

Apparent Right-of-Way in Indiana

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The Indiana Legislature recently enacted a statute intended to streamline the process of mapping county highway rights-of-ways. Known as the Apparent Right-of-Way statute, this legislation allows counties to identify, map, and describe certain of their rights-of-ways without going through the judicial process.

Circumventing the judicial process is no mean feat, and carries a certain price; the apparent right-of-way will often be narrower than the actual right-of-way, had the county gone through the judicial process. This article (which originally appeared in the *HERPICC Pothole Gazette* discusses how this statute came about and what it means for Indiana counties; how apparent right-of-way relates to actual right-of-way; some of the problems the statute may solve and some of the potential problems it may cause; and what means are available to counties to map apparent right-of-way.

THE LONG AND COMPLEX HISTORY OF INDIANA'S ROADWAYS

Highways come into existence in a number of ways. They are acquired by dedication, deed, eminent domain, prescription, or statute. The location and/or width of a highway created by dedication, deed, or eminent domain is usually well known because due to their written nature.

Highways created under one of the last two categories (highways established via unwritten rights) often have no definitive location or width due to the unwritten nature of their creation. It is for this group of highways that the apparent right-of-way statute was written.

HIGHWAYS CREATED "BY USER"

To understand how the apparent right-of-way statute will operate, it is important to see how highways are created by user. The two means — prescription and statute — are similar but have a different basis in law.

Prescription is a mode of acquiring title to incorporeal hereditaments (a right in property but not the property itself) by immemorial or long continued use. It strictly involves the question of open and notorious, adverse and continuous use, for the statutory period. Adverse use being of its essence "use by consent" could never ripen into a right or establish a highway. Consequently, very few highway, if any, are established in Indiana by prescription.

Statutory highways are those used continuously for twenty years, the public having no right so to use them, except from such continued use. They differ from prescriptive highways in that there

is no need for adverse use, simply continuous use. Statutory highways have no established width by law, but their width, as used at the end of twenty years, cannot legally be intruded on.

The apparent right-of-way statute will most likely be applied to statutory highways because such highways typically have no written description or survey information, and are the most common highway created as a result of unwritten rights.

STATUTORY LEGACY

The apparent right-of-way statute is merely the latest in a series of highway statutes. A review of these statutes reveals an interesting history that will aid in the mapping of apparent rights-of-ways.

The first statute I found was the Highway Act of 1849. This act said that all public roads, not recorded, which have been or shall be used for twenty years or more, shall be deemed public highways.

Five years after the enactment of this act, a dispute occurred concerning public highways. The outcome of that decision, *Epler v. Niman* (1854) 5 Ind. 459, hinged on the definition of a public highway. The argument was, since the road in question was of no established width, it was not a public highway.

The court declared that “A road which by twenty years use becomes a public highway is of no established width by law; but the width as used at the end of twenty years can not legally be intruded upon by any one”. This case confirms the use of the highway statute in Indiana and is the basis of the apparent right-of-way statute, as we will see later.

The highway act was later revised to empower county commissioners to enter of record highways created by user. The revised act, known as the Highway Act of 1867, maintained the section concerning creation of public highways by virtue of twenty years use.

The 1867 act also said . . . “and the board of county commissioners shall have power to cause such of the roads used as highways as shall have been laid out but not sufficiently described, and such as have been used for 20 years but not recorded to be ascertained, described, and entered of record”.

The next revision, The Highway Act of 1897, may have been the first act to attempt to legislate the width of user established highways. The act added this section to the 1867 version, “. . . and such board shall declare and establish the width of any such highway, which width shall not be less than thirty feet”. Notice that this act appears to be in direct conflict with the decision reached in *Epler v. Niman*.

It was not long before this apparent conflict was decided in court. In the case of *McCreery v. Fallis* (1903) 162 Ind. 255, the court upheld the decision of *Epler v. Niman* when it said the Highway Act of 1897 only applied to prescriptive highways having a breadth of thirty feet or more, otherwise the Highway Act of 1867 still applied.

This decision was based on the assumption that the purpose of the act was to authorize partial abandonment or narrowing of highways that user had established to a width of more than thirty feet. To interpret otherwise, the court said, would be to sanction the confiscation of property in this and a large number of other cases — an unconstitutional operation. As we will see later, *McCreery v. Fallis* can be applied to the current apparent right-of-way statute.

In 1905, the state revised the highway act to reflect the court's decision in *McCreery v. Fallis*. The revised statute included the section concerning establishment of highways used for twenty years and added two new statements concerning their widths.

The first statement said that those same highways used for twenty years shall continue as located and as of their original width, respectively, until changed according to law. The second statement said that "hereafter, no highways shall be laid out less than thirty feet wide."

The highway statute went rather untouched until the 1960's. In 1961, the following clause was added, "As of the effective date of this amendment, new highways shall be forty feet wide." In 1963, the 1961 addition concerning the forty foot width was changed to read "not less than twenty feet on each side of the centerline of county highway."

During the 1980's, the highway statute underwent additional refinements prior to reaching its present status. In 1984, reference was made to when user established highways were "as of their original width" and when they might be wider.

The statute read as such: a) All county highways laid out before April 15, 1905, according to law, or used as such for twenty (20) years or more, shall continue as originally located and as of their original width, respectively, until changed according to law. b) From and after January 1, 1962, no county highway right-of-way shall be laid out which is less than twenty feet (20) on each side of the centerline of said county highway, exclusive of such additional width as may be required for cuts and fills.

The 1988 version dropped reference to highways laid out in the past and referred only to new highways. This statute simply reads "A county highway right-of-way may not be laid out that is less than twenty (20) feet on each side of the centerline, exclusive of additional width required for cuts, fills, drainage, and public safety." This last version was carried through 1991 and was referenced as Indiana Code (IC) 8-20-1-15.

The latest and current edition of the highway act, commonly known as the Apparent Right-of-Way Act, took effect on July 1, 1992. The statute defines apparent right-of-way as the "location and width of county highway right-of-way for purposes of use and control of the right-of-way by the county executive".

The statute also says the county executive shall make a preliminary finding of the apparent right-of-way by using the "best available" evidence, including physical observations from the ground or air. Based upon this evidence, the apparent right-of-way shall be established but shall not exceed twenty feet from each side of the center line.

THE RELATIONSHIP BETWEEN APPARENT AND ACTUAL RIGHT-OF-WAY

The Apparent right-of-way statute says that the width of the apparent right-of-way may not exceed 20 feet on each side of the center line. Under what conditions would the apparent right-of-way be less, and why? The apparent right-of-way would be less when the actual right-of-way is less than 20 from the center of the road. I say this because the statute was not intended for counties to establish new interests in land. It was only intended to be a means by which counties could document and map existing interests.

This interpretation is supported at law by the case of *McCreery v Fallis* (1903), 162 Ind. 255. In that case, the court addressed the interpretation of the highway act of 1897 which said that new highways established by use “shall not be less than thirty feet”. The court ruled that the act applied only to prescriptive highways having a breadth of thirty feet or more. To apply the act to highways having a breadth of less than thirty feet would lead to confiscation of property in that particular case, as well as in a large number of other cases.

Interpreting the apparent right-of-way statute in a similar fashion makes the location of actual right-of-way lines extremely important. Apparent rights-of-way should be located wholly within actual rights-of-ways. If not, new interests will be established which will either have no basis in law or will require compensation to the adjacent land owner.

APPARENT RIGHT-OF-WAY LIMITED BY ACTUAL RIGHT-OF-WAY

Locating actual right-of-ways, in an approximate fashion, can often be done by applying guidelines based on case law to the evidence at hand. This article focuses on those guidelines established for two broad categories of highway established by use: unfenced and fenced highway. Admittedly, they are general and should apply to many situations but not all. For application of case law to specific situations, I suggest the advice of an attorney and/or land surveyor be sought.

Unfenced Highways Limited in Width to the Traveled Way

Two Indiana court cases address the extent of “use” when the way is established by user but is not fenced. These cases tend to support the concept that the way is limited to that which is actually traveled.

According to *Board of Commissioners v Hatton*, 427 N.E.2d 696 (Ind. App. 1981), where boundary lines have never been established by competent authority, the width of the road established by use is limited to that portion actually traveled and excludes any berm or shoulder.

In the case of *Elder v Board of County Commissioners*, 490 N.E.2d 362, (Ind. App. 1986), the court held that the county owned only that land physically occupied by the road and no more.

Based on these Indiana court cases, I suggest the county’s interest in unfenced highways established by user may be limited to the paved, traveled way and may even exclude shoulders.

It would seem that this interpretation is rather restrictive, in that no provisions are made for maintenance, utilities, or the emergency use of shoulders. To address some of these issues, one must look beyond the Indiana courts.

In *Meservey v. Gulliford*, 14 Idaho 133, 93 P 780, the court said that it would seem that the right acquired by prescription and user of a public highway carried with it such width as was necessary for the reasonable convenience of the traveling public, ... and common experience showed that width to be no more than sufficient for the proper upkeep and repair of roads generally.

In *Highland Park v Driscoll*, 24 Ill 2d 281, 181 NE2d 93, the court said evidence sufficiently showed a prescriptive right in the public to the use of a strip of land embracing the gravel road along with its drainage ditches which were essential to make the road easement effective.

However, in the case of *Grenell v Scott (Fla App) 134 So 2d 866*, the court said the width of the prescriptive easement in a public highway includes shoulders and ditches needed and actually used, but does not include the allowance of a width for shoulders and ditches not used but needed

No references were found to cases involving right-of-way required to properly sign a highway.

Fenced Highways Limited in Width by Fences

A few Indiana cases address the extent of “use” for highways established by user which are fenced. These cases tend to support the concept that the use is limited to the fenced way.

In the case of *Pitser v McCreery (1909), 172 Ind 663*, the court said “The (highway) statute should have a reasonable construction to effectuate its intent. To fix the outlines as parties owning the land have themselves fixed them (constructed fences) is reasonable, and attended with no hardship.”

In the case of *Anderson v City of Huntington, (1907) 40 ind. app 130, 81 NE 223*, the court said that where the boundary lines of a road have never been established by any competent authority, but the right of the public to travel over such road has been established by continuous usage, the width of such road is determined by the width of such use.

In the case of *Evans v Bowman, et al (1915), 183 Ind 264*, the court found that “where an adjoining landowner maintained a worm rail fence at the side of a highway established by user, the limits of the road could have been no broader than the use, and the court judicially knows that the public could not use for travel the strip occupied by such fence.

Based on these court cases, I suggest the counties actual right-of-way lines may be limited to long established fence lines erected by the adjacent landowners. The width or even physical location of the pavement within the fenced way may have little bearing on the actual right-of-way lines.

POTENTIAL PROBLEMS

If you are planning on implementing an apparent right-of-way mapping and monumentation program, there are a number of problems you should also be aware of before starting. This section will address some of these problems, both real and potential, associated with right-of-way mapping. That is, problems the statute may solve and problems it may cause.

Problems with rights-of-ways can develop while nothing at all is done as well as when a mapping and monumentation program is undertaken. First, I will discuss what can happen when nothing is done. Then I will follow up with the types of problems which can develop during a mapping program.

The problem I foresee occurring when no mapping is done is the loss of undocumented right-of-way, especially along fenced highways where the fence is already no more than 20 feet from the center of the road. As mentioned above, if a highway is established by use (undocumented) and the adjacent landowners implicitly agreed to its location by erecting fences, then there is a good chance in Indiana that that fence is the highway boundary. Remove the fence and then where are you? At that point the adjacent landowner may argue that Indiana case law says the right-of-way is limited to the traveled way. And he has the case law to make that argument.

The problems I foresee arising after mapping and monumenting, and particularly after monumenting, are: taking too much right-of-way, not taking enough, and having monumented in the first place.

It does not seem to make a whole lot of sense to me that a highway in Indiana, established by use, should be limited in width to the traveled way. Especially when drainage ditches, shoulders, and street signs are all necessary for the proper upkeep and repair of roads and are all typically located outside of the traveled way. Which leads to the first potential problem with mapped and monumented highways. Although it might make sense to claim the apparent right-of-way should extend out to that drainage ditch located 20 feet from the center of the road, Indiana courts may not agree. And until someone tries, one will not know what the courts will say. So the problem with taking too much land is that it is going to take a lawsuit before the question is resolved: what is the limit of the apparent right-of-way on unfenced highways?

The other approach to that question is to claim only the traveled way as apparent right-of-way. This is in keeping with the Indiana case law I have seen and is consistent with the procedures of the Indiana Department of Transportation. The problem may be the loss of right-of-way the day someone does go to court over that drainage ditch 20 feet from the center of the road, and wins. Now no one wants to go to court. But until someone does, concerning this issue, claiming only the traveled way may be short changing a county or municipality of rightful right-of-way.

The last such potential problem with apparent right-of-way may occur on fenced highways where the fence is more than 20 feet from the center of the road. Recall the statute limits apparent right-of-way to no more than 20 feet from the center of the road. Also recall that Indiana case law favors long established fence lines erected by adjacent land owners as right-of-way lines. Should apparent right-of-ways be mapped and monumented in this situation, it might appear to the adjacent landowner that the county was giving up any claim to land 20 feet from the center of the road. It may also appear that way to a court at some future date if that same county went through court proceedings in order to use the actual right-of-way (up to the fence) rather than be restricted to the apparent right-of-way. The more immediate concern would be the adjacent landowner moving his fence in to the apparent right-of-way monuments. Should this happen, and should they remain at the apparent right-of-way line, the county would have foregone any chance of claiming to the old fence line.

SUGGESTIONS

To avoid as many potential problems as possible be aware of what can happen. If there are fences located 20 feet from the center of a road, be aware that they can be taken down by the adjacent land owner. So to avoid the possibility of losing apparent right-of-way, this would be a good situation in which to map and monument.

If no such fence exists, someone should find out what the Indiana courts will say about apparent right-of-way. A small pilot project along an unfenced highway with a drainage ditch, a shoulder, some signs, and a neighbor who is likely to object would be a good place to start. Once the objection reaches court, the precedent will be set for the remainder of the state.

When there are fences, but those fences are over 20 feet from the center of the road, one should exercise caution. To avoid as many potential problems as possible, the prudent approach might be

to survey but not map and monument. Not at least until those fences begin to come down and the possibility of losing right-of-way becomes real.

MAPPING, MONUMENTING AND DOCUMENTING

The process of mapping and documenting apparent right-of-way can be divided into three categories: data collection, boundary line analysis, and monumentation. The first and last tasks, collection and monumentation, are described below having described the task of preparing right-of-way location guidelines in previous articles.

GROUND SURVEYS

Ground surveys historically involved survey crews using transits and tapes to locate planimetric and topographic features found on or near the ground. Equipment has evolved over time through theodolites and electronic distance meters to total stations and even more recently to the use of satellites. Although the equipment has changed, the principals remain basically the same. Surveyors identify and occupy points on the ground for the purpose of locating those points with respect to some reference system.

Ground surveys have advantages as well as disadvantages. The advantage of mapping apparent right-of-ways in this manner is that the work can typically be done in-house by the county surveyor and her crew without any large expenditure of money. Even the drafting of maps can be done by hand thus avoiding a capital outlay for a CADD system. The disadvantage of using ground surveys is the time required to complete the process. Done little by little, it could very easily require 20 years to complete the process.

AERIAL PHOTOGRAPHY

Apparent right-of-way surveying and mapping can also be done using aerial photography. Done this way, planimetric features (ground points) and control points would be located remotely with relatively little field work. Field work would be limited to establishing and identifying the control system, locating those features unidentifiable from the air, and locating the “best available to be used for the boundary line analysis” not visible from the air.

As with ground surveys, aerial photography also has both advantages and disadvantages. The advantage is clearly time savings. This would could contract to a consultant and be done in a matter of months. Using aerial photography would also free up the survey crew to perform their duties. The disadvantages is the large capital outlay required to pay the consultant. Either way, counties have to pay for apparent right-of-way mapping. Paying for it all at once may only seem more expensive. If aerial photography is used, the photo mission should be planned for accurate base mapping of all county needs prior to purchasing photography for an entire county.

MONUMENTATION

Once the apparent right-of-way of a county road is mapped, the county may wish to locate the right-of-way on the ground by virtue of monuments. The county may choose to perpetuate the location of apparent right-of-ways with physical monuments as a matter of course or they may choose to set monuments only upon the request of an adjacent land owner. Regardless of the reason,

or the method of mapping, monuments can be set either prior to or after the mapping is complete if they are tied into an area-wide coordinate system such as the Indiana State Plane Coordinate System.

With apparent right-of-ways tied to the state plane coordinate system, monumentation can be established while the maps are being produced or after they are completed. If monuments are to be set to identify the location of all county apparent right-of-ways, they will surely be set after the mapping is complete. In this case, a program must be developed whereby all such monuments are set systematically over a given period of time. The alternative is to set monuments only as required using the state plane coordinate system as control. Again, both choices are available. Planning to set all monuments over the course of time is the more thorough approach and more time consuming. However, it should not delay production of apparent right-of-way maps.

SUGGESTIONS

Having discussed options, I will now make some suggestions as to how the county might choose to map and describe the apparent right-of-way. I suggest the first thing the county do is to review appropriate case law, starting with those cases cited here, and develop right-of-way location guidelines. Next, undertake a pilot project using in-house staff and describe and map a section of county highway. Hold a public hearing and receive input on the final product and process. Then, if necessary, modify the process and choose a method of production mapping.

Ideally, the first section of road should present the opportunity to test the previously established right-of-way location guidelines. A section of roadway containing an unused drainage ditch and roadside signs and utilities but without right-of-way fences should provide ample opportunity for such a test.

The pilot project can be performed completely in-house. The county survey crew can identify and locate as much of the record evidence as possible as well as any other pertinent field (extrinsic) evidence. The locations should again be done with respect to the state plane coordinate system. The record evidence and the field evidence should then be compiled for examination by the appropriate professionals: the attorney and the surveyor.

Using the best available evidence and the rules of law, those professionals should then attempt to establish the apparent right-of-way without infringing upon the actual right-of-way. The county commissioners can then make public the findings and hold a public hearing. Based on the results of the hearing, and the entire process, the county can then modify that process, if necessary, and proceed to map the remainder of their roads.

Once a process is established, it can be modified for many different reasons. If all goes well, a county may decide early on to convert to aerial photography. If this is the case, I would suggest another small pilot project to work out any potential problems from using a different technology. A county may also decide to incorporate apparent right-of-way mapping into a CADD system or even a geographic information system for future use. Anything is possible, and little is lost if counties begins with small projects, progresses cautiously, and seeks the advice of the appropriate professionals.