



Landowners Next to Unopened Rights-of-Way May Be Able to Secure Title to the Land Based on Washington's Non-User Statute

JUNE 8, 2018

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Under Washington State's Non-User Statute, public rights-of-way that have never been "opened" may be subject to a "statutory vacation," meaning the right-of-way is extinguished and the underlying land reverts to the original fee title owner. Landowners should consider whether the Non-User Statute could apply to abutting unopened public rights-of-way as they may have a claim to a portion of the underlying land if adequate facts in the historical record suggest the road was not opened during the relevant time period.

Although the Non-User Statute vacates streets by operation of law, a judicial determination confirming the applicability of the statute is necessary to establish it on the record and to free the land involved from the right-of-way. Lawsuits based on the Non-User Statute are generally brought as "quiet title" actions. Unless avoidable through settlement negotiations with the relevant jurisdiction, the end goal of such action is a judicial ruling that extinguishes the right-of-way and secures title to the land in the plaintiff's name. The facts surrounding the relevant land will often dictate the time and expense of bringing such an action. Similarly, the posture of the city or county involved (i.e., whether they will staunchly oppose or merely be indifferent to an action to vacate the street) will influence how much effort one must devote to the litigation. For this reason, it is often advisable to engage in preliminary discussions with the local jurisdiction to gauge whether there are opportunities to avoid disputed litigation if there are agreed upon facts.

The Non-User Statute, originally passed by the state legislature in 1890, and now codified at RCW 36.87.090, provides:

Any county road, or part thereof, which remains unopen for public use for a period of five years after the order is made or authority granted for opening it, shall be thereby vacated, and the authority for building it barred by lapse of time...¹

Although the Non-User Statute only operates to vacate county roads, roads within city limits may still be eligible for the statutory vacation if the land was annexed to a city after the relevant 5-year period of non-use.

Another significant limitation exists to the statute as a result of a 1909 amendment which restricted its' scope such that rights-of-way dedicated by plat would not be eligible for statutory vacation. Eventually, Washington courts ruled that the amendment did not apply retroactively to streets dedicated by plats which had been on file already for the five-year period. Ultimately, the Non-User Statute can still operate where the plat dedicating the road was recorded (or signed) before March 11, 1904 (five years before the legislative change).

Establishing that a county road was not opened for five years after it was designated can be a difficult task. It is the classic dilemma of proving a negative; to prove that the Non-User Statute operated to vacate the road by law, one must prove that the road was not opened. When evaluating a potential claim under the Non-User Statute, there are numerous sources of evidence including: property documentation, plat maps, and other historical maps or drawings that may contain useful notations

¹ The 1890 law was worded slightly different, but provides substantively similar language. Laws of 1889-90, Chapter 19, Section 32.

providing evidence of non-use.² In some cases, engaging a professional land surveyor to do a field investigation or even opine on satellite imagery can provide testimonial support for your case. Although satellite imagery presents a picture of the land long after the relevant time period, sometimes these images can reveal faint traces of a road that would indicate the road had been opened, or contrastingly, large trees that might be inconsistent with a road ever having been present. The specifics of the case and the difficulty in establishing that the road was not opened ultimately dictate how far a plaintiff should go to establish an evidentiary record. In one recent case, we interviewed local residents who lived within a couple blocks of the relevant right-of-way and used their testimony in support of a successful motion for summary judgment.

For more information

For those landowners interested in evaluating whether they may have a claim to a portion of land underlying an unopened right-of-way, please contact [Steve Scheele](#).

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² For example, in *Real Progress*, ___s were able to point to early maps which labeled the relevant stretch of land where the road was located as “impassable” or _____.