HISTORICAL CREATION OF INDIANA ROADS (How To Determine Existing Right of Way)

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DEFINITION OF RIGHT OF WAY

• “The right of passage held by the public in general to travel on roads, freeways and other thoroughfares” (Black’s Law Dictionary, 8th Edition).

• This session is concerned with the right of way line that separates the area encumbered by a public right of way and private ownership.

• Existing vs. Proposed Right of Way
Examples of Right of Way “Evidence”

- Plat
- Deed
- Grant
- Boundary survey
- Assumed R/W (2-rod)
- Highway Plans
- Commissioner’s Records

- Highway Department records
- Testimony of local officials
- County GIS
- Apparent use (fences, utilities, ditches)
- Old maps
Highway Act of 1905

“All highways heretofore laid out according to law, or used as such for twenty years or more, shall continue as located and as of their original width, respectively, until changed according to law; and hereafter no highway shall be laid out less than 30 feet wide, and the order for the laying out of the same shall specify the width thereof. The board of 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 twenty years, but not recorded, to be ascertained, described and entered of record”. 
Highway Act of 1961

a) “All county highways heretofore laid out according to law, or used as such for twenty years or more, shall continue as originally located and as of their original width, respectively, until changed according to law.”

b) “From and after the effective date of this amendatory act no county highway right of way shall be laid out which is less than forty feet wide. The board of commissioners shall declare and establish the width of any such highway right of way, which width shall not be less than forty feet.”
Highway Act of 1963

“From and after the effective date of this amendatory act no county highway right of way shall be laid out which is less twenty feet each side of the centerline of said county highway, exclusive of such additional width as may be required for cuts and fills.”
Relevant Indiana Statutes

• IC 8-20-1-15

“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, utilities and public safety.”
Relevant Indiana Statutes

• IC 8-20-1-15.5

a) As used in this section, “apparent right-of-way” means 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.

b) A county executive may establish the apparent right-of-way of a county highway. However, the width of the apparent right-of-way may not exceed twenty (20) feet on each side of the centerline exclusive of additional width required for cuts, fills, drainage, utilities, and public safety.
IC 8-20-1-15.5 cont.

c) A county executive that desires to establish the apparent right-of-way of a county highway shall do the following:

1. Make a preliminary finding of the apparent right-of-way by using the best available evidence, including physical observation from the ground or air.

2. From the preliminary finding of the apparent right-of-way:
   A. Prepare a map and a written description of the apparent right-of-way;
   B. Give notice of the preliminary finding by publishing the map and the written description in the manner provided by law; and
   C. Give notice of the preliminary finding by certified mail to the owners of land, according to the records of the county auditor, that abuts the apparent right-of-way.
3. Conduct a public hearing at which owners of land in the county may:
   A. Object to the preliminary finding;
   B. Present evidence in support of or in opposition to the preliminary finding; and
   C. Propose changes to the preliminary finding.

4. After the hearing under subdivision 3), revise the preliminary finding of the apparent right-of-way, if necessary.

5. Adopt an ordinance to establish the revised finding as the apparent right-of-way as established by the ordinance.
IC 8-20-1-15.5 cont.

6. Record with the county recorded a map and a written description of the apparent right-of-way as established by the ordinance.

d) The apparent right-of-way of a county established under this section is the right-of-way for purposes of use and control of a county highway by the county executive.

e) If the apparent right-of-way exceeds the legal right-of-way, then the county must proceed under IC-36-1-4-5 and IC 8-20-3-1 to acquire the apparent right-of-way.
How Are Roads Created?

1. By recorded deed or grant
   - Statute of Frauds
   - IC 32-21-1-12 – any conveyance of land or interest in land is to be written.
   - Written conveyance is to be recorded.
     • Why? Constructive Notice.
   - To be recorded, the conveyance must list the grantor and grantee and have a description of the conveyed land.
Unrecorded R/W Grants

• Back in the 1920s and ‘30s, many highway grants to State of Indiana never recorded.

• *Indiana v. Anderson*
  - In 1944, Anderson purchased property at U.S. 41 and S.R. 54 intersection in Sullivan County.
  - Prior to 1932, the State Highway Department acquired right of way from the predecessor in title with a r/w grant.
  - Grant was filed in the State Highway offices but never recorded.
Unrecorded R/W Grants

- **Indiana v. Anderson**
  - Right of way grant never appeared in the abstract of title.
  - No right of way markers indicated anything more than a 30-foot right of way.
  - Court ruled that the unrecorded grant was invalid.
  - “The purchaser of land subject to an easement expressly created by grant or reservation in an unrecorded deed is not affected by it if he has no notice of the servitude.”
Untimely Recorded Grants

• Many of the unrecorded grants of the 1920s and ‘30s were eventually recorded in the 1970s.
• Problem arises when property along a State Highway was sold after the right of way was conveyed but before it was recorded.
• Likely outside chain of title.
• Indiana: “race-notice” state.
• INDOT defines timely as recordation within 1 year of signing (R/W Engineering Manual, October 31, 2007 revision)
Untimely Recorded Grants

• Possible Exceptions to the Rule
  – Parent tract not conveyed between signing and recording of the grant.
  – Parent deed acknowledges or describes to the grant right of way.
  – Right of Way markers or other markers which monument the grant right of way.
How Are Roads Created?

2. By public use of a road
   - Roads created after 20 years of continual use.
   - 1905 Highway Act
   - IC 8-20-1-15 – amended in 1988 removed language concerning 20 years of use by the public. However, still applicable to roads created before 1988.
Width of Highway Established by Use

- *Board of Commissioners of Monroe County v. Hatton* – “Where boundary lines have never been established by competent authority, the width of the road established by use is limited to that portion actually travelled and excludes any berm or shoulder.”
Width of Highway Established by Use

• *Contel v. Coulson*
  - Contel buried fiber optic cable adjacent to S.R. 63.
  - Coulson’s property extended to S.R. 63 centerline.
  - No right of way for S.R. 63 ever conveyed to State prior to this case.
  - Court ruled in favor of Coulson, stating that the State’s right of way only included the traveled portion of the road excluding any berm or shoulder.
How Are Roads Created?

3. By statutory dedication of right of way

   – Dedication – “The donation of land or creation of an easement for public use” (Black’s Law Dictionary, 8th Edition)

   – Statutory dedication is performed according to state or local statutes.

   – Example: subdivision plat executed according to existing statutes.
Statutory Dedication

• Requirements (per *Beaman v. Smith*)
  – Platting of a street
  – Acknowledgement
  – Proper municipal approval
  – Recording of the plat
Statutory Dedication

• *Beaman v. Smith*

  • Irwin Lewis Subdivision: 6 lots with 50-foot wide “Easement for Future Street”.
  • Approved by plan commission in 1969; recorded in 1970.
  • 1988 – owners on each side of Easement filed for quiet title of easement area claiming adverse possession.
  • Beaman claimed the plat was not executed according to relevant statutes.
  • Cited IC 36-7-3-3(a)(3) – not in effect in 1969 or 1970.
  • Do your research!
How Are Roads Created?

4. By common law dedication of right of way
   – Dedication not made according to a statute.
   – Elements
     • Intent of the owner to dedicate
     • Acceptance by the public
   – Example: subdivision plat accepted by the public but not created according to statute.
How Are Roads Created?

5. By authority of the county commissioners
   – 1905 Indiana Highway Act gave authority to the board of commissioners to ascertain, describe and enter into record roads used for at least 20 years.
   – Commissioner’s Records can be found in the County Auditor’s Office.
Worldcom v. Thompson

• Trial court – no notice of 30-foot street because such notice not recorded in county recorder’s office.

• Appeals Court
  – Commissioner’s Records are binding on public.
  – “County Highways can be established in this state by order of the board of county commissioners, by express grant or public use.”
  – “The recorder’s office is not the only public office required to maintain records affecting the title to real estate.”
How Are Roads Created?

6. By judgments of the court (Eminent Domain)
   - “...nor shall private property be taken for public use, without just compensation” (U.S. Constitution, 5th Amendment)
   - “No person’s particular services shall be demanded, without just compensation. No person’s property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered” (Indiana Constitution, Article 1, Section 21).
**Eminent Domain**

- IC 8-23-18-2 – “Whenever the department is unable to agree with an owner of real property or a right described in section 1 of this chapter upon the damages sustained by the owner or upon the purchase price of the real property in fee or the right, interest, or easement sought to be acquired, the department may proceed in the name of the state in the exercise of the right of eminent domain to condemn and acquire the real property or right.”

- IC 8-20-3-1 – grants the county power of eminent domain
How Are Roads Created?

7. By acts of Congress or Legislature
   – Cumberland Road (a.k.a. U.S. 40)
     • March 2, 1829 - Congress approved the construction of the 80-foot wide Cumberland Road.
   – Michigan Road (a.k.a. SR 29)
     • Treaty between the United States and the Pottawatomie Indians.
     • Late 1820s, Indiana State Legislature ordered road laid out, marked and established to 100-foot width.
Solid Evidence of Right of Way

- Recorded subdivision plat (meeting statutory requirements)
- Long time public use
- Recorded Deed/Dedication
- Timely Recorded R/W Grant
- Commissioner’s Records
- Acts of Congress or Legislature
Shaky Evidence of Right of Way
(need more investigation)

- Untimely recorded grants
- Testimony of local officials
- County GIS
- Boundary surveys
- Highway plans
- Unrecorded documents
- Apparent or assumed right of way