

APPENDIX 10 Customs and Culture: Transportation and Rights-of-way

BACKGROUND:

In the debate over mineral legislation that occurred in Session I of the 39th Congress of 1866, Congressman George Julian of Indiana, then Chair of the Public Lands Committee of the House, favored subdivision and sale of mineral lands at auction to pay the war debt, with some "restrictions to prevent monopoly and ensure ordinary claimants some opportunity to purchase the land."

Senator William Stewart of Nevada, however, favored a ratification of the status quo, with the additional inducement of giving the successful miner fee-simple title at a nominal price. He introduced a bill on the floor of the Senate stating, "All there is in this bill is a simple confirmation of the existing conditions of things in the mining regions, leaving everything where it was, endorsing the mining rules. It simply adopts and perfects the existing system allowing these people to enjoy their property without being subject to the fluctuation created now by agitations in Congress."

The Senate passed the bill, but Congressman Julian buried it in his House committee. Stewart countered by amending the contents of a House passed bill on rights-of-way across public lands with his mining bill and pushed it through the Senate. It was returned to the House Committee on Mines and Mining instead of the Public Lands Committee and passed the House as the Act of July 26, 1866 (U.S. Statutes at Large, XIV, pgs. 251-253. or "An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes.")

The integration of Stewart's two original pieces of legislation on rights of way and mining into the Act of July 26, 1866, (also known as the "Lode Act") provided a broad contextual basis for the Congressional recognition of the vesting of various possessory rights on public lands as had been obtained under local customs and laws.

The Act of July 26, 1866, included provisions that "The right-of-way for the construction of highways over public lands, not reserved for public purposes, is hereby granted." (These provisions were later separated from the mineral and water use provisions as R.S 2477.)

In California, State law recognizes both informal prescriptive creation by customary use by the public and formal action by public authority as sufficient to constitute the acceptance of a right-of-way and dedication as a "public highway" [n Ball v Stephens. 158 P. 2d 207 (Cal. Ct. App. 1945), citing Pol. Code Section 2618 as reenacted in 1883 and in force until 1935, established that "Acceptance of the offer of the government could be manifested and dedication could be effected by selection of a route and its

establishment as a highway by public authority. 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 in law to constitute acceptance by the public of an offer of dedication. In order that a road should become a public highway, it must be established in accordance with the law of the state in which it is located."

It should be specially noted that according to California law, the "public" may manifest acceptance of the U.S. offer of a right-of way over public lands just by laying out a road and using it. The process requires no action by the state or county.

In 1870, under the "Placer Act" or U.S. Mining Law amended July 9, 1870 (vol. 16 Statutes at Large p.217; U.S.C. vol 30, section 35), Congress also clarified that it was its intent that the water rights and rights of-way to which the 1866 legislation related were effective not only against the United States but also against its grantees; that anyone who took title to public lands took such title burdened with any easement for water rights or rights of way that had been previously acquired against such lands while they were in public ownership.

In 1873, the portion of the body of federal Mining Law applicable to rights of-way for the construction of highways over public lands was separated from the historic context of the original Acts and reenacted as Revised Statute (R.S.) 2477. In 1938, it was recodified as 43 U.S.C. Section 932.

The Mining Law of 1866 applied the free-access principle to all mineral lands of the public domain. The 1872 Mining Law changed this to "all valuable mineral deposits in lands belonging to the United States. In numerous cases decided both before and after the period 1866-1872, the courts had held that the "public domain" embraced only lands available for disposal under the various disposal laws - that is, those areas not withdrawn from disposal and reserved by the federal government for other uses.

In Siskiyou County, the Modoc National Forest was created on Nov. 29, 1904. The Klamath National Forest was, in large part, created on May 6, 1905; the Trinity National Forest on April 26, 1905; the Shasta National Forest on October 3, 1905; the Upper Klamath Wildlife Refuge on April 3, 1928 (with additions on Feb 26, 1954); the Lower Klamath Wildlife Refuge on Aug. 8, 1908 (with reductions on May 14, 1915 and March 28, 1921); Lava Beds National Monument in 1925 (transferred to National Park status in 1933); and the Tule Lake National Wildlife Refuge was created Oct. 4, 1928 (enlarged in 1932 and 1936 and reduced in 1942).

These would correspond to the dates in which these lands were withdrawn or reserved from public domain and the dates that the free access offer of the Mining Law of 1866 or R.S. 2477 ceased to apply. However, public rights-of-way that had been established prior to withdrawal or reservation became grandfathered as vested rights.

NOTE: Activities that do not ordinarily cause any appreciable disturbance or damage to public lands resources or improvements have been generally designated as "casual use" by federal agencies and have not normally required a right of-way grant or temporary-use permit. Traditionally, this has included foot traffic and use of pack animals or horses. Off-highway

vehicle use may also be included generally as posted. However, current management trends appear to be moving toward more restrictive control and permitting requirements.

There is an implied right of reasonable access for those engaged in valid uses of public lands and for "in- holders" of private lands. This includes patented and unpatented mining claims, grazing allotments or other permitted use. Court decisions have upheld agency requirements for helicopter access to Wilderness mining claims, and there are many local incidences of helicopter logging. So, mode of access may be specified for access. Route of access may also be specified for resource concerns. Season of access may also be specified as has been done to protect spotted owl nesting habitat.

Grazers currently require a trailing permit to move cattle overland to allotments and Rangeland Reform proposes to charge them a fee for forage consumed along the way.

There is some unresolved question as to whether the Taylor Grazing Act of 1934 withdrew lands from public domain into grazing districts. It would appear not, as the Act states, "...in order to promote the highest use of public lands pending its final disposal" The 1866 Mining Act and RS.2477 were repealed with the Federal Land Policy and Management Act (FLPMA) on October 21 1976, but under 43 U.S.C. s 1769, all rights-of-way that existed on the date of repeal were expressly preserved.

DEFINITION OF A "HIGHWAY~":

The dictionary defines a "highway" as a road or route to some end destination. The criteria for the conditions that constitute the establishment of a "highway" necessarily vary from era to era. Certainly, pre-European Native Americans in Siskiyou County travelled by foot or by boat. Centuries of use of deer traces/foot trails established seasonal migratory paths and trade routes between tribes across prairies, along rivers and streams, through the forest, and across mountains, which are evidenced by remnant artifacts constructed of materials not native to an area.

Many of these same historic trails, such as the Siskiyou Trail, were later used by Russian, Hudson Bay Company and Rocky Mountain Fur Company trapping parties in the early nineteenth century. (Peter Skene Ogden, Jean Baptiste McKay, John Work, Alexander McLeod, Jedediah Smith, Michel La Framboise, Stephen Meek, and Thomas McKay were known to have trapped the county and there was a permanent settlement at Squaw Valley).

Early explorers such as Lt. George Emmons (as part of the Wilkes expedition), John Fremont and Kit Carson passed through the county along the trails that were the highways of that era.

As the original Indian and trapping trails were used and re-used, by foot, mule, horse and cattle, they compacted and became broader. As wagons passed over sod, the way became compacted in defined ruts. In many cases, very little preparation of the trail was performed. The public simply established permanent passage as a highway and widened it through repeated use.

It was really not until the era of established communities that cleaning and preparation of the path was required in order to accommodate the easy passage of freight wagons and stagecoaches to central

points of commerce. These conditions continued as the general status quo well into the 20th century in many parts of the West.

Most motor vehicle roads were not even started in the county until the late 1920s and many overlaid earlier routes.

Transportation via horseback is still a common practice among ranchers and recreationalists in Siskiyou County. According to the Annual Report of Estimated Crop and Livestock Production of the Year Ending December 31, 1994, issued by the Siskiyou County Department of Agriculture, there are an estimated 13,500 horses and mules in the county with a human population of 46,426 and a cattle population of 84,500. It is obvious that there is a large equestrian population. The era of access and transportation that exists in Siskiyou County today is a mixture of prepared motor vehicle roads, (most of which are gravel and dirt), traditional trails that have evolved from continued public use, access roads and four wheel drive paths similar to the pioneer wagon wheel rutted roads of the 1850s.

These are the realities of our "highways" in the context of our culture. They include main equestrian routes and footpaths to some end destination such as a pasture, mountain cabin, lake or fire lookout; foot paths used by hikers along old Indian and mining trails that branch off the main Pacific Crest Trail or end at lakes or mountain summits; dirt roads to access timber stands for harvest; or 4-wheel drive ruts over former foot or horse paths to hunting grounds or mining claims. (Please see the attached paper entitled, "HISTORIC REFERENCES TO OLD TRAILS, ROADS, & RAILROADS IN SISKIYOU COUNTY").

ABANDONMENT & STATUTE OF LIMITATIONS FEDERAL PERSPECTIVE: (From pg. 15 of the Draft R.S.2477 Report of March 1 1993)

"Current policy and case law do not recognize any form of Federal provision for abandonment of R.S. 2477 rights-of-way. In the absence of a waiver of sovereign immunity, no one, including State and local governments, may challenge the title of the United States to Federal property. In recognition of this, Congress passed a quiet-title statute that now appears at 43 U.S.C. Section 2409a. It allows those who have been put on notice that the United States has a claim adverse to their property interest to file a law suit to quiet-title. However, the statute also provides that quiet-title action must be filed within 12 years of the date the affected party discovers the Federal claim. R.S. 2477 rights-of-way are easements and therefore, interests in land subject to the quiet title statute. If they are not acted upon within 12 years of the date the Federal Government takes action that is consistent with their existence, then arguably, they are gone whether they existed in the first place or not. This would be true where Congress established a wilderness area, where BLM designated an area as a Wilderness Study Area, or where the U.S. Forest Service blocked off a former right of-way and no one had acted on it for over 12 years."

Conclusions

All existing public roads and trails in Siskiyou County are an integral part of Siskiyou County's infrastructure. Plans for changing, altering, eliminating, or otherwise modifying any public roads or

trails or their access has the potential for impacting infrastructure and thus community stability, thereby requiring coordination.

Excerpts from “HISTORIC REFERENCE TO OLD TRAILS, ROADS AND RAILROADS IN SISKIYOU COUNTY”

There are many historic references to old trails, wagon roads, stage roads and railroads across the Public domain lands in Siskiyou County that were established and developed prior to the federal reservation and management of lands within the County. The following is a catalogue of some of the reference dates for these public rights-of-way as documented in various historic texts and notations as to early maps:

1904: Nov. 29, Modoc National Forest created.

1905: April 26, Trinity National Forest created; May 6, Klamath National Forest created; June 2, Lassen National Forest created; Oct. 3, Shasta National Forest created.

February 13, 1909 Klamath National Forest Proclamation No. 3 added about 22 sections to the Goosenest-Ball Mountain area. The KNF made this a separate Ranger District.

The Upper Klamath Wildlife Refuge was created on April 3, 1928, with additions on Feb. 26, 1954; the lower Klamath Wildlife Refuge was created on Aug. 8, 1908, with reductions on May 14, 1915, and March 28, 1921; the Tule Lake National Wildlife Refuge was created Oct. 4, 1928 and enlarged in 1932 and 1936, and reduced in 1942.

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