

NICK DIRE ET AL.

IBLA 80-420

Decided June 8, 1981

Appeal from decision of Oregon State Office, Bureau of Land Management, rejecting application for right-of-way. OR 22021.

Vacated and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Revised Statutes Sec. 2477

While the question of the establishment of a public highway under the Act of July 26, 1866, 43 U.S.C. § 932 (1976), otherwise known as R.S. § 2477, is ultimately a matter for the state courts, BLM may properly decide the matter for its own purposes where such a question arises during the consideration of an application for a private access road right-of-way under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1976).

2. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Revised Statutes Sec. 2477

A Bureau of Land Management decision rejecting a right-of-way application for a private access road, filed pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1976), because the road in question is a public highway established pursuant to the Act of July 26, 1866, 43 U.S.C. § 932 (1976), otherwise known as R.S. § 2477, will be vacated where the evidence in the record does not support the finding that the road is a public highway.

APPEARANCES: William C. Boehm, Esq., Morton, Washington, for appellants.
 OPINION BY ADMINISTRATIVE JUDGE HARRIS

Nick DiRe, Jurgen H. Huck, and Richard P. Feley have appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated January 28, 1980, rejecting appellants' application for a right-of-way, OR 22021, for a private access road situated in the W 1/2 NW 1/4 sec. 24, T. 13 S., R. 29 E., Willamette meridian, Grant County, Oregon. 1/ The basis for the rejection was the prior establishment of a "public highway", pursuant to section 8 of the Act of July 26, 1866, 43 U.S.C. § 932 (1976), otherwise known as R.S. § 2477, on the site of appellants' proposed right-of-way. As stated by BLM:

In as much as the trail is and has been a public highway, the United States has neither the need nor the authority to issue additional rights-of-way across the lands and in view of the existing rights of the public to use of the trail, issuance of a grant of right-of-way would be a useless act, adding nothing to the existing rights of the applicants, (Herb Penrose, A-29507, July 26, 1963).

R.S. § 2477 simply provides that: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." 2/ The nature of the grant is more fully explained in Limitation of Access to Through-Highways Crossing Public Lands, Solicitor's Opinion, 62 I.D. 158, 161 (1955):

Section 2477 is an unequivocal grant of the right-of-way for highways over the public lands without any limitation as to the manner of their establishment. Smith v. Mitchell, 58 Pac. 667 (Wash., 1899). The grant becomes fixed when a public highway is definitely established in one of the ways authorized by the laws of the State where the land is located. State v. Nolan, 191 Pac. 150 (Mont., 1920); Moulton v. Irish 218 Pac. 1053 (Mont., 1923). The act did not specify nor define the extent of the grant contemplated over the public lands, the width of the right-of-way

1/ Nick DiRe filed the application on July 12, 1979. On Dec. 10, 1979, the application was amended to include the other two applicants.

2/ This statutory provision was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 (1976), effective Oct. 21, 1976. However, nothing in the Act was to be construed as terminating any valid existing right-of-way and the Act was made subject to "valid existing rights" pursuant to the savings provision, section 701(a), of FLPMA, supra.

nor the nature and extent of the right thus conferred, both as against the Government and subsequent patentees (21 L.D. 354 (1895)). Whatever may be construed as a highway under State law is a highway under Rev. Stat., sec. 2477, and the rights thereunder are interpreted by the courts in accordance with the State law. The lands over which the right-of-way is located may be patented to others subject to the easements and to whatever rights may flow to the State and to the public therefrom. Eugene McCarthy, 14 L.D. 105 (1892).

Relying on Montgomery v. Somers, 50 Or. 259, 90 P. 674 (1907), BLM in its decision stated that a "public highway" under R.S. § 2477 may be established in the State of Oregon "by public user sufficient to clearly indicate an intent by the public to accept the [grant]." Furthermore, BLM held that use of the subject land as an access road for at least 15 years "for cattle hauling, ranch maintenance and hunting" had established a "public highway," under R.S. § 2477. This decision was based on a report by the District Manager, Burns District Office, BLM, dated November 28, 1979.

Appellants' application was filed pursuant to section 501 of FLPMA, supra, for a right-of-way "over an already existing trail used primarily for hauling cattle to our land." Appellants sought a right-of-way 60 feet wide and one-quarter mile long. Section 501(a) of FLPMA, supra, provides general authority for the Secretary to grant rights-of-way for roads on "public lands."

Initially, appellants challenge BLM's determination "on the basis of a one-paragraph report, that a crude cattle trail is a public highway under state and federal law." The "report" in question actually contains two paragraphs and is a November 28, 1979, memorandum from the Burns District Manager to the Oregon State Director. It states:

We have investigated the road concerning Nick Dire's [sic] right-of-way application for the use of cattle hauling. The investigation has revealed that the road has been used as an access road for several years historically. This road is a spur off of the old Stage Coach Road from John Day to Prineville. It may have been built by an entryman to provide necessary access, however, this road is now used mainly for cattle hauling and ranch maintenance and hunting access. This road has little or no improvements. It was designed to follow the ridge, so the only improvement that was done was to roll the big rocks out of the roadbed.

The BLM has not maintained or improved this road in any way. The Lessee has stated he can remember the road

being there for at least 15 years. This road should be an R.S. 2477 road because of the long standing public use; therefore, the BLM has no jurisdiction over this road.
3/

[1] In Homer D. Meeds, 26 IBLA 281, 298, 83 I.D. 315, 323 (1976), we stated that:

[T]his Department has considered State courts to be the proper forum to decide ultimately whether a public highway under 43 U.S.C. § 932 (1970) has been created under State law and to adjudicate the respective rights of interested parties. Alfred E. Koenig, A-30139 (November 25, 1964); Herb Penrose, A-29507 (July 26, 1963).

However, in that case we found that it was appropriate "that the Bureau review the propriety of its actions for its own purposes and to ascertain whether it should either alter its position or receive and adjudicate an application under 43 CFR 2822.1-2." Id. at 298-99, 83 I.D. at 323.

Therefore, while the question of the existence of a "public highway" is ultimately a matter for state courts, BLM is not precluded from deciding the issue where it is considering an application for a private access road right-of-way, under section 501 of FLPMA, supra. The potential conflict is properly a matter of administrative concern.

[2] As stated in the BLM decision at page 2: "In the State of Oregon public roads under R.S. 2477 may be created by the acts of the counties and other public bodies as well as by public user sufficient to clearly indicate an intent by the public to accept the dedication." (Emphasis added.) There is no evidence that any public body took any action to establish the road in question as a public highway. The

3/ The report was solicited by the State Director on Nov. 7, 1979, in a memorandum to the Burns District Manager in which he stated:

"Your October 26, 1979, memorandum concludes that the road in question is a public highway under R.S. 2477. In order to justify a decision denying the application, I would ask that you provide the basis for this conclusion. The memorandum of the Regional Solicitor dated May 27, 1970, provides guidance on the kinds of factors bearing upon this problem.

"(1) the history of the construction and use of the road as related by public records and the memory of local residents,

"(2) the present use which the road receives,

"(3) whether other segments of the same road on private land are considered to be dedicated public roads, and

"(4) whether the BLM has maintained and improved the road (this is important because the Bureau has no authority to maintain and improve 'public roads')."

question is whether there is sufficient evidence in the record of public user to indicate clearly an intent by the public to accept the dedication.

The evidence of public user is that "the road has been used as an access road for several years historically." Since the critical date for determination of whether or not the road is a public highway is October 21, 1976, the date of passage of FLPMA, the assertion of "several years" historical use in a November 28, 1979, report does not evidence any long standing use of the road. In fact, "several years" could be interpreted as not even predating FLPMA. The present use is indicated as being for cattle hauling, ranch maintenance, and hunting access. In the application it is stated that the proposed right-of-way was "[h]istorically used for access for many years." But there is no further explanation of the use.

Concerning the history of the construction of the road, BLM indicated only that it "may have been built by an entryman to provide necessary access." There is no explanation of whom the entryman may have been or when the road was built, other than BLM's statement in the report that the "Lessee" remembered the road being there for "at least 15 years." However, the fact that at one time a road or trail may have been created by rolling the "big rocks out of the roadbed" does not establish any historical use. An entryman could have built the road one day and abandoned it the next. Mere existence of the road for 15 years does not necessarily establish any use of the road.

BLM stated that it had not maintained or improved the road in any manner. The application seems to indicate that the road extends over land other than that sought for the right-of-way; however, BLM has not indicated whether other segments of the road which might traverse private land have been considered to be dedicated public roads.

Even though it has been held that a road may be a public highway when it provides access to only one land owner, Leach v. Manhart, 102 Colo. 129, 77 P.2d 652 (1938), courts look closely at the type of use which a road receives. See Hamerly v. Denton, 359 P.2d 121 (Alaska 1961); Kirk v. Schultz, 63 Idaho 278, 119 P.2d 266 (1941). In Hamerly v. Denton, supra at 125, the court stated:

It is true that the road was used during the tenures of homesteaders Murphy and King, between 1927 and 1942. But the road was initially established by these homesteaders for their own use. It had no other substantial use except when occasion made it convenient for persons to visit Murphy and King, either socially or for business purposes or simply out of curiosity. It cannot be implied from this that either Murphy or King intended to dedicate the road for public use. Nor can such intent be presumed from the fact that the homestead claimants apparently did not attempt to

stop sightseers and hunters from occasionally using the road. Dedication is not an act or omission to assert a right; mere absence of objection is not sufficient. * * * Passive permission by a landowner is not in itself evidence of intent to dedicate. * * * Intention must be clearly and unequivocally manifested by acts that are decisive in character. [Footnotes omitted.]

The record in this case does not support the finding by BLM that the road in question is a public highway under R.S. § 2477. The evidence does not clearly indicate an intent by the public to accept the dedication.

For that reason, the BLM decision is vacated and the case remanded to allow BLM to adjudicate appellants' right-of-way application.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case remanded.

Bruce R. Harris
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Gail M. Frazier
Administrative Judge

