Is That a Right of Way

By Rick Elliott, SR/WA

or an Easement . . .

And Does It Really Matter?

I have always been a little confused about what makes a right of way a right of way and what makes an easement an easement. Just what is the difference? In conversations with my peers, I have discovered that others also are a little hazy on the distinction. For example:

> Many times I have heard the term "right of way" used as if it defined a specific type of interest. As in, "is it a right of way or an easement?" ... Lumped together within the term "right of way" are a multitude of interests ranging from a limited and revocable permit to fee title." (Bennett)

The terms do seem to mean different things to different people.

The purpose of this article is to document my findings and draw some observations from a limited research effort on the subject. Let's start with some definitions straight from *Black's Law Dictionary:*

> **Right of way**: Term "right of way" sometimes is used to describe a right belonging to a party to pass over land of another, but it is also used to describe that strip of land upon which railroad companies construct their road bed, and, when so used, the term refers to the land itself, not the right of passage over it.
> **Easement**: A right of use over the property of another.

Webster's confuses the issue by defining an easement as "a right, ***as a right of way***, afforded a person to make limited use of another's real property." (Emphasis added)

Burby defines an easement "as a non-possessory interest in the land of another." (Bruce and Ely)

In his *Real Estate Dictionary*, John Talamo offers the following definitions:

> **Easement:** A right created by grant, reservation, agreement, prescription, or necessary implication, which one has in the land of another.
>
> **Right of way:** A strip of land, which is used as a roadbed, either for a street or railway. *The land is set aside as an easement or in fee,* either by agreement or condemnation. (Emphasis added)

So, from these definitions we could reasonably conclude that what is sometimes called a right of way might also be called an easement and vice versa. However, a right of way, may, in some cases, be a possessory or fee interest. This is an important distinction because "fee owners receive substantive and procedural rights unavailable to easement holders ... Furthermore, easements may be lost by abandonment, whereas fees cannot be terminated in that way." (Bruce and Ely)

Professor C.A. Fox offers the following opinion about abandonment:

> ... The general rule is that the holder of an easement may abandon it by an unequivocal act [which] show[s] the owner's intent to relinquish all dominion and control over the property interest. However, the owner [of] a freehold estate in the land, whether fee simple, fee simple determinable, or fee simple subject to condition subsequent (and right of entry in the grantor) can not a bandon its property interest. The owner of a fee can only relieve itself of the rights and obligations of ownership by transferring the fee to someone else.

Thus, the fee/easement distinction is important to the servient estate owner, the "right of way" owner, adjacent landowners, as well as third parties that may need to obtain some interest in the land.

Bruce and Ely point out that the problem arises when the parties do not accurately explain the nature of the interest intended. The intent of the parties controls, so when there is ambiguity the courts must decide what the intent was. "Generally, the courts conclude that a conveyance of a 'right of way' creates only an easement whether the grantee is an individual, a railroad, or another entity." That position has been affirmed by a Missouri appellate court:

> Use of terms such as "right of way," "road," or "roadway" as a limitation on the use of land is a strong, almost conclusive, indication that the interest conveyed is an easement. This doctrine arises from recognition that from a practical standpoint long narrow strips of land serve little or no function other than for road or rights of way. Therefore, unless the parties make it clear that a fee is intended, it is presumed that they did not intend to create an otherwise unusable interest in land. (Bruce and Ely)

Bruce and Ely also mention that the courts often struggle with the interpretation of contradictory language in the instrument of conveyance. "Neither the form of the instrument nor its label dictates the nature of the interest created. Such matters are only evidence of intent." In other words, the name of the document may be some evidence of what the parties intended, but the name, in itself, does not necessarily prescribe the nature of the interest that is granted.

A good example of a document that has resulted in different interpretations of its effect is the "Quitclaim Deed" which was issued by the federal government to the state of Alaska under the Alaska Omnibus Act of 1959. The deed purported to convey "all rights, title and interest in the real properties owned and administered by the Department of Commerce in connection with activities of the Bureau of Public Roads." (Bennett)

Did the state receive a fee interest or an easement interest? For several years there were differing opinions on this issue. In February 1993 an Attorney General's opinion (which overruled a 1985 opinion) was issued concluding that "Under the Alaska Omnibus Act and resulting Quitclaim Deed, the state of Alaska received, in general, easements for its roads at statehood." (Bennett)

An area of particular controversy in many states is the intent of rights of way for railroad purposes. Since many railroads have failed or reduced operations, the issue of whom owns abandoned tracks and other property frequently leads to litigation. The conversion of out of service tracks to bike and pedestrian trails under the National Trails System Act of 1983 (Public Law 98-11) has resulted in many court battles.

Section 1247(d) of the National Trails System Act put a new spin on the abandonment of railroad rights of way by providing:

> ... In the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a state, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

The effect of the above statute was to "allow the Interstate Commerce Commission, under certain conditions, to 'bank' railroad rights-of-way when a railroad wishes to halt operations on the line, rather than permitting the railroad to 'abandon' the right-of-way." (Fox)

The law was challenged by property owners in Vermont whose land contained a now unused railroad right-of-way that

was proposed for conversion to a public trail. "Their argument was that, under state law, the right of way could exist only as long as it was used for railroad purposes. Once that use ceased, the right of way ended and the possession and ownership of the easement area reverted to the owner of the land over which the right of way extended." (Fox)

The case went all the way to the U.S. Supreme Court. The Court held that the "rails-to-trails" law is constitutional, but ruled the claimants should take their "takings" claim to the U.S. Court of Claims, ***Preseault v. ICC.*** The Court of Claims rejected the "takings" claim, but in November 1996, on appeal, the U.S. Court of Appeals ruled that the reversionary property owner would get just compensation from the federal government for a rails-to-trails conversion. (Welsh)

Richard Welsh, Executive Director of the National Association of Reversion Property Owners (NARPO) contends that:

> Most users of ROWs (railroads and utilities) do not own the underlying land that the right of way is on; they only have an easement for a specific purpose. When this specific purpose is extinguished (railroad abandoned, road closed, utility moved to another location, sewer line not now needed), the land reverts back to the then existing abutting or adjacent property owner free of encumbrance or easement.

NARPO reports that there are over 500 federal and state court decisions on the abandonment of different type of rights of way. (Welsh)

Bruce and Ely offer the following analysis of rights of ways for railroads:

The railroad purpose cases ... present more complicated problems of interpretation because, in many of them, land for railroad stations, depots, roundhouses, and office buildings was included in the transaction. These cases naturally involve a variety of documents worded in various ways. Some of these documents speak of both a right of way and use for railroad purposes only. If the purpose limitation is included in the granting clause, the courts tend to find an easement, if not, a fee is favored. Thus, a slight difference in the location of terminology is often largely responsible for the results reached by courts attempting to ascertain the intention of parties.

Concerning the interpretation of ambiguous grants of interests, in his course material for IRWA Course 802, *Legal Aspects of Easement,* Daniel Beardsley makes the following distinctions:

- The more specifically defined and the narrower the purpose of the interest created, courts will generally rule the interest is an easement rather than a fee simple.
- Where the interest is not narrowly defined courts are more likely to find the interest conveyed is a fee simple.

A document may be called a "deed of right of way" (or some other equally confusing title). A deed is generally an instrument that is used to pass fee title. But the name of the document is not controlling. A deed of right of way may be nothing more than an easement. Regardless of what it is called, the courts are going to look at the characteristics of the document. The controlling factor is the intent of the parties at the time of the transaction.

In summary, the definitions we ascribe to the terms "right of way" and "easement" are not too important. The terms have, in many cases, been used interchangeably. In determining whether the instrument is a fee transfer "right of way" with possessory interests or an "easement" with non-possessory interests, the important thing is what the document says. What was the intent of the parties? The courts appear to be reluctant to rule that a right of way is a fee interest unless there is clear intent.

Doesn't it make sense to draft documents so that the label and the granting clause are consistent? We can't undo what has already been done, but we can take positive steps to avoid future problems caused by contradicting language in documents. If a possessory interest is to be transferred, let's call it a deed and use the appropriate language for a deed. If a non-possessory interest is to be transferred, let's call it an easement and use the appropriate language for an easement. Finally, I think that we should move away from the idea that a right of way may represent either a possessory or non-possessory interest. A right of way should be thought of as class of easement. If a fee interest is to be conveyed, a deed, with the appropriate granting language, should be used. ■

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Rick Elliott is a natural resource manager for the state of Alaska. He is currently the program manager for the Land Management and Mapping program in the Department of Community and Regional Affairs. He holds master degrees in Public Administration and Business Management from the University of Alaska, Anchorage. He is approved to teach IRWA courses and is certified by the Alaska Real Estate Commission as an instructor of land title courses.