

Public Highways, Power of Board of County Commissioners to Declare and Record Same. Public Highways, Established by Prescription.

A board of county commissioners has the power and authority to declare a road traveled by the public for a long number of years to be a public highway. Section 2600, Political Code, is

construed as a remedial statute, and does not of itself establish traveled roads used by the public as highways. Roads may become public highways through use by the public during the period required by the statute of limitations.

Helena, Montana, Jan 28, 1908.

J. W. Speer, Esq.,
County Attorney,
Great Falls, Mont.

Dear Sir:—

I have your letter of Jan. 22nd, 1908, making inquiry as to whether a certain traveled road in Cascade County can now be declared a public highway by the board of county commissioners.

From your statement of the facts, together with the enclosed letter from W. A. Conklin, it seems clear that the road, if at present a public highway, is such only by prescription and continuous user.

Section 2600 of the Pol. Code of the State of Montana has been construed in the case of *The State of Montana vs. Auchard*, 22 Mont. page 14, in which the court says that the statute must "be interpreted as a remedial statute, curing irregularities, but not supplying jurisdiction, where none was acquired, in the creation of the roads, and as recognizing the existence of highways by prescription when they had been used or traveled by the people generally for the period named in the statutes of limitations. It is also doubtless true that if the road had been used and traveled by the public generally as a highway, and is treated and kept in repair as such by the local authorities whose duty it is to open and keep in repair public roads, proof of these facts "furnishes a legal presumption, liable to be rebutted, that such road is a public highway."

This opinion is approved in 25 Mont. 427. After reading this decision it is my opinion that the action of the board of county commissioners in declaring the road to be a public highway, and so recording it, would not in any way improve the rights of the public. I would advise that you bring some action whereby the status of the road would be judicially determined; either by charging the owners of the fences with obstructing a public highway, or by some other action whereby the court could determine upon all the evidences whether or not the road is a public highway. The board of county commissioners may declare the road to be a public highway. However, as I have stated, that would not help matters any.

Very truly yours,

ALBERT J. GALEN,
Attorney General.