

BOARD OF COUNTY COMMISSIONERS

KLAMATH COUNTY, OREGON

RECEIVED
MAR 6 1995
COUNTY CLERK

IN THE MATTER OF ADOPTING A)
PUBLIC RIGHT-OF-WAY ORDINANCE) ORDINANCE NO. 69
IN KLAMATH COUNTY, OREGON)
_____)

An Ordinance Declaring and Defining Ways of Travel
as Public Rights-of-Way

WHEREAS, before the territory of Oregon was settled, the area was inhabited by native Americans and other explorers who used tracks, pathways, trails, and water ways as ways of travel between destination points; and

WHEREAS, the title to the territory passed to the State of Oregon under the equal footing doctrine upon Oregon's admission into the Union in 1859; and

WHEREAS, before and after statehood for Oregon, farmers, ranchers, sportsmen, loggers, hunters, trappers, and other members of the public have established numerous roads and other travel corridors by usage across federally controlled lands; and

WHEREAS, previously it was the public policy of the United States of America as implemented by the United States Congress in laws enacted, and by common law of the land at the time, to promote the settlement of the western United States by granting ways of travel to facilitate westward migration and for the construction of highways; and

WHEREAS, the United States Congress granted the right-of-way for the construction of highways over public lands not reserved for public uses in Section 8 of the Mining Act of 1866, reenacted and recodified as Revised Statute 2477 (R.S. 2477), 43 U.S.C. § 932, and in other legislation; and

WHEREAS, Klamath County, a political subdivision of the State of Oregon, and the public relied upon the terms of the offers, as established by the common law, federal regulations, federal statements of policy, and numerous rulings of state and federal courts which have addressed the terms of the offers contained in federal legislation, by using and administering the granted rights-of-way; and

WHEREAS, the people of Klamath County accepted the grants offered under R. S. 2477 and other Congressional legislation, actions and sessions, through public use, construction, or

maintenance of the rights-of-way or other actions establishing the people of Klamath County's intent to accept these rights-of-way; and

WHEREAS, these rights-of-way have been an essential part of Klamath County's transportation and public access systems across the lands they traverse, and the public has relied on these access routes since prior to October 21, 1976, and continues to rely on these access routes; and

WHEREAS, public access to these routes of travel are important to the free flow of commerce in Klamath County and are essential to the economic, social and political well-being of the people and communities within the County; and

WHEREAS, state, county and local health, search and rescue, resource management, fire protection and law enforcement personnel rely on these access routes to carry out important public functions; and

WHEREAS, these rights-of-way are essential to the commonly accepted rights of citizens to carry out functions within a free society and the ability of Klamath County to carry out traditional governmental functions; and

WHEREAS, access through and across federally controlled lands in the County is essential for purposes of exercising rights of ownership in adjacent private and state mineral, timber, livestock grazing, water, oil and gas and other privately-held rights, either solely or jointly, on those lands; and

WHEREAS, the existence of a highway establishes a presumption that the highway has continued in use in its present location since the land over which it is built was public land not reserved for public use; and

WHEREAS, the federal government is responsible for the administration of approximately 56% of the lands in Klamath County; and

WHEREAS, the United States claims to be the owner of the servient estate traversed by rights-of-way accepted by the County pursuant to the grant offered in R. S. 2477 and other U. S. Congressional legislation; and

WHEREAS, the regulatory powers of the United States are limited by the obligation to honor valid existing rights, including the rights-of-way accepted pursuant to the grant offered under R. S. 2477 and other U. S. Congressional legislation; and

WHEREAS, the County is, and has been since its creation, responsible under State law to provide transportation systems

for the traveling public and to support the local economy, custom, and culture; and

WHEREAS, the public's right, title and interest in these rights-of-way includes the right to perform any and all construction and maintenance which is reasonable and necessary for safe passage over the rights-of-way and associated improvements; and

WHEREAS, the rights-of-way accepted pursuant to these federal grants have not been abandoned or waived except where formal procedures provided under State law have been followed; and

WHEREAS, it is the policy of Klamath County to ensure that all rights-of-way accepted pursuant to these federal grants be retained in perpetuity for the use and benefit of the public;

NOW, THEREFORE, IT IS HEREBY ORDAINED BY THE KLAMATH COUNTY BOARD OF COMMISSIONERS, KLAMATH COUNTY, OREGON, as follows:

I. DEFINITIONS as used in this Ordinance:

A. "Acceptance", "acceptance of a right-of-way for the construction of a highway over public lands, not reserved for public uses", or "accepted" means one or more of the following acts prior to October 21, 1976:

1. by the County or person with the intention of creating a public highway over public lands;

a. construction or maintenance of a highway;

b. inclusion of the right-of-way in a State, county, or municipal road system, plat, description, or map of County roads;

c. expenditure of any public funds on the highway;

d. execution of a memorandum of understanding or other agreement with any other public or private entity or an agency of the federal government that recognizes the right or obligation of the County to

construct or maintain the highway or a portion of the highway; or

2. use by the public for the period required by Section 27-12-89 or prior State law; or

3. any other act consistent with State or federal law indicating acceptance of a right-of-way.

B. "Highway" means:

1. any road, street, trail, or other access or way that is open to the public to come and go at will, without regard to how or by whom the way was constructed or maintained; and

2. appurtenant land and structures including road drainage ditches, back and front slopes, cut and fill slopes, turnouts, rest areas, and other areas that facilitate use of the highway by the public; and

3. pedestrian trails, horse paths, livestock trails, wagon roads, jeep trails, logging roads, homestead roads, mine-to-market roads, alleys, tunnels, bridges, water ways and water impoundments, and all other ways and their attendant accesses for maintenance.

C. "Federally controlled lands not reserved for public uses" means any federal lands open to entry, location, appropriation or purchase, until such lands were lawfully reserved.

D. "Right-of-way" means a right-of-way for a highway existing in this County on public lands not reserved for public uses and accepted by the County prior to October 21, 1976.

II. ACCEPTANCE:

A. Klamath County, as trustee for the public users who were granted rights by R. S. 2477 and as a result of other laws implemented by the United States Congress consistent with the public policy of the United States of America to grant right-of-ways to the public, hereby accepts as Trustee for the public all of the public's right, title, and interest in these rights-of-way;

B. Klamath County shall not be deemed to consent or have consented to the exchange of any right-of-way granted to Klamath County by virtue of U. S. Congressional action unless a formal written resolution specifically so stating has been passed at a duly called public meeting of the Board of County Commissioners. No employee or agent of Klamath County has been given authority to abandon, waive, or exchange any such right-of-way and any prior action by any employee or agent purporting to take any such action was void when taken, unless:

1. in the case of exchange, later ratified by formal written resolution as provided herein; or

2. in the case of abandonment or waiver, action has been taken in accordance with the procedures in ORS 366.005 *et seq.*

C. Where a right-of-way has been perfected through public use, the failure by the County to conduct mechanical maintenance of said right-of-way shall not affect in any way the status of said right-of-way as a highway accepted by the public in accordance with the policy of the Federal government.

D. The omission of any right-of-way from any plat, description, or map of County roads or highways, whether required by State law or otherwise, shall not be deemed a failure to accept the grant offered prior to October 21, 1976 as a result of the policy of the United States of America.

III. ABANDONMENT

A. Abandonment of these rights-of-way shall take place only in accordance with the procedures in ORS 366.005 *et seq.*

B. If any right-of-way is abandoned by Klamath County, the right-of-way shall revert to the State.

IV. SCOPE OF RIGHT-OF-WAY

A. The scope of these rights-of-way is that which is reasonable and necessary to ensure safe travel for all uses that occurred before October 21, 1976.

B. The scope includes the right to widen the highway as necessary to accommodate the increased travel associated with all uses that occurred before October 21, 1976, up to, where applicable, improving a highway to two lanes so travelers can safely pass each other.

C. Unless otherwise established by formal action taken by the Board of County Commissioners, the width of these rights-of-way used for vehicular travel may not be less than the setback standards for wilderness boundaries along existing roads as described in Bureau of Land Management Manual H-8560-1,

Management of Designated Wilderness Areas, dated July 27, 1988, as follows:

1. high standard paved highways shall be 300 feet from the centerline;

2. high standard logging roads shall be 100 feet from the centerline;

3. low standard logging, jeep, maintenance, dirt roads used for right-of-way, or similar roads shall be 30 feet from the centerline.

V. PUBLIC COMMENT

A. It is in the best interest of Klamath County and the public that facts and legal issues relevant to Klamath County's management of its rights-of-way be raised in a timely manner and it is a fundamental principle of due process and fairness that any person having knowledge relevant to such facts or issues bring them to the attention of the County.

B. Inclusion of any proposed action on the agenda for a duly called public meeting of the Board of County Commissioners shall be deemed notice to the public for all purposes under this Ordinance.

C. Any factual or legal issue not brought to the attention of Klamath County by presentation at the public meeting where action is proposed or authorized to be taken or by written comments filed within five (5) days of said meeting shall be deemed waived by any party in later proceedings, whether in a court of law or otherwise.

No action may be brought against Klamath County, its officers or employees for damage suffered by a person solely as a result of the unmaintained condition of a public right-of-way.

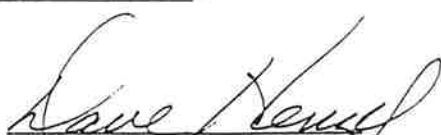
VI. SEVERABILITY


The provisions of this Ordinance are severable, and any invalid section, subsection, sentence, clause, phrase or portion of this Ordinance if for any reason is held invalid or unconstitutional in a court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and shall not effect the validity of the remaining portions of the Ordinance.

DONE and dated this 5th day of Feb., 1995.


Clifton H. McMillan III
Chairman


F. Jean Elzner
Commissioner


David Henzel
Commissioner


Approved as to form - County Counsel