

Opinion No. 76-11

March 25, 1976

BY: OPINION OF TONEY ANAYA, Attorney General Nicholas R. Gentry, Assistant Attorney General

TO: Mr. Tom B. Keyse, Executive Secretary, Natural Resource Conservation Commission, 321 West San Francisco, Santa Fe, New Mexico 87503

QUESTIONS

Questions

The Central Rio Grande Natural Resource Conservation District has asked several related questions, which can best be answered by addressing this opinion to three basic issues.

1. What are the methods for establishing public roads in New Mexico?
2. Who is charged with the responsibility of maintaining public roads?
3. What is the width of a public road established by prescription?

Conclusions

1. See Analysis.
2. See Analysis.
3. See Analysis.

Background

The situation necessitating this opinion exists in Bernalillo County where the status of two roads being used by the public is in question. The Gutierrez Canyon Road is located in the Tijeras area. It begins in Section 12, T 10 N, R 5 E, NMPM and runs northeasterly through Sections 7, 6 and 5, T 10 N, R 6 E, NMPM. At its southwestern end it connects with the Federal Highway System and in the northeast with Bernalillo County public roads. It runs through property of several private landowners and is maintained by Bernalillo County.

OPINION

The existence of acceptance by means of public use depends on the duration, though no minimum requirement has been established, the type and amount of use and any

other competent evidence. This is a factual determination {*66} which must be made on the basis of the circumstances surrounding each individual case.

Relative to this question of offer and acceptance is the federal statute, 43 U.S.C.A. Section 932, which states that:

"The right of way for the construction of highways over public lands, not reserved for public use, is hereby granted."

By this section, the United States offers a standing right-of-way for the construction of highways over public lands not reserved for public use which may result in dedication if acceptance is manifested by either user sufficient to establish a highway under the laws of the state or some positive act of the proper governmental authorities. See **Lovelace v. Hightower, supra**.

Thirdly, a public road may be established if "recognized and maintained by the corporate authorities of any county of New Mexico." A determination of exactly what constitutes recognition and maintenance has not been made, although the court in **Norero v. Board of County Comm'rs of Grand County**, 82 N.M. 300, 481 P.2d 88 (1971), considered this problem to a certain extent. The language employed by the court would indicate that maintenance without objection from the landowner and proper recognition by the appropriate county authority are fundamental requirements.

In addition to these methods created by the statute, there is one common law method of establishing a public road. This is by prescriptive use, acquisition of an easement through adverse use. The court in **Hightower v. Lovelace, supra**, listed the required elements for acquisition by prescription. The use of a road by the public must be open, uninterrupted, peaceable, notorious, adverse, under a claim of right, for a period of at least 10 years and with the knowledge, or imputed knowledge, of the landowner. See also **Hester v. Sawyers**, 41 N.M. 497, 71 P.2d 646 (1937). Mere permissive use of a private road by the public is insufficient. See **Commissioners San Miguel Co. v. Friendly Haven Ranch Co., supra**. It should also be recognized that this method of establishing public roads can be utilized only on private lands and not on lands held by governmental entities, federal or state. See **Burgette v. Calentine**, 56 N.M. 194, 242 P.2d 276 (1951).

When these various methods of establishing public roads are applied to the facts made available to use, it would appear that the Gutierrez Canyon Road might possibly be a public road, although there exists no formal dedication, nor has there been any exchange, purchase or condemnation of the land. However, the road is maintained by Bernalillo County. Such maintenance is one of the two requirements for establishing a public road if "recognized and maintained by the corporate authorities of any county of New Mexico." If the maintenance is sufficient and proper recognition is present, this road could be classified as public. It is also possible that this road may be public by virtue of the process of prescription. The road runs through private land, but of course, the eight required elements must also be satisfied.

As to the Primera Agua Road, it appears that the only manner in which this could be a public road would be by prescriptive use. It also is on public land and has been in use by the public for an {*67} extended period of time. Again, the requirements set out in **Lovelace v. Hightower, supra**, must be met, and this is ultimately a factual determination.

2. The matter of maintenance of public roads is covered by several related statutes. Generally, the duty is divided between the State Highway Commission and the respective boards of county commissioners. According to Section 55-2-11, NMSA, 1953 Comp., it shall be the duty of the highway commission:

". . . to construct, repair and maintain, at the expense of the state either wholly or in part, such public roads and highways, within the state, as in their judgment will best subserve the interest of the general public looking to the construction and maintenance of a complete system of highways in the state."

See also Sections 55-2-8 and -29, NMSA, 1953 Comp. All public roads not so designated by the State Highway Commission are to be maintained by the counties in which they are located. See Sections 55-3-1 and -13, NMSA, 1953 Comp. However, when the state road fund lacks sufficient money for maintenance of the state road system, the counties shall maintain at their own expense the sections of state roads in their county which the state is incapable of maintaining, Section 55 - 3 - 13, **supra**. See also Opinion of the Attorney General, 1933-34, No. 797.

If either of the roads under consideration would qualify as public roads, they would most probably be county roads and thus should be maintained by Bernalillo County, unless designated by the Highway Commission as part of the state highway system, an unlikely occurrence in view of their relatively minor importance. Of course, if a road fails to meet the requirements for becoming a public road, neither the state nor county is obligated to provide any maintenance.

3. In regard to the width of public roads, there are two relevant statutory provisions. First of all, Section 55-4-1, NMSA, 1953 Comp., states:

"County bridges are parts of public highways and must not be less than sixteen [16] feet in width; when practicable the county commissioners shall declare all townships and section lines, public highways of not less than forty [40] feet in width, . . ."

Secondly, and more importantly, Section 55-4-2, NMSA, 1953 Comp., states:

"All public highways laid out in this state shall be sixty [60] feet in width unless otherwise ordered by the board of county commissioners."

These specifications are applicable to all public roads laid out in accordance with statutory provisions. The width of roads established by prescription, a common law procedure, is governed by common law principles. See **State v. Partman**, 523 P.2d 56

(Mont. 1962), where the court refused to apply a statute similar to Section 55-4-2, **supra**, when determining the extent of prescriptive use, but instead applied its own common law standard. See 76 A.L.R. 2d 535 (1961); 39 Am. Jur. 2d **Highways, Streets and Bridges** 352 at 441.

Unfortunately, there is no New Mexico case law on point, however there are numerous decisions from other jurisdictions. As far as easements by prescription in general are concerned, the character and extent of a prescriptive easement right are determined by the character and extent of user during the prescriptive period. **Stickle v. Link**, 511 S.W. 2d 848 (Mo. 1974). 28 C.J.S. **Easements** § 74. According to the court in **Yakima Valley Canal Co. v. Walker**, 76 Wash. 2d 90, 455 P.2d 372 (1969), a prescriptive easement is established to the extent necessary to accomplish the purpose for which the easement is claimed.

This basic principle also applies to easements in the form of public roads established by prescriptive use. Although there is some disparity among the various state courts as to the exact principle of law to apply, the determination of width is ultimately a factual determination, taking all the particular facts and circumstances into consideration. The most practical and well reasoned rule is presented in **Hunsacker v. State**, 29 Utah 2d 322, 325, 509 P.2d 352, 354 (1973). The court stated that the width of a public road established by prescription should not be limited to the actual use or merely the "beaten path," but "The use carries with it such use as is reasonably necessary for the public easement of travel." See also **Kirk v. Schultz**, 63 Idaho 278, 119 P.2d 266 (1941); 39 Am. Jur. 2d 352, **supra**. In each case, the peculiar character and extent of the prescriptive use must be considered. With such use comes the width necessary for the enjoyment and convenience of the traveling public who use the road. **Whitesides v. Green**, 13 Utah 341, 44 P. 1032 (1896). Such factors as the amount and nature of public use, physical characteristics of the land, location of fences or walls, need for repair and improvement, width of other roads in the locality, statutory width or any other relevant information should be given attention.