

Indian Reservation, Establishment of Public Roads on. Statute of Limitations.

Prior to the opening of an Indian reservation, the public has no right upon lands embraced therein, except by license or permission from the Indian department, and therefore a prescriptive right to a public road cannot be obtained. The public cannot date a prescriptive right under such circumstances at any time prior to the opening of such reservation.

September 7, 1912.

Hon. L. C. Rinard,
County Attorney,
Thompson, Mont.

Dear Sir:

I am in receipt of your letter of the 3rd inst., submitting the question:

“Does the statute of limitation run in favor of the public as to roads used by the public on the Indian Reservation prior to the opening of such reservation?”

The rights of the public to roads on the Flathead Indian Reservation has been discussed to some extent by this office in an opinion rendered to the Hon. Joseph A. Edge, Chairman of the Board of Commissioners of Flathead county. In the question there submitted a map of definite location had been made and filed with the Indian department and had been approved by that department. Under those circumstances this department held that the easement of the public to the right of way had attached to the soil and that that right was not divested by subsequent settlement of the land. But, in the case you mentioned, it appears that no action was ever taken by the authorities relative to the establishment of the road, nor was any permission given by the Indian department for use of the strip of land as a public highway.

Sec. 2477 of the Revised Statutes of the United States grants a right of way for highways over public lands “not reserved for public uses,” but the land embraced within the Flathead Indian Reservation was not public land, for it was not “subject to sale or other disposal under general laws.”

32 CYC. 775.

Hence this statute granting the right of way would not apply.

Prior to the opening of the Reservation the public had no right upon these lands except by license or permission from the department, and it is fundamental that a prescriptive right cannot be initiated by trespass or under license.

Sec. 1337 of the Revised Codes of Montana defines highways and refers to roads “now traveled or used by the public.” This Act was approved March 2, 1903, but in as much as the public could not rightfully use these roads across the Indian Reservation except by permission of the Interior Department, the provisions of this statute would

not apply. Hence, I take it, that the public cannot date any prescriptive right prior to the time of the opening of the reservation.

I enclose you herewith copy of the opinion rendered to Mr. Edge.

Yours very truly,

ALBERT J. GALEN,

Attorney General.