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 vague 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 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.

[A Supreme Court decision of 1879, Jennison v. Kirk (98 U.S. 453, 457-459,) held that the object of the Act of 1866 "is to give sanction of the United States to possessory rights which had previously rested solely on local customs, laws and decisions." Because the statutes were silent, common law became the underpinning of the doctrine of possessory rights.

In the same year, the Court under Broder v. Water Co. (101 U.S. 274, 276,) the court ruled that the pre-existing possessory right dated back to the time of the formation of the state and were rights "the government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the Act of 1866."

Later in 1881, 8 P.C.L.J. 455 Re: Lux v. Haggin affirmed that the court had held that the Act of 1866 did not create any new right, but merely recognized and sanctioned preexisting rights.

In Mohl v. Lamar Canal Co. (C.C. Colo. 128 F. 776 appeal dismissed 140 F. 988; 1904) the court affirmed that the Act of 1866 did not create rights, but is a recognition by Congress of a preexisting right of possession and asserted that such rights constituted a valid claim to their continuance.]

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."

[The grant of a right of way is self-executing. An R.S. 2477 right of way comes into existence automatically when a public highway is established across public lands in accordance with the law of the state, [Standard Ventures, Inc. v. Arizona, 499 F.2d , 9th Cir. (1974); Sierra Club v. Hodel, 848 F.2d, 10th Cir.; (1988.)]

Whether a right of way has been established is a question of state law, [Standard Ventures, Inc. v. Arizona; Fisher v. Golden Valley Elec. Ass'n., Inc. 658 P.2d, Alaska;(1983) - citing United States v. Oklahoma Gas & Elec. Co. 328 U.S.; (1943.)]

That the character of the use of the right of way was such as to constitute acceptance of the public of the statutory grant. (Hamerly 359 P.2d at 123.)

The standard for conditions that establish a right of way include whether a trail has been frequented by public users for such a period of time and under such conditions as to prove that a public right of way has come into existence, (Hamerly; Dillingham 705 P.2d; Alaska Land Title 667 P.2d; Girves 536 P.2d.)

Continuous use is not a requirement. "Infrequent and sporadic" use is insufficient. "Regular" and "common" use by the public is necessary, [McGill v. Wahl, 839 P.2d, Alaska (1992); Hamerly; Kirk v. Schultz, 110 P.2d, Idaho (1941.)

The test is what is "substantial" use under the circumstances. Courts must look to the circumstances as they existed at the time of establishment. The court noted that travel over a claimed R.S. 2477 right of way was irregular, but that was the nature of the country and to the fact that only a limited number of people had occasion to go that way, [Ball v. Stephens, 258 P.2d, Cal. (1945.)

The purpose of travel is irrelevant to R.S. 2477 (Ball; Dillingham.)

To assert a public easement by prescription, the public need only act as if it were claiming a permanent right to the easement, [Swift v. Kniffen, 706 P.2d 296, Alaska (1985.)]

Public prescriptive easements involve the public use, not possession of the land, [Jesse Dukeminier & James Krier, Property 850 2d ed. (1988); See also Dillingham for a discussion of the distinction between use and possession.)

The law recognizes that routes may evolve. There is no requirement that the historic route and its current location coincide exactly. Where parts of an historic road or trail are obliterated by another more modern highway, or are destroyed by natural forces, the right of way is not

obliterated or destroyed, (Ball;)

In 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."

[(SEE also: McRose v. Bottyer, 22 P. 393, Cal. 1989; Bequette v. Patterson, 37 P.917, Cal. 1894; Schwerdtle v. Placer County, 41 P.448, Cal. 1895 - citing St. 1870, p.457; Sutton v. Nicholaisen, 44 P. 805, Cal. 1896 - citing Pol. Code Section 2619, enacted 1873, amended by Act of March 30, 1874, repealed 1883; Town of Red Bluff v. Walbridge, 116 P. 77, Cal. Ct. App. 1911; People v. Quong Sing, 127 P. 1052, Cal. Ct. App. 1912 - citing Pol. Code Section 2619; Central Pacific Ry. Co. v. Alameda, 299 P. 77, Cal. 1931; 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.)

Several cases have affirmed this transfer to the State of proprietary jurisdiction over rights-of-way: In Colorado v. Toll, 268 U.S. 278, (1925,) the Park Service tried to assert exclusive control over the roads within the Park. The Supreme Court held that the creation of Rocky Mountain National Park did not take jurisdiction away from the State of Colorado over existing roads within the Park. In Wilkinson v. Department of the Interior, 634 F. Supp. 1265, D. Colo, (1986,) the case involved a road that entered and then exited the Colorado National Monument. The Court held that the Park Service could not charge an entrance fee for those using the road through the Monument because this was an invalid restriction on the right- of-way. An attempt to prohibit all commercial traffic was also determined to be contrary to the right-of-way. In U.S. v. Jenks, 804 F. Supp. 232 - D.N.M., (1992,) the court again found that the issue of whether an R.S. 2477 right-of-way has been established is a question of State law.]

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).

[In 1891, a Congressional Act also separated the rights-of-way for canals and ditches from the mining law, establishing limits on reservoirs, ditches and canals over public land to the ground occupied by the water plus 50 feet on either side and establishes the right to take earth and stone for necessary construction from adjacent public land.]

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. [See Oklahoma v. Texas, 258 U.S. 574, 599-600; (1922)]

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.)