

PUBLIC ROADS:
PRESCRIPTION:

Public road may be established when such road has been continuously used by the public for a minimum period of ten years, and upon which there shall have been expended public money or labor for such period to the extent that such road has been kept in substantial repair and condition for the public use and public travel.



October 3, 1955

Honorable W. H. Pinnell
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Section 228.190. (A L A. L. 1953 H. B. 40)

"Define legally established public roads as follows:

"All roads in this state that have been established by any order of the county court, and have been used as public highways for a period of ten years or more, shall be deemed legally established public roads; and all roads that have been used as such by the public for ten years continuously and upon which there shall have been expended public money or labor for such period, shall be deemed legally established roads; and nonuser by the public for five years continuously of any public road shall be deemed an abandonment and vacation of the same.

"A matter has come up in this County in regard to this Section. The situation here is that there is a road crossing private land which has been continuously used by the public for more than ten years and has been maintained on one occasion by the expenditure of public funds through the use of a road grader or other public owned equipment.

"The particular road in question has been in reasonably good shape and has not required any other public maintenance within the past ten years. Assume, for the purpose of this question, that the road in question has been used for ten or more

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years continuously prior to this date and assume further that the road has been 'worked' one time by public equipment. And assume further that the road has not required any public maintenance during this ten year period. In view of these facts I would like to know whether such circumstances mean that a public road had been created.

"In trying to determine the law on this matter I reviewed the cases including: Sellers v. Swehla, 253 S.W. (2d) 847, which in my opinion holds that public money be expended for ten 'consecutive' years, coupled with continuous use for a like period of time, and therefore, a public road could not be created by mere continuous public use for more than ten years and public maintenance for one year. Despite this conclusion I would like an opinion from your office as to whether a public road has been created if the facts hereinbefore set forth are true."

On May 24, 1954, this department rendered an opinion to Honorable Irvin D. Emerson, Assistant Prosecuting Attorney of Jefferson County, in which we construed Section 228.190, referred to by you. A copy of this opinion is enclosed and will, I believe, probably answer the question asked by you in your opinion request.

In the enclosed opinion we do not discuss the case of Sellers v. Swehla, 253 S.W.(2d) 847, referred to by you. That case does discuss what seems to be the only debatable situation set forth in your opinion request, to wit, the expenditure of public money for labor for the period of ten years' prescriptive use. The pertinent part of the Sellers opinion is found upon pages 851 and 852 and reads as follows:

"As to the expenditure of public money or labor upon the road in question, the evidence shows a probable use of a grader some five years before the trial and another use of a grader about the time the suit was filed, probably a short time before. There is also some evidence that 30 or 35 years ago certain persons worked out their poll taxes on this road. The evidence further shows that the plaintiff, Ralph Sellers, did some work on the road himself, part of it with the knowledge of the defendant. Taking this all as true and fully proved, we do not think it yet meets the requirement of the statute. This court, speaking through Judge Bradley, in State v. Kitchen, supra said:

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"We are clearly of the opinion that all that is required by this statute with reference to the expenditure of public money or labor is that for the ten consecutive years of use sufficient public money or labor should be expended on the road to keep it in substantial repair and condition for the public use and public travel."

"The evidence in this case clearly shows that the road was not kept in substantial repair and condition for the public use, even by adding the labor of the plaintiff to the alleged operations of the public grader. It is not sufficient that the road be used for ten years continuously, but public money or labor must be expended on it 'for such period,* * *.' We think the evidence here wholly fails in that regard."

From the above, it seems clear that in order to satisfy the requirement as to public maintenance set forth in Section 228.190, supra, only so much expenditure of public money or labor is required as is necessary to keep the road in "substantial repair and condition for the public use and public travel."

In your letter you state that "The particular road in question has been in reasonably good shape and has not required any other public maintenance within the past ten years."

As we said above, it does not appear that any certain amount of public labor must be expended upon the road at any particular time in order to bring it within the purview of Section 228.190, supra, but that only so much as is necessary to keep the road in "substantial repair and condition" is necessary. Since you state that this was done, we believe that the requirement of the statute has been met and that a public road has been established under the state of facts submitted by you. We must, of course, bear in mind in this regard that there could very easily be a wide difference of opinion as to what constituted "substantial repair and condition." One person might believe that such condition existed, whereas, another person might believe that it did not. This would be a matter of general conclusion based upon the standards of maintenance of other roads in the same area.

CONCLUSION

It is the opinion of this department that a public road may be established when such road has been continuously used by the public

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for a minimum period of ten years, and upon which there shall have been expended public money or labor for such period to the extent that such road has been kept in substantial repair and condition for the public use and public travel.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld

enc. Opn. to
Irvin D. Emerson
4-24-54