highway was located 'over public lands,' and (2) that the character of its use was such as to constitute acceptance by the public of the statutory grant." Hamerly, 359 P.2d at 123.

[29] Alaska law, consistent with Alaska's circumstances, does not place a burdensome requirement on RS 2477 claimants regarding the nature of the "highway," whether established by dedication or public use. It broadly defines "highway" to include a "road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof." A.S. 19.45.001(9) (1988); cf. 48 U.S.C. § 321d (repealed 1959) (similar definition). It is necessary to establish that the road traverses public land because an RS 2477 right of way may be created only while the "surrounding land [retains] its public character." Adams v. United States, 3 F.3d 1254, 1993 U.S. App.

[30] If the conditions were such that the lands were not public lands - having been taken up under homestead applications - then the congressional grant was not in effect. Public use of the road would be of no avail since there would be at that time no offer which the public could accept. The fact that the entries were later relinquished or cancelled would not change the conditions.

[31] Hamerly, 359 P.2d at 124; see also Dillingham, 705 P.2d at 414. Valid pre-existing claims upon the land traversed by an alleged right of way trump any RS 2477 claim. As the Dillingham court put it, "it is clear that the public may not, pursuant to § 932 acquire a right of way over lands that have been validly entered." Dillingham, 705 P.2d at 414. Homesteading rights clearly are superior to later established RS 2477 claims. Territory validly withdrawn for other purposes also falls within the Dillingham rule. Thus, when Congress set aside land for the support of territorial schools, the sections it named from each township no longer were available public lands. Act of March 4, 1915, ch. 181, 1-2, 38 Stat. 1214, 48 U.S.C. § 353 (repealed by Pub. L. No. 85-508, 6(k), 73 Stat. 343 (1958)) (withdrawing all township sections numbered 16 and 36 for schools unless "settlement with a view to homestead entry had been made upon any part of the sections reserved hereby before the survey thereof in the field"). Cf. Mercer v. Yutan Constr. Co., 420 P.2d 323, 324, 325-26 (Alaska 1966) (grazing land "public" because grazing permit subordinate to public right of way).

[32] The Hamerly line of cases sets the standard for the other condition: whether a trail has been frequented by "public users for such a period of time and under such conditions as to prove" that a public right of way has come into existence. Hamerly, 359 P.2d at 123; see also Dillingham, 705 P.2d at 413-14; Alaska Land Title, 667 P.2d at 722; Girves, 536 P.2d at 1226. Continuous use is not a requirement. Cf. McGill v. Wahl, 839 P.2d 393, 397 (Alaska 1992) ("to establish a prescriptive easement a party must prove that (1) the use of the easement was continuous and uninterrupted"). Although the law of RS 2477 rights of way suggests that "infrequent and sporadic" use is insufficient, Hamerly, 359 P.2d at 125, and that "regular" and "common" use by the public is necessary, Kirk v. Schultz, 63 Idaho 278, 119 P.2d 266, 268 (Idaho 1941), and that travel across the route may not be "merely occasional," the test is what is "substantial" under the circumstances, Ball v. Stephens, 68 Cal. App. 2d 843, 158 P.2d 207, 210 (Cal. 1945). Courts must look to the circumstances as they existed at the time of establishment. In California, a court noted that "travel over [a claimed RS 2477 right of way] . . . was irregular but that was due to the nature of the country and to the fact that only a limited number of people had occasion to go