

Jefferson Mining District

Highways & Trails: "Right of the County"

Constitution of Oregon - 1859

(With Amendments to 2004)

ARTICLE I - BILL OF RIGHTS

Section 18. Private property or services taken for public use.

Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use. [Constitution of 1859; Amendment proposed by S.J.R. 17, 1919, and adopted by the people May 21, 1920; Amendment proposed by S.J.R. 8, 1923, and adopted by the people Nov. 4.]

Oregon Revised Statute, ORS, § 368, partially reproduced below, is a restatement of jurisdiction over established roads/trails being in the county, private rights, the source of the authority, e.g., grants as an obligation of the government, i.e., Trust, and not in any federal or state agency to obliterate:

An interesting case "arose in this county (Alameda), involving the Central Pacific Railroad right of way granted by Acts of Congress in 1862 and 1864. This right of way conflicted with a public highway in Niles Canyon, maintained ever since 1859. **The Supreme Court of the United States held that the right of the county to the public highway was confirmed by the provisions of the Mining Act of 1866, (14 Stats. 251, § 8)**, which act even though subsequent to the railroad granting acts, not only granted rights upon the public domain subsequently initiated, but also recognized, and confirmed, preexisting rights. This interpretation of the act in its bearing on rights to mineral lands of the public domain which had attached prior to the act, is of sufficient importance to justify the following quotation from the court's opinion:

"By the Act of July 26, 1866, c. 262, 14 Stat. 251-253, Congress dealt with the acquisition of a variety of rights upon the public domain. By §§1-7, mineral lands, whether surveyed or unsurveyed, are open to exploration and occupation, subject to regulations prescribed by law, and to the local customs and rules of miners in the several districts." (468) The court cites the case of Broder v. Water Co., 101 U.S. 274, involving a right of way to a canal constructed across the public domain in 1853, which right of way it upheld as against a tract of subsequently patented railroad land issued under the railroad land grants of 1862 and 1864, and quotes from that case to the effect that the section of the Act of 1866 granting these rights of way - 14 Central Pacific Railway v. Alameda County (1932) 284 U.S. 463. 15 12 Stats. at Large 489 and 13 ibid. 356. "was rather a voluntary recognition of a pre-existing right of possession, [Pg.16] constituting a valid claim to its continued use, than the establishment of a new one." (469-470) The opinion in the Central Pacific Railway case goes on to say:

"Likewise, this court has recognized that the appropriation of mineral lands upon the public domain in accordance with the local customs of miners, prior to Congressional legislation, was assented to by the silent acquiescence of the government, and was entitled to protection. . . ." (Citing cases, 471) and also quotes from *Jennison v. Kirk*, 98 U.S. 453, that the Act of 1866: ... merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached." (98 U.S. 459)

The Central Pacific Railway case concludes that these rights granted by the Act of 1866 "... were such rights as the government in good conscience was bound to protect against impairment from subsequent grants" (473) – [Vol. 33, MINING LAW IN RECENT YEARS, Wm. E. Colby, 1945.]

Act of July 26, 1866, Sec. 8:

And be it further enacted, That the right of
2 way for the construction of highways over public lands, not
3 reserved for public uses, is hereby granted.

{NOTE: These vested highways/trails are not properly called R.S. 2477 highways but county roads, forever disposed to the public, in the exclusive jurisdiction of the county; No limitation on mode of use. No right in any purported authority for obstruction, by any means, of any mode of lawful use. No reservation of authority to the State. The Road Authority, ORS 810.010 (5), by federal grants is to the private constructors, or to the general public as a matter of law, as a matter of right. Consistent with:

Oregon Revised Statute, ORS § 801.305 - Highway

(1) Highway means every public way, road, street, thoroughfare and place, including bridges, viaducts and other structures within the boundaries of this state, open, used or intended for use of the general public for vehicles or vehicular traffic as a matter of right. }

ORS 368

County authority over roads. (1) Except as provided in this section or as otherwise specifically provided by law, **the exercise of governmental powers relating to a road within a county is a matter of county concern.**

Oregon Law, H.B. 208, enacted that:

Section 1. *All roads or thoroughfares not hereto fore legally established within the State of Oregon that may have heretofore been used, or hereafter be used, for a period of ten (10) consecutive years or more by the general public for the purpose of travel, without protest, are hereby declared to be county roads.*

Section 2. *No road of public easement shall be altered or vacated except by the county court in the manner now provided by law; and no county shall be bound to work, or improve, or keep in repair such road of public easement. Approved February 28, 1901.*

Oregon Revised Statute

368.016 County authority over roads; limitations. (1) Except as provided in this section or as otherwise specifically provided by law, the exercise of governmental powers relating to a road within a county is a matter of county concern. See also, the Territorial Roads Act, February 4th, 1851.

368.021 County authority over trails. (1) A county governing body has the same jurisdiction over trails as it has over local access roads.

(2) This section applies to trails that:

- (a) Are easements over land or by watercourse that are not part of a road right of way;
- (b) Provide certain forms of ingress to or egress from land or water or permit travel between places;
- (c) Do not provide vehicle access of the type provided by a road; and
- (d) Are not under the jurisdiction of a state or federal agency. [1981 c.153 §5]

368.131 Right of way over United States public lands. The county governing body may by resolution accept the grant of rights of way for the construction of public roads over public lands of the United States. **This section does not invalidate the acceptance of such grant by general public use and enjoyment.** [Formerly 368.555]

368.326 Purpose of vacation proceedings; limitation. ORS 368.326 to 368.366 establish vacation procedures by which a county governing body may vacate a subdivision, part of a subdivision, a public road, a trail, a public easement, public square or any other public property or public interest in property under the jurisdiction of the county governing body. The vacation procedures under ORS 368.326 to 368.366:

(1) Shall not be used by the county governing body to vacate property or an interest in property that is within a city.

(2) Are an alternative method to the method established under ORS chapter 92 for the vacation of a subdivision. [1981 c.153 §34]

810.010 Jurisdiction over highways. (1) The Department of Transportation is the road authority for all state highways in this state including interstate highways.

(5) Any federal authority granted jurisdiction over federal lands within this state under federal law or rule is the road authority for highways on those lands as provided by the federal law or rule. [1983 c.338 §145; 1985 c.16 §45]

810.012 Jurisdiction over access to facilities and services from certain roads

- rules

Notwithstanding any other provision of the Oregon Vehicle Code, the Oregon Transportation Commission, by rule, may establish procedures for, and certify to the Federal Highway Administration compliance with, Federal Regulation 23 C.F.R. part 658 for roads under the authority of cities and counties. [1991 c.283 §2]

Supplemental

A. Public Law 88–657,

(The Act of October 13, 1964, commonly known as the Forest Roads And Trails Act),
Roads and trails system; Congressional findings and declaration of policy

AN ACT To enable the Secretary of Agriculture to construct and maintain an adequate system of roads and trails for the national forests, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That [16 U.S.C. §532]

The Congress hereby finds and declares that the construction and maintenance of an adequate system of roads and trails within and near the national forests and other lands administered by the Forest Service is essential if increasing demands for timber, recreation, and other uses of such lands are to be met; that the existence of such a system would have the effect, among other things, of increasing the value of timber and other resources tributary to such roads; and that such a system is essential to enable the Secretary of Agriculture (hereinafter called the Secretary) to provide for intensive use, protection, development, and management of these lands under principles of multiple use and sustained yield of products and services. (Pub. L. 88–657, §1, Oct. 13, 1964, 78 Stat.1089.)

SEC. 5, [16 U.S.C. §536], *Copies of all instruments affecting permanent interests in land executed pursuant to this Act shall be recorded in each county where the lands are located. Copies of all instruments affecting interests in lands reserved from the public domain shall be furnished to the Secretary of the Interior.*

In the words of the first Chief of the United States Forest Service 1905–1910, Gifford Pinchot, ““The earth and its resources belong of right to its people.” Refresh your memories with this passage from “The Fight for Conservation”, written by Pinchot in 1910:

“The first great fact about conservation is that it stands for development. There has been a fundamental misconception that conservation means nothing but the husbanding of resources for future generations. There could be no more serious mistake. Conservation does mean provision for the future, but **it means also and first of all the recognition of the right of the present generation to the fullest necessary use of all the resources** with which this country is so abundantly blessed.””

Title 36 Parks, Forests, and Public Property, Parts 200 to 299; Revised as of July 1, 2011, Page 401, relevant part. [36 CFR §261]

Subpart A—General Prohibitions

§ 261.1 Scope.

(a) **The prohibitions in this part apply, except as otherwise provided, when:**

(1) An act or omission occurs in the National Forest System or on a National Forest System road or trail.

(2) An act or omission affects, threatens, or endangers property of the United States administered by the Forest Service.

(3) An act or omission affects, threatens, or endangers a person using, or engaged in the protection, improvement or administration of the National Forest System or a National Forest System road or trail.

(4) An act or omission occurs within the designated boundaries of a component of the National Wild and Scenic Rivers System.

(b) **Nothing in this part shall preclude activities as authorized by the Wilderness Act of 1964 or the U.S. Mining Laws Act of 1872 as amended.**

(c) Unless an offense set out in this part specifies that intent is required, intent is not an element of any offense under this part.

(d) None of these prohibitions apply to any person engaged in fire suppression actions.

[42 FR 35958, July 13, 1977, as amended at 43 FR 32136, July 25, 1978; 46 FR 33519, June 30, 1981; 66 FR 3218, Jan. 12, 2001; 73 FR 30307, May 27, 2008]

§ 261.1a Special use authorizations, contracts and operating plans.

The Chief, each Regional Forester, each Forest Supervisor, and each District Ranger or equivalent officer may issue special-use authorizations, award contracts, or approve operating plans authorizing the occupancy or use of a road, trail, area, river, lake, or other part of the National Forest System in accordance with authority which is delegated elsewhere in this chapter or in the Forest Service Manual. These Forest Officers may permit in the authorizing document or approved plan an act or omission that would otherwise be a violation of a subpart A or subpart C regulation or a subpart B order. In authorizing such uses, the Forest Officer may place such conditions on the authorization as that officer considers necessary for the protection or administration of the National Forest System, or for the promotion of public health, safety, or welfare.

[49 FR 25450, June 21, 1984]

§ 261.1b Penalty.

Any violation of the prohibitions of this part (261) shall be punished by a fine of not more than \$500 or imprisonment for not more than six months or both pursuant to title 16 U.S.C., section 551, unless otherwise provided.

[46 FR 33519, June 30, 1981]

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