ct. V.I. 1975). However, the declaration of "invalidity" [seems] to have worked a repeal of the statute and therefore lands acquired on or after January 18, 1949 were not burdened with the highway easement until a reacceptance was made. It should be noted, however, that the repeal of the statute is not a repeal of the rights-of-way and therefore all land acquired in Alaska between April 6, 1923 and January 18, 1949 is subject to a territorial 66-foot section line right-of-way for highway purposes.

In 1951, the Territory of Alaska enacted the following provision in chapter 123, SLA 1951:

> Section 1. A tract 100 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 . . . Approved March 23, 1951.

Thus the legislature limited the acceptance of lands owned by the territory. Thus would appear to bolster the argument that the 1949 declaration of invalidity of the 1923 statute was truly a repeal of the section line right-of-way acceptance across public lands of the United States. In 1953, the statute was amended to include "a tract four rods wide between all other sections in the territory". Ch. 35 SLA 1953. The 1953 statute is currently codified as AS 19.10.010. Thus, since 1953, land owned by either the Territory or the United States government is subject to this section line easement. The 1953 statute, effective continuously since March 21, 1953, constitutes the acceptance of the highway offer to dedicate public land for highway purposes which is necessary to complete the grant. The repeal of the grant by the 1976 BLM Organic Act would therefore have no effect on lands acquired since 1953; that is, lands would be burdened with the appropriate easement as long as the statute remains unrepealed in Alaska.

The history of acceptance of the highway grant in Alaska has necessarily presented many questions as to what lands are burdened by the section line the easement. These questions, however, may be answered through an analysis of the nature of the grant and acceptance as reviewed in the first section of this memorandum. It should initially be remembered that the repealing statute in the 1976 BLM Act provides that all existing rights of way are to be preserved. Federal Land Policy and Management Act, 1976, Title VII, Sec. 701(a), 90 Stat. 2793. In determining that there is an existing right of way over every section line in the State of Alaska, it need only be shown that the land was public land of

the United States [or land owned or acquired by the territory or state] at the time of the acceptance of the grant; specifically, that the land was public land between April 6, 1923 and January 17, 1949 or since March 21, 1953. If a valid entry under the homestead laws was not made, or patent did not issue between January 18, 1949 and March 20, 1953, the land would be forever subject to the right-of-way easement unless the highway is subsequently vacated by competent authority. This is true even if the section lines had not been surveyed, for once the acceptance has been made, the right attachs as of that date and subsequent survey will only serve to protect the right. Wells v. Pennington County, supra. Thus, in the 1969 Opinion of the Attorney General, No. 7, Dec. 18, 1969, Mr. Norman states at p. 6 that:

> Like the standing federal offer, the Alaska statutes are continuous in their operation, and they apply to "each" section of land in the state as it becomes eligible for the section line dedication. Public lands which come open through cancellation of an existing withdrawal, reservation, or entry, and subsequently acquired by the territory (or state), are all subject to the right-of-way.

As long as AS 19.10.010 is law in the State of Alaska, this statement of the law should hold true regardless of the fact that the federal offer has been withdrawn. Again, this is true because the offer has been accepted as to all of the section lines of the State as they become eligible for dedication, and an offer once accepted is not subject to withdrawal. Rather, the section line easement falls into the category of the "right-of-way heretofore granted" under Section 509 of the BLM Organic Act and is thus unaffected by that Act.

In conclusion, the repeal of R.S. §2477 should have no effect on those rights of way for highway purposes which were accepted prior to the repeal. The acceptance can be proved on a case-by-case basis if the acceptance is by public use. The territory and state authorities have accepted the grant as to all section lines in the State through the enactment of Ch. 19, SLA 1923 and Ch. 35, SLA 1953. Such declarations are all that is needed to constitute the "positive act" necessary to show the intention to accept as required in Hamerly. Upon survey, the section line highway may be established and the effective date of the right-of-way will be the date of the legislative acceptance. Thus, whether or not land is burdened with a highway easement will depend on the status of the land when the grant was accepted. That the grant is no longer operative has no affect on the prior acceptance or on the status of the land when accepted.