

ROADS AND BRIDGES: County road may be vacated by abandonment for a period of ten years.

September 28, 1939

Mr. I. T. Bode, Director  
State Park Board  
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion, dated September 25, 1939, which is as follows:

"Further reference is made to the matter of county roads in State parks. It is our understanding that a State law exists which provides for the automatic abandonment of a county road if the county does not spend any money for maintenance on any road within a five or ten year period.

We have some county roads on the inside of State parks which we would like to eliminate. On these roads the respective counties have spent no money for maintenance, or for any other purpose, within a ten year period.

Is it true that a county road is automatically abandoned at the end of any specific period of time provided the county court spends no money on it for maintenance? Should this be true, what would be our procedure in getting rid of the road?"

The law which you have in mind is found at the latter part of Section 7839, R. S. Mo. 1929, and is as follows:

" \* \* \* \* and nonuser by the public for ten years continuously of any public road shall be deemed an abandonment and vacation of the same."

It is apparent from the reading of this statute that the question of whether or not public money is expended on any public road for a period of ten years is not material, the only question being that of user by the public.

The leading case in Missouri on this subject is *Oetting v. Pollack*, 189 Mo. App. 263. The abandonment of a public road is clearly defined in this case, and we quote at length from the opinion of Judge Farrington, l. c. 270, 271.

"There may be a vacation of a public highway by proceedings under the statute, as we have shown, or the vacation may occur by abandonment under section 10446, Revised Statutes 1909--from nonuser by the public for a period of ten years continuously. That is to say, 'a highway may cease to exist either by abandonment or by vacation according to law.' \* \* \* \* \* The court in our case, in its finding of facts, stated that this road has been regarded by most of the people living in the neighborhood of it as an abandoned road. We do not believe this is sufficient to constitute abandonment. If no other way existed of vacating highways, it might be argued with good reason that what most of the people thought who were entitled to use a highway would be a controlling factor. In the case of *O'Dea v. State* (Neb.), 20 N. W. 299, 300, the rule is thus declared: 'In order to vacate a road by nonuser, there must be a clear and entire abandonment of the road by the public for the statutory period. \* \* \* \* \* Officers and courts cannot inquire into the extent of the use whether used much or little by the public. If used at all, the road will not 'be deemed vacated.'" (See, also, *Cox v. Commissioners of Highways of East Fork Twp.* (Ill.), 62 N. E. 791, 793; *Kelly Nail & Iron Co. v. Lawrence Furnace Co.* (Ohio), 22 N. E. 639, 640.) In the case of *Small v. Binford* (Ind.), 83 N. E. 507, 510, the court said: 'The fact that the road is rarely, if ever, used by persons other than the

appellants, makes it none the less a public highway. The law does not fix the number of persons who must travel upon a road to determine its existence'--citing authorities. When a right to use a road as a public highway has become vested in the public it inures to the benefit of all the public; hence such a right cannot be surrendered or abandoned unless all of the public concur therein. The court in this case did not find that the public generally had entirely ceased to travel this road, but did find that it had not been traveled by the public generally to any extent for the last fifteen or twenty years; and that can only mean that the extent of the travel by the public was limited. The fact that defendant in the year 1912 took the law in her own hands and fenced up a highway that at least was still used by the plaintiff and the children who attended the school situated on that road, and one that was recognized as an existing public road in 1907 by the county court, does not constitute an abandonment under the statute. Our Supreme Court in the case of Hickman v. Link, 116 Mo. l. c. 127, 22 S. W. 472, said: 'Abandonment includes both the intention to abandon and the external act by which the intention is carried into effect.'

The same rule has been followed by the courts until the present time, a similar rule being laid down in Rosendahl v. Buecker, 27 S. W. (2d) 471.

From the reading of the foregoing, it is apparent that any user of a public road, once dedicated in a proper manner, is sufficient to maintain the road as a public way, regardless of the frequency of such use. In former opinions we have fully set out the law regarding the statutory method of vacation of roads, and suggest that this is the only procedure open for the closing of such county roads passing into or through state parks.

Respectfully submitted,

ROBERT L. HYDER  
Assistant Attorney General

APPROVED:

W. J. BURKE  
(Acting) Attorney General