

December 2019

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Recommended Citation

John R. Smyth, *Rights of Way to Mining Claims across Public Lands in Wyoming*, 12 Wyo. L.J. 162 (1958)
Available at: <https://scholarship.law.uwyo.edu/wlj/vol12/iss2/18>

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The reason for allowing counties to purchase land sold at tax sales is to enable them to collect the taxes owed on the land.¹⁶ The county has no right to bid in at a tax sale unless no bid is given that covers the delinquent taxes. A Texas case,¹⁷ exploring this theory, stated that a city may exercise proprietary functions, while a county, as a mere subdivision of the state, can exercise only governmental functions. It seems then, if a county is intended to exercise only governmental functions, that once the taxes, interest, and such costs as have been a necessary part of the sale have been realized, all of the county's right title and interest to the land should be extinguished.

Since the legislature should prescribe the functions and purposes of the counties, and since the *Probasco* decision clearly invites review by the legislature of the present statutes, it would seem that the legislature would want to review the statutes to determine whether they, as interpreted, provide a definition of the power of counties to deal with land which is in accord with contemporary thought.

LESA LEE WILLE

RIGHTS OF WAY TO MINING CLAIMS ACROSS PUBLIC LANDS IN WYOMING

A person or association of persons carrying on a mining business in the state of Wyoming often finds it necessary to secure rights of way across public lands in order gain access to its claims. Since the power to dispose of the state public lands is vested with the board of land commissioners,¹ subject to direction of the legislature;² and since the power to dispose of the federal lands is vested in Congress,³ it is necessary to comply with some statutory authority in order to secure rights of way across these lands.⁴

An examination of the state and federal legislation regarding rights of way across public lands, discloses four possible statutes under which a grant of this nature may be procured.

Beginning with the state statutes, the first provision to come under consideration is Section 44-136.⁵ This statute purports to grant to corporations the right to build roads across the "public domain," which has been defined as land belonging to the state or federal government,⁶ or those lands which are subject to sale or other disposal under the general

16. *Supra* note 2.

17. *Miller v. El Paso County*, 136 Tex. 370, 150 S.W.2d 1000 (1941).

1. Wyo. Const., Art XVIII, § 3.

2. Wyo. Const., Art. XVIII, § 4.

3. U.S. Const., Art. IV, § 3, cl. 2.

4. *United States v. Utah Power & Light Co.*, 209 Fed. 554 (8th Cir. 1913).

5. Wyo. Comp. Stat. § 44-136 (1945).

6. *Sullivan*, Handbook of Oil and Gas Law, 422 (1955).

land laws of the United States.⁷ This statute allows a corporation the exclusive right of way to the line of their road, and to one hundred feet on either side thereof, as well as exclusive possession at the termini of said road, and at such intermediate points as may be required.

Since there is some question as to what meaning the legislature wished to impart to the term "public domain," it is possible that the legislature intended this grant to extend only to lands owned by the state of Wyoming. If so, it was within the power of the state legislature to pass legislation which would allow rights of way across public lands owned by the state.⁸ However such legislation must be in the form of a direction to the board of land commissioners to allow such a grant, for this board has the direction, control, disposition and care of all lands that have been heretofore or may hereafter be granted to the state.⁹ The grant contained in Section 44-136 does not comply with the latter restriction but instead purports to grant such a right directly to the corporation. Therefore it appears to be in direct conflict with the constitution of the state of Wyoming, which vests control over the public lands of the state in the board of land commissioners.

An examination of Chapter 24 of the Wyoming Compiled Statutes relating to public lands, and Chapter 44, in which the statute under consideration appears, reveals that this term public domain is not used again. Therefore it is necessary to consider the second construction which the legislature may have intended to put upon this statute.

The Wyoming Legislature may have been acting pursuant to an act of Congress of July 26, 1866,¹⁰ which stated, "That the right of way for the construction of highways over public lands, not reserved for public uses is hereby granted." The term public lands as used in this legislation refers to those lands which are subject to sale or other disposal under the general land laws of the United States.¹¹ This act by the federal government was an open grant which specified neither the method of acceptance nor the persons capable of accepting such a grant.¹² Since the acceptance of this grant must conform to state law, and because Congress did not specify a particular mode of acceptance, the legislature may have enacted this statute to allow corporations the right to accept this grant of the federal government.

A determination of what constitutes acceptance of this federal grant has been made by courts of several of the Western states. In Colorado it has been held that mere use by those for whom the land is necessary would be sufficient to constitute an acceptance by user of this grant.¹³

7. *United States v. Lee Wilson & Co.*, 214 Fed. 630 (D.Ark. 1914).

8. *Supra* note 2.

9. *Supra* note 1.

10. 14 Stat. 253 (1866), 43 U.S.C. § 932 (1928 ed.).

11. *United States v. Lee Wilson & Co.*, 214 Fed. 630 (D.Ark. 1914).

12. *Ball v. Stephans*, 68 Cal.App.2d 843, 158 P.2d 207 (1938).

13. *Leach v. Manhardt*, 102 Colo. 129, 77 P.2d 207 (1938).

In California mere dedication after public user has been held sufficient,¹⁴ and the New Mexico court has held that even if this land subsequently passes into private hands, the acceptance of this grant by public user would be sufficient to sustain the right of way across the land after change of ownership.¹⁵ However in each of these jurisdictions the point was stressed that in their state acceptance by user was in conformity with state law.

If Section 44-136 was passed with the intent of allowing corporations the right to accept the federal grant, then the statute was improperly constructed to effect the intent of the legislature. Instead of granting the right to build highways across the public lands, the language used in the federal grant, the legislature utilized the terminology, "the right to build a railroad, tramway road, or wagon road across the public domain," and granted exclusive possession at the termini and at such intermediate points as required by the corporation. It is to be noted and stressed that the act of 1866 is a grant to build a public highway, meaning open to public use;¹⁶ whereas the Wyoming statute purports to give exclusive possession which is a grant of a private right of way denying public use.

The contention that the federal and state statute are in conflict is further sustained by the present statutory definition of the term "public highway" in Wyoming.¹⁷ This legislation was induced as the result of a decision by the Wyoming court in 1917 which held that public user was sufficient to constitute an acceptance of the federal grant.¹⁸ This decision was not received with favor in Wyoming,¹⁹ so in 1919 the legislature undertook to define the term public highway. At the present time in Wyoming a public highway is one which is lawfully established by the county commissioners in the county where it exists, which must be for the use of the general public, and which has been put of record by the board of county commissioners.²⁰ Since these three elements are necessary to constitute a highway, and because the corporation has no way of forcing action upon the board of county commissioners, action under this Wyoming statute cannot constitute acceptance of the federal grant of 1866. Nor can the statute be deemed effective to create rights

14. *Supra* note 12.

15. *Lovelace v. Hightower*, 50 N.M. 50, 168 P.2d 864 (1946).

16. *Rodgers v. Commercial Casualty Insurance Co.*, 237 Ala. 301, 186 So. 684 (1939); *Mississippi Central R. Co. v. Alexander*, 169 Miss. 620, 152 So. 653 (1934).

17. Wyo. Comp. Stat. § 48-301 (1945). Public Highways defined—Official Establishment—Exception. (a) On and after January 1st, 1924, all roads within this state shall be highways, which have been or may be declared by law to be State or County highways. It shall be the duty of the several boards of county commissioners, within their respective Counties, prior to said date, to determine what if any, such roads now or heretofore travelled but not heretofore officially established and recorded, or if need be laid out, established and recorded, and all roads recorded as aforesaid, shall be highways. No other roads shall be highways unless and until lawfully established as such by official authority.

18. *Hatch Bros. Co. v. Black*, 25 Wyo. 109, 165 Pac. 518 (1917).

19. *Nixon v. Edwards*, 72 Wyo. 274, 264 P.2d 287 (1953).

20. *Rocky Mountain Sheep Company v. Board of County Commissioners*, 73 Wyo. 11, 269 P.2d 314 (1938); *Nixon v. Edwards*, 72 Wyo. 274, 264 P.2d 287 (1953).

in federal public domain in as much as such power is vested in Congress and no rights may be acquired in these federal public lands except by virtue of some Congressional act.²¹

The second state statutory provision to be considered is Section 24-203. This statute sets out the duties of the commissioner of public lands, one of which is:

. . . to receive all applications for purchasing, leasing, entering, locating, or in any manner acquiring title to, interest in, or benefit from any lands belonging to, or under the control of the state of Wyoming . . . and he shall allow or disallow such applications subject to the approval of the board of land commissioners.

Since it has been held that the only authority vested with power to lease or grant interests in the state lands is the board of land commissioners,²² compliance with the above statute would be more likely to create a valid grant across the lands of the state of Wyoming, than one which depended on Section 44-136.

Turning to federal legislation there are two acts which might entitle a person or association of persons to gain a right of ingress and egress across the public lands of the federal government. The first act was the Act of 1866 which has previously been discussed in determining the validity of Section 44-136 of the Wyoming Compiled Statutes. It is important to reiterate however that a public highway can be created only by official action by the board of county commissioners, in the state of Wyoming, so it is impossible for any individual or association to accept this grant by user, or under any statute which would appear to allow the acceptance of this grant without the consent and control of the board of land commissioners.²³

The second federal statute to be considered is the Act of January 21, 1895,²⁴ which authorizes the Secretary of the Interior, under such regulations as may be fixed by him, to permit the use of rights of way over public lands of the United States for tramroads to the extent of 50 feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, engaged in the business of mining, quarrying, or of cutting timber and manufacturing lumber.

It is to be noted that this statute does not give the state the power to make such a grant, as Section 44-136 of the Wyoming Statute purports to do. Instead of providing for 100 feet upon either side of the right of way, this federal act restricts the grant to fifty feet upon either side of the middle line of such right of way. This grant is not restricted to highways as was the federal grant of 1866, nevertheless it does not grant exclusive

21. *United States v. Utah Power & Light Co.*, 209 Fed. 554 (8th Cir. 1913); *Kansas v. Colorado*, 206 U.S. 46, 27 S.Ct. 655, 51 L.Ed. 956 (1907).

22. *Banzhof v. Swan Co.*, 60 Wyo. 201, 148 P.2d 225 (1944).

23. *Supra* note 19.

24. 28 Stat. 635, 43 U.S.C. 956 (1952 ed.).

possession to these roads as does the Wyoming statute, Section 44-136. Instead the interest granted is merely a right of way which is revocable at the discretion of the Bureau of Land Management, and does not allow the holder thereof any estate of any kind in fee in the lands.²⁵

To secure such a right of way, an application must be filed with the Bureau of Land Management. In this application the person desiring such right of way must specify the purpose for which it is to be utilized, and that the person or association requesting such grant will comply with all rules and regulations which are prescribed by the Bureau of Land Management.²⁶

The application must be accompanied by a map made in triplicate, which has been drawn up by an engineer, designating the route the right of way is to take.²⁷ The application must also be accompanied by the first payment of the rental charge for a calendar year or fraction thereof,²⁸ plus documents sustaining the validity of the corporation.²⁹ When a person or association complies with these rules and regulations, it may gain ingress and egress to mining claims across the public lands of the federal government.

From a consideration of the foregoing statutes it is to be concluded that in order to secure a valid right of way across lands owned by the state of Wyoming, it will be necessary to comply with the procedures prescribed by Section 24-203 of the Wyoming Compiled Statutes. Section 44-136 would be insufficient as a basis to sustain such a right of way since only the board of land commissioners has power to dispose of this land in any manner.³⁰

In order to secure a right of way across the public lands of the federal government, the Act of 1895 provides a much sounder procedure than that which was established by the 1866 statute. In Wyoming a right of way established under the latter act cannot be in conformity with state law, because it could not conform to the statutory definition of highway necessary to bring it within the terms of the grant.

Therefore, in order for a person or association of persons to avoid being subjected to prosecution and liability for trespass across the public lands of the federal government,³¹ it is necessary to secure a valid right of way across the lands of the federal government, by complying with the procedures set up by the Bureau of Land Management under the statute of January 21, 1895.

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25. 43 C.F.R. § 244.7 (1954 ed.).

26. 43 C.F.R. § 244.3 (1954 ed.).

27. 43 C.F.R. § 244.6 (1954 ed.).

28. 43 C.F.R. § 244.21 (1954 ed.).

29. 43 C.F.R. § 244.4 (1954 ed.).

30. *Supra* note 19.

31. 43 C.F.R. § 244.8 (1954 ed.).