

A CASE STUDY

Contel of Indiana, Inc. v. Lee Coulson, Beverly Coulson and Zoe Coulson
659 N.E.2d 224, 1995 Ind. App. LEXIS 1643 (Ind. App. 1995)

(Rights of Way and Utilities)

- I. **FACTUAL BACKGROUND** – This case involves SR 63 in Sullivan County. The portion of SR 63 that was the subject of this case was formerly a County Road. Sometime prior to this case, the State assumed jurisdiction and maintenance of the County Road and made it part of SR 63. As is common with property adjacent to a County Road, the Coulson's property extended to the center of the County Road, now SR 63, subject to an easement in favor of the public for the use of the ROW. Coulson's ownership to the center of the road was a result of (i) no public easement or ROW ever having been conveyed to the County or State over the Coulson's property; and (ii) the failure of the County or State to obtain the ROW by fee conveyance or condemnation. The existence of the easement was not in dispute. The State, in maintaining the ROW, had on occasion entered the Coulson's land adjacent to the paved portion of the ROW to mow and maintain the shoulder and side ditch area. At some point prior to the events leading up to this case, the Coulson's installed a fence between the highway and their crop line. The stated facts are not clear on the width or depth of this area between the paved highway and the fence.

Contel, a telecommunications company, had previously installed or assumed control over underground local telephone lines in this "gap" area between the paved highway and Coulson's fence. Contel applied and received a permit from INDOT to access the State's ROW to install fiber optic cable. The actions of Contel that resulted in the filing of this case involved Contel's trenching and burring of approximately two and one-half miles of fiber optic telephone cable along SR 63, including in this "gap" area on Coulson's property. It is not clear from the Court's opinion, but it appears Coulson had notified Contel that they were working on Coulson's property and that they had no right to do so.

A. See Map

- II. **PROCEDURAL POSTURE.** Coulson filed a trespass action against Contel. Each party filed a Cross-Motion for Partial Summary Judgment on the issue of the width of the State's ROW, asking the Court if the ROW included any area beyond the travelled portion of SR 63. The trial court granted partial summary judgment in favor of Coulson, finding that the State's ROW did not extend beyond the traveled portion of SR 63. On Contel's request, the Court determined there was no just reason for delay, and entered a final judgment on this issue, leading to the appeal.
- III. **ISSUE 1:** Establishing the outer limits of the Right of Way. The Court discussed and relied on the following cases in coming to the Court's decision:

Extent of Public Use: When there is no evidence of a fee, easement or condemnation to establish a road ROW, the existence and width of that ROW is established by the public's use. Anderson v. City of Huntington (1907), 40 Ind. App. 130, 81 N.E. 223.

“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.”

Id. At 133, 81 N.E. at 224. The established traveled portion does not include any berm or shoulder area adjacent to the road. Bd. of Commissioners of Monroe County v. Hatton (1981, Ind. App.), 427 N.E.2d 696. In Hatton, the plaintiff attempted to establish County responsibility for maintenance of the land adjacent to the traveled portion of the road in order to establish liability for the County’s failure to do so. Because there was no evidence of any conveyance to the County of a fee or easement, the extent of the County’s responsibility was found to be limited to the traveled portion of the road.

In another case discussed, a landowner filed an inverse condemnation action against Clark County for Clark County’s attempt to extend the width of the ROW for a county road from 20 feet to 40 feet by removing trees, etc. within the 40 feet desired extension. Because there was nothing in the public record that would have included in the landowner’s historical land abstract the County’s claim to a 40 foot right of way, there was no notice to the property owner of any claim by the County to the extra 20 feet. The court found the ROW was limited to the established traveled portion, which was 20 feet. Elder v. Bd. of Commissioners of Clark County (1986, Ind. App.), 490 N.E.2d 362 *trans. denied*.

Relevant Factors: The Court determined that the State’s right of way was limited to the traveled portion of SR 63. The following factors were relevant in this decision:

- No evidence that the public ever traveled over any portion of the highway other than the paved portion; and
- Neither the County nor the State acquired a right to any property adjacent to the traveled road by conveyance or condemnation, or by use; and
- The State never placed any markers on Coulson’s land to indicate the State claimed any of Coulson’s land other than the paved portion; and
- The State’s permit to Contel was limited to the State’s ROW, without any indication of the width of the ROW.

Contel argued that Contel, as a public utility, is entitled to install public utility facilities adjacent to a public road. In response, the Court referenced Ritz v. Indiana and Ohio R.R. (1994, Ind. App.), 632 N.E.2d 769.

Where a fee is already subject to an easement for highway purposes, a utility may use a public right-of-way without the consent of the servient landowner who claims that such utility work is an additional burden on the fee.

Id., 632 N.E.2d at 775. All cases cited by Contel in support of this argument recognized the utility’s right to use the ROW, but not beyond the ROW. In this case, the Court found the State’s ROW was limited to the traveled portion of the road and did not extend to the adjoining land. Based on the facts of this case, the Court rejected Contel’s argument.

Finally, Contel argued that Coulson failed to object to the State's maintenance and mowing of the area adjacent to the traveled portion of the road, i.e., the shoulder, thereby recognizing the State's right to access this adjacent area and establishing an easement beyond the roadway. In response, the Court referenced the State's right to enter upon Coulson's land was in the nature of an implied license resulting from the State's authority and responsibility to maintain the public road, i.e., to mow and maintain the side ditches and culverts. This authority comes from an implied license, not from an easement. The Court discussed the nature and limits of an implied license and the differences of an implied license from an easement, citing Industrial Disposal v. City of East Chicago (1980, Ind. App.), 407 N.E.2d 1203.

" . . . [U]se of land under a mere license cannot ripen into an easement, regardless of how long that use is continued. (Citation omitted). The occasional, intermittent entry by the State on the property adjacent to the roadway merely to maintain areas appurtenant to the roadway did not establish a public right-of-way in those areas."

Contel v. Coulson, 659 N.E.2d at 228.

IV. **ISSUE 2: Prescriptive Easement**

Contel argued that Contel and its predecessors in interest to the local telephone lines had acquired a prescriptive easement in the area adjacent to the roadway through the continued use of this area for the prior buried local telephone lines, all with the knowledge and acquiescence of the adjoining landowners. Coulson did not object to the existence of the local telephone lines, but did object to the addition of the fiber optic cable. Coulson argued a distinction between the local telephone lines and the new fiber optic line which was to provide long distance service. The Court refused to draw this distinction. There was no evidence in the record to allow the Court to determine if a prescriptive easement existed due to the presence of the telephone lines providing local service.

- V. **DECISION.** The Court found no State easement or right-of-way beyond the traveled portion of SR 63 and upheld the trial court's decision on the partial summary judgment. However, the Court remanded the case for a determination on the prescriptive easement issue.

VI. **TAKE-A-WAYS:**

- A. Determination of the width of a right-of-way and rights of utility. The following should be considered to establish the width of a ROW, and the right of a utility to occupy the ROW.
 - i. DOCUMENTS OF RECORD which grant the right-of-way and establish its width. These documents could include the recording of a specific grant of the right-of-way or an easement, or historical records that establish the right-of-way, such as County Commissioner records creating the road. These documents need to be such that they would appear in the abstract of the specific land and put the landowner on notice of the existence of the

width of the right-of-way. See the following discussion of WorldCom. The utility will have the right to occupy the ROW for public utility purposes.

- ii. WIDTH OF USE of a road will establish the width of the right-of-way, including an implied license to maintain the shoulder or side ditches. The shoulder and side ditches are not part of the ROW and may not be occupied by a utility solely on the basis of the ROW.
- iii. PRESCRIPTIVE EASEMENT, an existing use that meets the elements of a prescriptive easement may establish the right of a utility to add to its existing use of the area adjacent to a ROW.

VII. SUBSEQUENT CASE

A. WorldCom Network Services v. Thompson (1998 Ind. App.), 698 N.E.2d 1233.

In WorldCom, the dispute involved the laying of buried communication cable adjacent to Baltimore Road in Morgan County and the appropriate width of the road. The landowner, Thompson, disputed the width of the road and assumed self-help and cut the cable. The road had been established by a Commissioner's Order in 1913, arguably under the 1905 Highway Act (IC 8-20-1-1 to 8-20-1-72) ("Act"). The Order was filed in the Commissioner's records with the Auditor. The Act required the Order to be entered of record. One dispute involved the meaning of "of record". The Court determined that "of record" did not reference the records of the County Recorder, but the records of the Auditor. Therefore, the Order, having been adopted under the 1905 Highway Act and filed in the records of the Auditor, established the width of the road as 30 feet.

This finding falls under the first take-a-way of the Contel decision – documents of record.

The second issue addressed in WorldCom concerned the actual location of the road. The Commissioner's Order described the center line of the road and the Court determined that the described center line followed the section line at the point of dispute, which happened to be one of the boundary lines of Thompson's property. Therefore, the right-of-way extended 15' on either side of this center line, and 15' onto Thompson's property.

The case was remanded because the construction of Baltimore Road was postponed, and the record was not clear if the road was ultimately constructed under the 1913 Ordinance or subsequently established by public use.

B. Ostler v. Level 3 Communications., Inc. (2002 S.D. Ind), 2002 U.S. Dist. LEXIS 17366, 2002 WL 31040337. (Unpublished Opinion)

In Ostler, an opinion marked "not for publication", the plaintiff attempted to certify a class based on ownership of 465 miles of property on which Level 3 had buried a communications cable adjacent to a ROW. Citing Contel, the Court refused to certify

the class because each individual landowner would have to establish their ownership rights with respect to their property and the method by which the adjacent ROW was established.

“Because each of the property owners' claims requires an individualized determination of the owner's rights and Level 3's rights with respect to the particular parcel of land at issue, common questions do not predominate. The proposed class cannot be certified under Rule 23(b)(3).”

Id., pg. 10.

VIII. CONCLUSION:

When working with a utility seeking to install a utility in a public right-of-way without an adjoining property owner's consent, the utility is limited to the right-of-way, whether it is established by a conveyance of fee or easement, condemnation, or public use. The precise location of that right-of-way is determined by how the right-of-way was established.

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