

ROAD RIGHT-OF-WAY

Most people I have talked to refer to Right-of-Way and Easement as if they were two different things. They consider right-of-way as a fee ownership, meaning that whoever owns the right-of-way owns the land where the right-of-way exists.

Let's look at the words, *right-of-way* and *easement*:

Right-of-Way: The word *Right* in itself does not imply the ownership of any physical object or land of any kind. The word *Way* also does not imply the ownership of any physical object or land of any kind. The word *Right-of-Way* only describes the right to pass through land owned by someone else for a specific purpose.

Easement: "The right to use land owned by another person." (Webster)

The only conclusion that can be reached is that *Right-of-Way* and *Easement* mean exactly the same thing and only describe the right to pass through the land of another person.

A road easement is always a right-of-way, but, a right-of-way is not always an easement. A right-of-way may also be a fee interest, or ownership.

"Roadway" is defined in C.R.S. 43-2-301 as "includes any platted or designated public street, alley, lane, parkway, avenue, road, or other public way, whether or not it has been used as such.

Road Right-of-Way is granted by several means: I will discuss eight ways of acquiring right-of-way for public roads. The most important element of which is the width of the right-of-way, I hope I can make this clear during this discussion.

(1) Federal Law RS 2477:

The entire text of RS 2477 reads "**The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.**" This may be the earliest grant of right-of-way in the State of Colorado but it definitely is the earliest grant of right-of-way in Mesa County and several other Counties in Western Colorado because it came into effect when the Ute Indian Reservation in Western Colorado was declared Public Domain in 1881. This would include all of the military roads that passed through this area from one fort to another, for example, the road from the fort near Montrose to a crossing of the Grand River, which is now the Colorado River, then down through the

valley and into Utah, and the road from near Delta over the Grand Mesa near what is now Vega Reservoir to the fort at Meeker.

The RS2477 Statute was enacted by the Federal Government in 1866. Under this statute a person or public entity need not pay for nor seek approval of a right-of-way nor apply for a permit to construct a road over federal lands. They needed only to create a road either by use or actual construction. The Federal Government did not have any regulations governing highways. This was left up to the individual states. Therefore, after becoming a state in 1876 several session laws were passed regulating roads and highways, portions of which will be covered later. The Federal Regulations 43 C.F.R. 2822.2-1 (October 1, 1972) state “Grants of [R.S. 2477] rights-of-way ... become effective upon the construction or establishment of highways, in accordance with State laws” In the case of *Lovelace v. Hightower*, 50 N.M. 50, 168 P.2d 864 (1946) the word “highway” as ordinarily used means a way over land open to the use of the general public without reasonable distinction or discrimination, established in a mode provided by the laws of the state where located.

Highway is very loosely defined and includes, frequently-traveled roads, periodically-maintained roads, carriage-ways, bridle-ways, footpaths, bridges, turnpike roads, railroads, canals, ferries, or navigable rivers. Because Colorado is a prior-appropriation State, case law has asserted that there are no navigable rivers in Colorado¹. Prior-appropriation means the water rights are granted by the state for specific uses and just because you live next to a stream or ditch does not mean you have the right to use the water.

Colorado, in the Session Laws of 1883 stated, “all public highways hereafter laid out in this State shall be sixty feet in width, unless otherwise ordered by the board of county commissioners”. The County Commissioners of Mesa County, on April 26, 1883, ordered that all roads be sixty (60) feet in width. This does not mean, however, that all rights-of-way acquired by RS 2477 are 60 feet wide. The type of use and the actions of the governing body have a lot to do with how wide the right-of-way is. In *Southern Utah Wilderness Alliance v. BLM*, 425 F.3d 735 (10th Cir. 2005) it was held that “the scope of the right-of-way is limited to historic use, and the BLM does not have “primary jurisdiction” in determining validity of road.” The court has the final say concerning the validity of a R.S. 2477 road.

C.R.S. 1973 section 43-2-201 Declares the following to be a “Public Road”, ... “all roads over the public domain, whether agricultural or mineral.” The case of *Martino v. Pueblo County*, 146 Colo. 143. states “And the term “public domain” as used in this Colorado statute includes school lands.” When the township’s in Colorado were originally laid out certain sections were set aside for schools.

Justice Sutherland, U.S. Supreme Court, described the 1866 act as the federal governments “voluntary recognition and confirmation of pre-existing rights” held by explorers and settlers using a burgeoning system of roads and trails to access

¹ *Stockman v. Leddy*, 55 Colo. 24 129 P. 220 (1912)

communities and new lands. Sutherland determined that the term “highway” included roads “formed by the passage of wagons, etc., over the natural soil.” His decision does not focus on the word “constructed” but uses instead the terms “created,” “established,” and “laid out.”

When the Lake Meade Air Base was established the court ruled that RS2477 was a grant in praesenti (current, at the present) that became effective immediately upon construction of a road. The United States had to compensate Nevada miners who used a road across land designated for the air base when they closed the road. The court held that right-of-way to this road vested in the miners and their successors in ownership without any further action by the minors or any public official.

Leach v. Manhart et. al. February 28, 1938, States “We think the statute of the United States enacted in 1866 (RS 2477) is controlling.” To establish a road over the public domain it is not necessary that work be done thereon or that public authorities take action in the premises. User is the requisite element, which may be by one or more persons. The character of a highway is not determined by the fact that but few persons use it; a road may be a highway though it reaches but one property owner.

These cases bring out one point that was used in a case in the Grand Staircase area of Utah, These RS 2477 Roads must have a destination. It can be a single private property, the grazing of cattle, a mine, or to access recreation, but a destination is required.

Construction of a highway as a means of acceptance of the grant has been interpreted as an appropriate method by which this grant could be utilized. However, the road may be a sufficiently constructed facility that may be utilized by motorized traffic or it may be as simplistic as a footpath. The term “highway” has been interpreted to have a wide variety of meanings, but grants to the public the right to “come and go at will” across the public lands controlled by the Federal Government. The term “public lands” is interpreted to mean land owned by the Federal Government but not reserved for specific uses such as national parks, military reservations, wilderness area, or other restricted federal lands. Restricted or reserved federal lands are not subject to RS 2477 unless the public had established a right prior to the creation of the restricted or reserved land. Similarly, RS 2477 did not apply to lands which were transferred by the Federal Government to individuals if the transfer occurred before 1866, or before the road was established.

Private parties may bring quiet title actions to establish public roads without the participation of the county. This includes cases claiming a right under R.S. 2477 where neither the local government nor any other governmental agency took part. There are many cases in Colorado to back this up.

In 1976 the Federal Government replaced this grant by the passage of the Federal Land Policy Management Act (FLPMA). The FLPMA protected all those rights of passage that had come into existence between 1866 and 1976. If the need exists for local government to prove its right of access pursuant to RS 2477, information such as the historical date of the “highway”, the date of any reservations or restrictions, and the date of any lands

transferred by the Federal Government to the private sector will need to be determined. If in dispute, the public's right would be determined by an action in a federal court. Additionally, the public is bound by State law in Colorado to properly extinguish its interest in road rights-of-way by the statutory procedure for vacating any road right-of-way.

It may be advisable for local government to know which roads were created under the authority of RS 2477, the date of creation, the characteristics of the roadway, and the maintenance operations assumed by the local government entity. Budget constraints and workload will be the limiting factors to a proactive approach for an inventory of RS 2477 rights and may prove time-consuming. Since, the rights established prior to 1976 are protected by FLPMA, a reactive approach to these issues is probably more realistic; if and when an issue pursuant to RS 2477 becomes apparent.

Without any action by the County Commissioners declaring the road to be a public road the width of these roads is limited to the width of the traveled way.

(2) Road Petition:

The Road Laws in the General Laws of 1877 describe the procedure that was to be used to establish roads across private lands in the State of Colorado. This was done when ten or more owners of land residing within two miles of a proposed road would sign a Road Petition and submit it to the County Commissioners². The Commissioners would then appoint three viewers to view, mark out by setting stakes, blazing trees, turning a furrow, or other appropriate monuments to the terminus named in the petition by the most practicable and convenient route that they in their judgment can find. They shall determine damages and benefits of the desired road³. They shall cause a survey and plat to be made by the County Surveyor or other competent person. The Commissioners would, after receiving the report and survey from the viewers, then determine whether or not such road shall be established and ordered open for travel⁴. These Road Petitions, Survey Plats, and Road Viewers Reports were then ordered filed in the County Road Books in the County Clerk and Recorders office⁵, specifically, "a Book for that purpose."

On April 7, 1885 the Statutes were changed to where if all of the owners of land through which a road is to be laid out sign the petition, granting right-of-way through their land, and accompanied by a plat of the road, the commissioners, if in their opinion the public good requires it, declare the road a public highway without going through the Road Viewer process.

² Sec. 4, "an act concerning roads and public highways," Chapter XCV 1883 Colorado Statutes Annotated

³ Sec. 7, "an act concerning roads and public highways," Chapter XCV 1883 Colorado Statutes Annotated

⁴ Sec. 13, "an act concerning roads and public highways," Chapter XCV 1883 Colorado Statutes Annotated

⁵ Sec. 14, "an act concerning roads and public highways," Chapter XCV 1883 Colorado Statutes Annotated

By this process the right-of-way through private land was obtained and the right-of-way through any federal land lying between said private lands was granted by RS 2477 once the road was constructed.

The declaration of a public road does not result in the acquisition of a property interest by any particular party but rather only makes available to the public a route through private land,⁶ meaning an easement.

The width of the right-of-way for these roads is as stated in the petition when they are declared to be public roads.

The primary method to create a public highway is “statutory dedication”, which means, creation by local government’s compliance with the terms of a governing statute. The rights-of-way for roads created by the Road Petition process that existed until 1953 are a “statutory dedication”.

(3) Proclamation:

On April 7, 1885 the General Assembly of the State of Colorado approved “An Act to amend Section (4) four, of Chapter (95) ninety-five, of the General Statutes of the State of Colorado, entitled “Roads and Highways.”

Section 1. Section four (4), of chapter ninety-five (95) of the General Statutes of the State of Colorado, entitled “Roads and Highways,” is hereby amended to read as follows, to wit: The Board of county commissioners may alter, widen, or change, any established road, or lay out any new road, in their respective counties, when petitioned by ten (10) freeholders residing within two (2) miles of the road sought to be altered, widened, changed, or laid out. Said petition shall set forth a description of the road sought to be altered, widened, or changed; and if the petition is for a new road, it shall set forth the points where the road is to commence and terminate, its general course and distance; *Provided*, The commissioners of the county may, at any regular meeting, by an order of the board, declare any section, or township line on the public domain, a public highway; and on and after the date of such order, which shall be attested by the clerk, under the seal of the county, and recorded in the office of recorder of deeds, the road so laid out shall be a public highway.

In 1953 this statute was repealed.⁷ However the repealing of this statute did not eliminate all of the rights-of-way previously granted under it. Those rights-of-way still exist until formally abandoned by the State Highway Department, or vacated by the County Commissioners or the City Council. What it did do is remove the ability to create road right-of-way by either of these methods from that time on.

⁶ Dept. of Natural Res. V. Cyphers, 74 P.3d 447 (Colo. App. 2003)

⁷ Section 46, “Roads and Highways”, of the 1953 Colorado Statutes

The County Commissioners of Mesa County passed two resolutions proclaiming rights-of-way on section lines.

PROCLAMATION ONE

On March 11, 1890 the County Commissioners of Mesa County designated certain section lines on the public domain as public highways.⁸ Township 1 South Range 1 East, Township 1 North Range 1 East, Township 1 South Range 2 East, Township 1 North Range 1 West, Township 1 North Range 2 West, Township 11 South Range 98 West, Township 10 South Range 104 West, Township 10 South Range 103 West, Township 9 South Range 103 West, Township 9 South Range 104 West, Township 8 South Range 98 West, Township 8 South Range 96 West, Township 9 South Range 97 West, and Township 8 South Range 97 West.

On March 18, 1890 these orders were recorded in the general records in the office of the Mesa County Clerk and Recorder, and in the Grantee and Grantor indexes.⁹

PROCLAMATION TWO

On August 3, 1892 the County Commissioners designated additional section lines on the public domain as public highways.¹⁰ Township 2 North Range 2 West, Township 1 North Range 3 West, Township 2 North Range 3 West, and Township 11 South Range 104 West.

On September 19, 1892 this order was recorded in the general records in the office of the Mesa County Clerk and Recorder, and in the Grantee and Grantor indexes.¹¹

In 1953 it was required that all counties in Colorado submit maps to the State Department of Highways showing all of the roads which are considered County Roads.¹² This map was recorded in the Mesa County Clerks Office.¹³ This map did not show the rights-of-way set aside by the Proclamations of 1890 and 1892 which had not been utilized. Therefore, the Commissioner's minutes showing the Proclamations of March 11, 1890 and August 3, 1892 were re-recorded in the General records of Mesa County on August 7, 1957 in Book 714 beginning at page 521 through page 537. Mesa County wanted to make sure these rights-of-way remained in place even though many of them had not been utilized.

⁸ Commissioners Records Book 1 Pages 395 to 409

⁹ General Records Book 13 Pages 113 to 123, Grantee Book 3 under M, Grantor Book 3 under S

¹⁰ Commissioners Records Book 1 Page 527

¹¹ General Records Book 40 Page 61, Grantee Book 4 under M, Grantor Book 4 under S

¹² Section 10, "Roads and Highways", of the 1953 Colorado Statutes

¹³ Reception Number 594048

The passing of the Federal Land Policy and Management Act (FLPMA) in 1976 by Congress, which repealed RS 2477, made it so that utilization of any unused rights-of-way on public lands under current control of the Federal Government may be within the authority of the federal courts. To avoid going to court the County will probably have to go through the FLPMA process to open any of these rights-of-way.

The width of these rights-of-way is 60 feet as declared by the Mesa County Commissioners on April 26, 1883.

(4) Deed Exception:

There are many recorded deeds that will describe the property to be transferred and then will say “except the east (or west) thirty (30) feet for road right-of-way”, or “except the south (or north) thirty (30) feet for road right-of-way”. These types of descriptions have been misinterpreted by Assessors, Surveyors, and Title Companies, as well as the land owners themselves. This exception does not necessarily remove the thirty feet from the ownership of the property. It may only create an easement for the road. The Colorado courts have held that an exception from the warranty is not an exception from the conveyance.¹⁴ An exception inserted into the warranty clause only protects the grantor on the warranty and does not serve as a limitation on the nature of the interest conveyed by the granting clause.¹⁵ The research for this kind of right-of-way is very time consuming because you have to look at the deeds for every parcel of land. Surveyors usually re-write the descriptions for these parcels when they do a survey leaving out the thirty feet that was excepted when that was not what was intended when the description was created.

Reservations in a deed are very common and are used when people split their property and need to provide access to the parcels created. The nature of such an easement will be construed by a court like any other language in a deed, i.e., the court will ascertain the intentions of the parties.¹⁶ Courts will construe reservations in deeds more strictly than grants and resolve ambiguities against the grantor.¹⁷ An easement created by grant or reservation may not be used to access property other than the dominant estate.¹⁸ The dominant estate is the owner of the easement and the servient estate is the one it passes through.

The types of right-of-way I have been talking about, RS 2477 rights-of-way, Road Petition rights-of-way, Proclamation rights-of-way, and deed exception, are all

¹⁴ First National Bank of Denver v. Allard, 31 Colo. App. 391, 506 P.2d 405 (1972), aff'd, 182 Colo.297, 513 P.2d 455 (1973)

¹⁵ First National Bank of Denver v. Allard, 182 Colo. 297, 513 P.2d 455 (1973); O'Brien v. Village Land Co., 794 P.2d 246 (Colo. 1990).

¹⁶ Lazy Dog Ranch v. Telluray Ranch Corp., 965 P.2d 1229 (Colo. 1998)

¹⁷ Notch Mountain Corp. v. Elliot, 989 P.2d 550, 557 (Colo. 1995)

¹⁸ Lazy Dog Ranch supra at 1238 and 1241

easements.¹⁹ An easement does not carry title to the land over which it passes. The owner of the land has the right to use the land where the easement exists as long as he does not interfere with the superior right of the easement holder. The property owner cannot change the location of the easement without the consent of the easement owner.²⁰

(5) Right-of-Way by Deed:

When government entities do road projects they generally acquire right-of-way by a deed. There are only four types of deeds, Quit Claim, Warranty, Special Warranty, and Bargain and Sale. You can go to an office supply store and pick from around a hundred different deeds, but they are all one of these types. I won't go into a discussion on deeds here but I will say that it could take quite a bit of time. I have seen right-of-way deeds from all four types of deeds.

Whenever real property is acquired for road or highway purposes, whether such acquisition is by purchase, lease, or other means or by eminent domain, the right to subsurface support of such real property is deemed to be acquired.²¹

Right-of-way granted by deed can be interpreted as either an easement or a fee simple ownership. A fee simple ownership is absolute and legal possession. You own the land as well as the road placed on it. The wording in the deed will determine whether it is an easement or fee simple ownership.

A deed that grants a Fee interest in the land then states "For Road Purposes" is a fee with a condition subsequent and allows the public to use their ownership for road purposes or purposes consistent with a roadway. No other use would be allowed. The most logical interpretation of "Road Purposes" would be "for travel and transportation purposes". However, broader interpretations have been used.

When land is dedicated for use as a road right-of-way it must be accepted by the County Commissioners for that right-of-way to ever come into being, pursuant to C.R.S. 43-2-201.

Many people make the mistake of granting an easement with a deed. All easements, unless dedicated on a subdivision plat, should be created using an Easement Agreement where both parties sign the document and the responsibilities and restrictions of both parties are spelled out in detail.

I have also found dedications of road right-of-way Recorded in the general records of the Mesa County Clerk and Recorder. These would be interpreted as a Quit Claim Deed granting an easement.

¹⁹ John F. Martino v. Board of County Commissioners of the County of Pueblo. 146 Colo. 143, 360 PR.2d 804 (1961), Sprague v. Stead, 139 PR 544 (1914)

²⁰ Roaring Fork Club, LP v. St. Jude's Co., 36 P.3d 1229 (Colo. 2001)

²¹ Section 43-1-209 Colorado Revised Statutes

(6) Dedication by Plat:

The dedication of road right-of-way on a subdivision plat is generally interpreted as a fee simple ownership. However, by CRS Section 31-23-107, dedication of streets, parks, and other places designated or described as for public use on the map or plat of any city or town or of any addition made to such city or town are public property and the fee title thereto vested in such city or town. A statutory dedication operates by way of a grant. The plat must be signed, acknowledged, and recorded. Without an acknowledgement (acceptance by the city council) there is no statutory dedication. The dedication will then be only a common-law dedication.

When the dedication is statutory, no act of acceptance on the part of the municipality is required to impose on it the responsibility to keep the streets in repair. The moment the plat is recorded the fee of all the streets, alleys, avenues, parks, and other public ground, reserved thereon to the use of the public, vests in the city or town in trust for the uses expressed.

Since the statutory procedures apply only to dedications to cities and towns, dedication to a county may be accomplished only through common-law dedication.²² A common-law dedication is limited to an appropriation for public use. It is established by demonstrating that a property owner unequivocally intended to make the dedication and the dedication was accepted by the governmental authority²³ (A mortgagor cannot make a dedication without the consent of the mortgagee.)²⁴ A plat is evidence of an intention on the part of an owner to dedicate streets and alleys to public use, and when accepted by the authorities having jurisdiction over highways, or by the public by general use, it will constitute a common-law dedication, which confers upon the county an easement in the streets and alleys. This is why the surveyors have been encouraged to put “in Fee Simple” in the dedication for right-of-way on the subdivision plats in Mesa County.

For the establishment of a public way by dedication, acceptance by the public is essential.²⁵ The signatures of the board of county commissioners, or the chairman of the board of county commissioners, on a recorded subdivision plat is the acceptance of the dedication of right-of-way for the roads shown on the plat. Many of the older subdivisions do not have commissioners signatures on them. I have found recorded plats with only one purpose, to dedicate road right-of-way. The acceptance of these dedications is by the act of building a road on them and the public using the road and, in most cases, the local government maintaining the road. In Mesa County the roads are accepted for

²² Board of County Commissioner’s of Delta v. Sherrill, 757 P.2d 1085 (Colo. App. 1987)

²³ Board of County Commissioner’s of Delta v. Sherrill, 757 P.2d 1085 (Colo. App. 1987)

²⁴ Stagecoach Property Owners Association v. Young’s Ranch, 658 P.2d 1378 (Colo. App. 1982)

²⁵ Burlington & C. R. R. v. Schweikart, 10 Colo. 178, 14 P. 329 (1887)

maintenance by a Road Petition to that effect. These petitions are recorded in the county clerk and recorders office.

A dedication must be accepted within a reasonable time. In the absence of acceptance by the public, there can be no common-law dedication. If before acceptance the offer is revoked, or the public has otherwise lost its right to accept, the county loses its right to the public places designated on the plat.²⁶ This is possible since, until acceptance, the land remains the property of the grantor and in private ownership, so it is not protected from prescriptive claims by the public property exemption.

Although Section 43-2-111, C.R.S., states the duties of the County Road Supervisor, to include "...recommendations for road repair..." it does not specifically mandate that the County maintain all county roads. Certainly the county should maintain all roads they receive HUT funds for but that is not necessarily all of the county roads that exist. The presence of County maintenance is not a requirement for a road to be declared a public road.

(7) Prescriptive Right-of-Way:

To discuss this aspect of right-of-way we need to consider two state statutes. (1) CRS 43-1-202 which reads "All roads and highways which are, on May 4, 1921, by law open to public travel shall be public highways within the meaning of this part 2." (Part 2 is entitled "The Highway Law.") (2) CRS 43-2-201 Public Highways. This statute states that the following are declared to be public highways:

- (a) All roads over private lands dedicated to the public use by deed to that effect, filed with the county clerk and recorder of the county in which such roads are situate, when such dedication has been accepted by the board of county commissioners."
- (b) All roads over private or other lands dedicated to public uses by due process of law and not hereafter vacated by an order of board of county commissioners duly entered of record in the proceedings of said board.
- (c) All roads over private lands that have been used adversely without interruption or objection on the part of the owners of such lands for twenty consecutive years.
- (d) All toll roads or portions thereof which may be purchased by the board of county commissioners of any county from the incorporators or charter holders thereof and thrown open to the public.
- (e) All roads over the public domain, whether agricultural or mineral.

To establish a public highway across private property a party must show that (1) the public used the road under claim of right and (2) in a manner adverse to the landowner's property interests; (3) the public use was uninterrupted for 20 years; and (4) the

²⁶ Board of County Commissioner's, Jefferson County v. Warneke, 85 Colo. 388, 276 P. 671 (1929)

landowner had actual or implied knowledge of the public's use and made no objection to such use.²⁷ The public's right results in an easement.

There are many other cases that state these four requirements to prove an adverse or prescriptive right for a road to be declared a public highway. They also show that adversity and claim of right constitute separate requirements.²⁸

To satisfy the claim of right requirement, the people or person claiming a public road by adverse use must provide evidence that a reasonably diligent landowner would have had notice of the public's intent to create a public right-of-way. The claiming party must establish that a public entity took some overt action or actions that gave property owner notice of the public's claim of right. Such an act may include snowplowing, showing the road on a public road system map, using the road for mail delivery or school busses, expending public funds for the maintenance or improvement of the road, posting signage indicating a public road, or installing drainage systems for the road. Such an act establishing notice begins the prescriptive period.²⁹ Mere use by the public, not adverse, even for the prescriptive period, is not sufficient to establish intent on the part of the owner to dedicate.³⁰

The people or person asserting the existence of a public road under CRS 43-2-201 (1) (c) must show that the public's use of the road is, or was, adverse and not permissive. That party is aided by a presumption that the character of the use is adverse when the use is shown to have been made for the prescribed period of time. However, where the public use was over land that was vacant, unenclosed, and unoccupied, such use is regarded merely as permissive, not adverse. Use of a right-of-way which begins as permissive will continue as such only until the user gives the landowner notice or explicit disclaimer that the user is claiming an exclusive legal right and is possessing in an adverse or hostile manner. Resolutions adopted by the board of county commissioners provided adequate notice of adverse use.³¹

To be adverse, the use should be part of a pattern of general public use and not sporadic in nature.³² However, in prescriptive easement cases, intermittent use on a long-term basis satisfied the requirement of adverse use.³³ Further, public use to access fishing, hunting, and other recreational activities has satisfied the requirement of adverse use.³⁴ However, the use of a road is not adverse where free travel along the road is obstructed

²⁷ Board of County Commissioners of Morgan County v. Kobobel, 74 P.3d 401 (Colo. App. 2002)

²⁸ Board of County Commissioners v. Flickinger, 687 P.2d 975 (Colo. 1894); State v. Cyphers, 74 P.3d 447 (Colo. App. 2003); Littlefield v. Bamberger, 32 P.3d 615 (Colo. App. 2001)

²⁹ McIntyre v. Board of County Commissioner's, __ P.3d __ (Colo. No. 02SC803, Mar. 15, 2004).

³⁰ Nilson v. Huempfner, 144 Colo. 87, 355 P.2d 316 (1960)

³¹ Board of County Commissioner's v. W. H. I., Inc., 992 F.2d 1061 (10th Cir. 1993) (applying Colorado law and discussing CRS 43-2-201 (1) (c)).

³² Board of County Commissioner's v. Flickinger, 687 P.2d 975 (Colo. 1894); see McIntyre v. Board of County Commissioner's, __ P.3d __ (Colo. No. 02SC803, Mar. 15, 2004).

³³ Weisiger v. Harbour, 62 P.3d 1069 (Colo. App. 2002)

³⁴ Board of County Commissioner's v. Flickinger, 687 P.2d 975 (Colo. 1894); Board of County Commissioner's v. White & Welch Co., 754 P.2d 770 (Colo. App. 1988)

by gates across the road, even though they are not locked. The use of the road under such conditions is permissive.³⁵ However, the mere existence of the gates is not conclusive that the public's use is permissive. They may exist only to keep livestock from wandering. Therefore, the reason for the gates and the intent of the property owner are very important.

The Tenth Circuit Court of Appeals discussed whether recording statutes apply to CRS 43-2-201 (1) (c) and concluded that CRS 43-2-201 (1) (c) does not require that "public use be based on color of title or properly recorded resolutions."³⁶ Other jurisdictions have reached the same conclusion in regard to establishing a public road through adverse use, title by adverse possession, or easement by prescription.³⁷ The issuance of a tax deed does not wipe out prescriptive right of public based upon adverse use of land prior to issuance of tax deed.³⁸

The user must be confined to a definite and specific line. The public cannot acquire a prescriptive right to pass over a tract of land generally; in order to create a highway by prescription, the user must be confined to a definite and specific line or way. This is especially true where the property consists of wild or unenclosed lands. However, it is not required that there shall be no deviation from a direct line of travel or that all vehicles that traverse the road shall follow exactly the same route or travel the road in exactly the same rut. Slight variations in the line of travel are not fatal; it is sufficient that the travel has been confined to substantially the same line.³⁹

The trial court must set forth in its decree a definite and certain description of the prescriptive way so there can be no possible doubt as to its location and width.⁴⁰ A highway's width is not limited to the actual beaten path but extends to such width as is reasonably necessary to accommodate the established public use.⁴¹ However, passageways by prescription, whether public or private, are confined to the extent of actual adverse usage.⁴²

A prescriptive right has to be proven in court and cannot ripen into anything more than an easement. Case Law calls these Common Law Prescriptive Easements. To obtain a Common Law Prescriptive Easement over a parcel of property, it is unnecessary to establish exclusive possession of that property.⁴³ That is why we have been trying to discourage everyone from using the term Prescriptive Right-of-way and call them a Common Law Dedication.

³⁵ Lang v. Jones, 191 Colo. 313, 552 P.2d 497 (1976)

³⁶ Board of County Commissioner's v. W. H. I., Inc., supra., 992 F.2d at 1066 (applying Colorado law)

³⁷ Jones v. Harmon, 175 Cal. App. 2d 869, 878, 1 Cal. Rptr. 192, 198 (1959)

³⁸ Town of Silver Plume v. Hudson, 151 Colo. 394, 380 P.2d 59 (1963)

³⁹ Shively v. Board of County Commissioner's, 159 Colo. 353, 411 P.2d 782 (1966)

⁴⁰ Board of County Commissioner's v. Osburn, 38 Colo. App. 212, 554 P.2d 700 (1976)

⁴¹ Goluba v. Griffith, 830 P.2d 1090 (Colo. App. 1991)

⁴² Board of County Commissioners v. Ogburn, 38 Colo. App. 212, 554 P.2d 700 (1976)

⁴³ Alexander v. McClellan, 56 P.3d 102 (Colo. App. 2002)

(8) Eminent Domain:

The power of eminent domain, most often called condemnation, is limited by restraints in the constitution for the protection of individual property rights. The Colorado Constitution provides for the taking of private property for private use and the taking of private property for public use.

Taking for Private Use:

Article II, section 14 of the Colorado Constitution provides:

Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes.

This provision has been supplemented by several statutes authorizing the exercise of the right of eminent domain. C.R.S. Sections 34-48-105, 34-48-107, and 34-48-111. The Colorado Supreme Court, in *Pine Martin Mining Co. v. Empire Zink Co.* (1932), stated:

Although the words “private use” occur in our Constitution and statutes, it is obvious that they do not mean a strictly private use, that is to say one having no relation to the public interest. The fact that the Constitution permits private property to be taken for certain specified uses is an implied declaration that such uses are so closely connected with the public interest as to be at least quasi public, or, in a modified sense, affected with a public interest.

A landlocked property owner can condemn an access easement across adjoining private property.⁴⁴

A private way does not include the right to construct a private railroad.

Taking for Public Use:

The term “public use” has a very broad definition including Highway right-of-way, canals, transmission lines, etc. In fact no definition has yet been formulated which serves as an infallible test in determining whether a use of property sought to be appropriated under the power of eminent domain is public or private.

Both the fifth and fourteenth Amendments of the United States Constitution and article II, Section 15 of the Colorado Constitution prohibit the taking of private property for public use without just compensation.

⁴⁴ Colorado Constitution, Article II, Section 15; C.R.S. Section 38-1-102(3); *Crystal Park Co. v. Morton*, 27 Colo. App. 74, 146 P. 566 (1915)

Counties have been granted the power of eminent domain (1) to acquire land or buildings, or both, for the provision of court and district attorney facilities, jails, and other necessary facilities specifically related thereto, (C.R.S. Section 30-11-104(2)); (2) to acquire water facilities or sewerage facilities, or both, and to acquire lands, easements, and rights in land in connection therewith, (C.R.S. Section 30-20-402(2)); (3) to acquire private lands for county roads, and for the improvement or construction of state highways. (C.R.S. Section 43-2-112(1) and C.R.S. Section 43-2-204)

The legislative intent of the Adverse Possession statute is that the establishment of a public road by prescription is a narrow alternative to the other available means a public entity has for establishing a road. These include, (1) Express or implied dedication of a road to the public by the property owner; (2) purchase of a right-of-way by the public entity; or (3) condemnation and payment of just compensation for the property interest necessary for the road. The general assembly has encouraged landowners to allow public use of their land; in turn, it has guarded against landowners losing their property rights when allowing such use.⁴⁵

Before commencing a condemnation action, the condemning party must make an offer to purchase the property.⁴⁶ The requirement of good faith negotiations is an element of a condemnation claim.⁴⁷

Most Counties would be well advised by their attorney's to avoid condemnation if at all possible. In cases where that is not possible the proper procedures must be followed and these procedures should be handled by the County Attorney.

(9) Right-of-Way Vacation or Abandonment:

A discussion on right-of-way would not be complete without talking about right-of-way vacations and abandonment.

If any roadway has been established as a county road at any time, by any means, such roadway shall not be vacated by any method other than a resolution approved by the board of county commissioners of the county. The same thing applies to a city or town except that they must vacate by an ordinance approved by the governing body of the municipality. If the roadway is a state highway, such roadway shall not be vacated or abandoned by any method other than a resolution approved by the transportation commission pursuant to section 43-1-106 (11) of the Colorado Revised Statutes. However, these methods of vacation shall not be used for any roadway that has been established (dedication on a plat, deed for road purposes, etc.) but has never been used as a roadway after such establishment. These types of right-of-way can be vacated by a re-subdivision of the property, by deeding the right-of-way back to adjoining property

⁴⁵ McIntyre v. Board of County Commissioners, 86 P.3d 402 (Colo. 2004)

⁴⁶ City of Thornton v. Farmers Reservoir and Irrigation Co. 194 Colo. 526, 575 P.2d 382 (1978)

⁴⁷ Minto v. Lambert, 870 P.2d 572 (Colo. App. 1993)

owners, or even a resolution of the County Commissioners stating they have no need for, or are not accepting the offer of the right-of-way.

Both attorneys and judges frequently refer to “abandonment” and “vacation” of a road as being the same thing. This is incorrect. Colorado follows two rules of “abandonment”.

First, there is “formal abandonment”, or “vacation of a public road”, performed by strict compliance with a governing statute.⁴⁸ Under these statutes, a Board of County Commissioners may, unilaterally or by request, determine a public road to no longer be needed or cost-effective for maintenance. The matter is brought before the Board of County Commissioners by notice, with the opportunity for the public to object or support. The Board of County Commissioners then votes to abandon or vacate the roadway. Since 1993, a formal resolution, or order of the Board, of vacation or abandonment must be recorded with the County Clerk and Recorder. Section 43-1-202.7, C.R.S.

Second, there is “common law abandonment”. Abandonment of a public road requires proof of intent to abandon and proof of non-use.⁴⁹ There must be proof of both. Mere non-use, without the intent to abandon, is not sufficient.⁵⁰ There is a two-fold analysis of “intent”. “Intent to abandon” focuses upon official acts of the governing legislative body: e.g., Board of County Commissioners. There must be affirmative evidence of a clear and affirmative intention by the Board of County Commissioners to abandon a county public road.⁵¹ Quoting the case of *United States v. W.H.I., Inc.* 855 F.Supp. 1207 (D. Colo. 1994) Non-use of a road reflects the public’s intent to abandon the road. However, even occasional use of a public road for access purposes, in the absence of an alternative road, precludes a finding of “common law abandonment”.⁵² When the County creates an original route, and later creates an alternate route which serves the same locations, then there is an “implication” that the County intended to abandon the original route. Yet, in the absence of specific proclamations by the Board of County Commissioners the existence of the alternate route merely creates an “implication” and not a “conclusive presumption” of abandonment. The statutes are very clear that if a roadway has been used at any time it must be vacated by a resolution of the Board of County Commissioners.

Mere nonuse of an easement acquired by grant, however long continued, does not constitute an abandonment.⁵³ To establish an abandonment of an easement, the party asserting that the easement was abandoned must show clear, unequivocal, and decisive evidence manifesting an intention on the part of the owner of the easement to abandon the easement.⁵⁴ For this reason if a county or municipality desires to abandon a right-of-

⁴⁸ Section 3, Highway Act of 1879; Chap. 143. Section 69 (3), Laws of 1935; Section 120-1-3, C.R.S., 1953; Section 120-14-3, C.R.S., 1963; Section 43-2-303, C.R.S., 1973.

⁴⁹ *Bockstiegel v. Board of County Commissioners of Lake County* 97 P.3d. 324, 331 (Colo.App. 2004), citing *Heath v. Parker* 30 P.3d. 746 (Colo.App. 2000)

⁵⁰ *Koenig v. Gaines* 165 Colo. 371, 375, 440 P.2d. 155, 157 (1968), citing *Uhl v. McEndaffer* 123 Colo. 69, 225 P.2d. 839 (1950)

⁵¹ *Koenig v. Gains* (Supra) quoting *Sterlane v. Fleming* 235 Iowa 480, 18 N.W. 2d. 159, 162 (1945)

⁵² *Heath v. Parker* (Supra at Pg. 749)

⁵³ *Westland Nursing Home, Inc. v. Benson*, 33 Colo. App. 245, 517 P.2d 862 (1974)

⁵⁴ *Clinger v. Hartshorn*, 89 P.3d 462 (Colo. App. 2003)

way that has not been used something needs to be recorded in the general records of the county so that everyone is put on notice that the abandonment occurred.

If a roadway is vacated or abandoned, the documents vacating or abandoning such road shall be recorded pursuant to the requirements of section 43-1-202.7 of the Colorado Revised Statutes. This simply states: “If any roadway is vacated or abandoned by the state, by a county, or by a municipality, the documents vacating or abandoning such roadway, including but not necessarily limited to any resolution, ordinance, deed, conveyance document, plat, or survey, shall be recorded in the office of the clerk and recorder of the county in which the road is located.”

In the event of a vacation, rights-of-way or easements may be reserved for the continued use of existing sewer, gas, water, or similar pipelines and appurtenances, for ditches or canals and appurtenances, and for electric, telephone, and similar lines and appurtenances. The vacation of a road right-of-way does not vacate the right-of-way for any utility that is located therein.

Upon the vacation of a roadway the title to the land included in such roadway shall vest in the owners of the adjacent properties. No portion of a roadway upon vacation shall accrue to an abutting highway. This does not mean that every vacation is split along the centerline of the right-of-way. Each portion of the right-of-way reverts to the parcel it originally came from. The one exception is if only part of a roadway is vacated, it attaches to the adjoining parcel of land even though it may not have originally been a part of that parcel of land.

If a parcel of land adjacent to a vacated roadway is sold and the original description, which does not include the vacated portion of the roadway, is used in the transaction, the vacated right-of-way was not transferred. For this reason it is very important that each adjoining property owner record new deeds including the portion of the vacated right-of-way that accrued to their property.

It is very important that the description and/or plat of the proposed vacation reflect exactly what is intended for vacation. The description from the original document that created the right-of-way is the one to use in every case, not a new description created from a recent survey. If the road being vacated extends beyond the described right-of-way the description of this portion should be tied to the former description.

No roadway shall be vacated so as to leave any land adjoining the roadway without an established public road or private easement connecting the land with an established public road.

Other facts about road right-of-way:

The Colorado Law [Title 43, Article 1-3, C.R.S. 1973] does not contain a specific definition identifying the physical characteristics (width; grade; etc.) of a “highway” or

“public highway”. Although not applicable to the Colorado Highway Law, Section 42-1-102(43), C.R.S. 1973, defines “highway” as follows:

“...the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel or the entire width of every way declared to be a public highway by any law of this state.”

The boundaries of a “highway” include all land, structures or fixtures lying within the exterior boundaries of the right-of-way, be it by deed, dedication, grant, prescription, or otherwise. Thus, I-70 is a “highway” but so is Main Street in any city or town in Colorado, and the road from Eagle, past Sylvan Lake, to Ruedi Reservoir.

The traveled surfaces of roads are always less than the right-of-way width. The Colorado courts have repeatedly held that the unused portion of the right-of-way is not abandoned by non-use, but is, held by the commissioners for future use when and if needed. Board of County Commissioners of Mesa County v. Wilcox 35 Colo. App. 215, 219, 533 P.2d. 50, 52 (1975) states:

“Where a right-of-way of specified width has been dedicated to the public use pursuant to legislative authority, it is not required that the entire width be at all times put to public use in order to preserve the unused portion from being lost from the dedication. So long as some portion of the dedicated right-of-way has been used and so long as there is no affirmative evidence that the county commissioners intended to abandon the unused portion, there cannot have been abandonment of a portion of the right-of-way simply because the public need has not yet required the use of the full sixty feet.”

Once a road has been declared to be “Public”, all uses that are permissible to the public under the laws of this state are permissible uses.⁵⁵ This includes those facilities for which the public has right of use without discrimination. This will include quasi-public uses such as public utilities including, electricity, gas, water, sewer, and telephone or telegraph service. This can be expanded to include any agency, instrumentality, business industry or service which is used or conducted in such a manner as to affect the community at large, that is, which is not limited or restricted to any particular class of the community.⁵⁶ You must remember, however, that a “Declared Public Road” does not include roads by Prescription or RS2477 Roads. Also a gas transmission line that passes through a county but does not serve the people of the county is not a utility and must acquire its own right-of-way.

The board of county commissioners of each county in the state of Colorado is authorized to lease a right-of-way over any lands in the state of Colorado held for public purposes which are not in actual use for the purpose to which they are dedicated, for such period of

⁵⁵ Lovvorn v. Salisbury, 701 P.2d 142 (Colo. App. 1985)

⁵⁶ Black’s Law Dictionary, sixth edition (Public Use)

time and under such terms and conditions as it deems advisable, and to construct and maintain public roads and highways thereon.⁵⁷

The County Commissioners have the sole right to authorize and control the use of a highway, including the borrow pit, whether the user be an abutting owner or otherwise.⁵⁸

When a parcel of land is subdivided and a private road is constructed the County cannot regulate the construction of the private road where the parcels are deemed to be “farm and ranch” land, but if it is not “farm and ranch” land the county can regulate.⁵⁹

The adjoining property owners, in Colorado, have special property rights in public roads providing access to their property, over and above the rights of the rest of the public. If a road has been established by law, the transfer of all or any part of the property upon which such road is constructed to any party, including, but not limited to, any government agency, shall not act to vacate such road. No such transfer shall act to diminish the rights of any person in such road.⁶⁰ If the local county is the only entity that has rights in roads, the phrase “any person” would not be necessary.

When a public road provides the only access to a parcel of land, the right to use that access is appurtenant to the property itself, and hence, is a property right. That is why you see the State Department of Transportation acquiring the access rights when they acquired the Interstate 70 right-of-way.

The right to use a public road to access abutting land is in the nature of an easement. In an easement, the owner of both the dominant and the servient estates own interests in the same piece of real property.⁶¹ While the local government may have some degree of ownership and control over public roads, it is not exclusive, but rather, is shared with abutting property owners.⁶²

The state highway department as well as the local government has the right to regulate where and how these access points are constructed on roads under their separate jurisdictions for the safety of the motoring public.

⁵⁷ C.R.S. Section 43-2-205

⁵⁸ Lewis v. Lorenz, 144 Colo. 23, 354 P.2d 1008 (1960)

⁵⁹ Zweygardt v. Board of County Commissioners of Elbert County, Colo. App. June 26, 2008

⁶⁰ C.R.S. Section 43-1-202.5(1)

⁶¹ Board of County Commissioners v. W.H.I., Inc., 992 F.2d 1061 (10th Cir. 1993)

⁶² Lazy Dog Ranch v. Telluray Ranch Corp. 965 P.2d 1229, 1234 (Colo. 1998)