NOTE: Incidental Uses, Railroad right-of-way

Terms: (LN-HEADNOTES(railroad right-of-way) OR CORE-TERMS(railroad right-of-way))
Narrow Search: (incidental uses) and (incidental uses)

Source: Highest Courts, All States;US Supreme Court & Courts of Appeals Cases, Com...
Combined Source: Highest Courts, All States;US Supreme Court & Courts of Appeals Cases, Com...
Project ID:

FOCUS - 2 of 11 DOCUMENTS

KERSHAW SUNNYSIDE RANCHES, INC., *Petitioner*, v. YAKIMA INTERURBAN LINES ASSOCIATION ET AL., *Defendants*, LEVEL 3 COMMUNICATIONS, L.L.C., *Respondent*.

No. 75982-1

SUPREME COURT OF WASHINGTON

156 Wn.2d 253; 126 P.3d 16; 2006 Wash. LEXIS 4

June 28, 2005, Oral Argument
January 12, 2006, Filed

PRIOR HISTORY: [*1]**
Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n, 121 Wn. App. 714, 91 P.3d 104, 2004 Wash. App. LEXIS 1092 (2004)

CASE SUMMARY:

PROCEDURAL POSTURE: In a suit against respondents, a telecommunications company, a line operator, a right of way holder, and others, for trespass, conversion, and violations for the placement of a cable, petitioner property owner challenged an order from the Washington Court of Appeals, which overturned a finding that the company's placement of a cable was a trespass. The company challenged an order finding that the right of way conveyed an easement interest.

OVERVIEW: The company installed a fiber optic cable on a railroad line. It received permission from the line operator and the right of way holder, which retained contractual rights to an easement for underground cable but did not receive permission from, nor grant compensation to, the property owner for the installation of the cable. The property owner brought a quiet title suit against respondents. The lower court upheld a determination that the right of way deed conveyed an easement interest, not fee simple title. The lower court overturned a finding that the company's placement of the cable within the right of way constituted a trespass. On appeal, the court found that the 1905 deed between the parties' predecessors stated that the conveyance was to be used as a right of way for a railway. The phrase "right of way" was used to establish the purpose of the grant and thus presumptively conveyed an easement interest. Further, it was evident that Wash. Rev. Code § 80.36.040 obligated the company to exercise its eminent domain powers to secure the right of way to lay its line. Absent an eminent domain action, the company's placement of the cable within the right of way constituted a trespass.

OUTCOME: The court affirmed the lower court's holding that the right of way conveyed an easement interest. The court reversed the lower court's holding that the company's placement of the cable was not a trespass. The court remanded the case to the trial court for further proceedings.

CORE TERMS: deed, railroad, right of way, easement, conveyed, railway, conveyance, telecommunication, cable, right of way, fee simple, strip of land, incidental use, convey, right-of-way, fiber optic, construct, grantor, trespass, granting clause, warranty deed, domain, habendum clause, installation, eminent, successor, highway, servient, forever, eminent domain

LexisNexis(R) Headnotes

Real Property Law > Deeds > Construction & Interpretation
[HN1] When construing deeds, a court's principal aim is to effect and enforce the intent of the parties.

Real Property Law > Deeds > Construction & Interpretation
Real Property Law > Estates > Present Estates > Fee Simple Estates
Real Property Law > Limited Use Rights > Easements > Creation > Express Easements
Transportation Law > Rail Transportation > Lands & Rights of Way
[HN2] When the granting clause of a deed declares the purpose of the grant to be a right of way for a railroad, the deed passes an easement only, and not a fee with a restricted use, even though the deed is in the usual form to convey a fee title.

Real Property Law > Deeds > Construction & Interpretation
[HN3] The intent of the parties is of paramount importance when interpreting a deed.

Real Property Law > Deeds > Construction & Interpretation
Real Property Law > Deeds > Types > Warranty
Real Property Law > Estates > Present Estates > Fee Simple Estates
[HN4] Where a party conveys property via a statutory warranty deed and the granting clause conveys a definite strip of land, courts must find that the grantor intended to convey fee simple title unless additional language in the deed clearly and expressly limits or qualifies the interest conveyed.

Real Property Law > Deeds > Construction & Interpretation
Real Property Law > Deeds > Types > Warranty
Real Property Law > Estates > Present Estates > Fee Simple Estates
[HN5] Wash. Rev. Code § 64.04.030 provides that every deed in warranty form shall be deemed and held a conveyance in fee simple to the grantee.

Real Property Law > Deeds > Construction & Interpretation
Real Property Law > Deeds > Types > Warranty
Real Property Law > Estates > Present Estates > Fee Simple Estates
Real Property Law > Limited Use Rights > Easements > Creation > Express Easements
[HN6] A party wishing to prove that a warranty deed conveys only an easement interest has the burden of showing less than fee simple title was intended to be conveyed.

Real Property Law > Deeds > Construction & Interpretation
Real Property Law > Deeds > Types > General Overview
Transportation Law > Rail Transportation > Lands & Rights of Way
[HN7] The Supreme Court of Washington gives special significance to the words "right of way" in railroad deeds.

Real Property Law > Deeds > Construction & Interpretation
[HN8] Generally, when a granting document uses the term "right of way" as a limitation or to define the purpose of the grant, it operates to clearly and expressly limit or qualify the interest conveyed.

Real Property Law > Deeds > Construction & Interpretation
[HN9] Rather than merely identifying the purpose of conveyances, reviewing courts should ascertain parties' intent by performing a deed-by-deed inquiry into the interests conveyed based on (1) the particular language of the deed, (2) the form of the deed, and (3) the surrounding circumstances and subsequent conduct of the parties.

Real Property Law > Deeds > Construction & Interpretation
Real Property Law > Deeds > Types > General Overview
Transportation Law > Rail Transportation > Lands & Rights of Way
[HN10] Courts should consider the following factors in reading railroad deed language: (1) whether the deed conveys a

strip of land, and does not contain additional language relating to the use or purpose to which the land is to be put, or in other ways limiting the estate conveyed; (2) whether the deed conveys a strip of land and limits its use to a specific purpose; (3) whether the deed conveys a right of way over a tract of land, rather than a strip thereof; (4) whether the deed grants only the privilege of constructing, operating, or maintaining a railroad over the land; (5) whether the deed contains a clause providing that if the railroad ceases to operate, the land conveyed will revert to the grantor; (6) whether the consideration expressed is substantial or nominal; and (7) whether the conveyance does or does not contain a habendum clause, and any other considerations suggested by the language of the particular deed.

Evidence > Inferences & Presumptions > Presumptions > General Overview
Real Property Law > Deeds > Types > Warranty
Real Property Law > Estates > Present Estates > Fee Simple Estates
[HN11] The use of a statutory warranty deed creates a presumption that fee simple title is conveyed.

Real Property Law > Deeds > Types > Quit Claim Deeds
Real Property Law > Deeds > Types > Warranty
Real Property Law > Limited Use Rights > Easements > Creation > Express Easements
Transportation Law > Rail Transportation > Lands & Rights of Way
[HN12] Whether by quitclaim or warranty deed, language establishing that a conveyance is for right of way or railroad purposes presumptively conveys an easement and thus provides the "additional language" which expressly limits or qualifies the interest conveyed.

Real Property Law > Deeds > Construction & Interpretation
[HN13] In addition to the deed language, when interpreting a deed, a court may also look to the circumstance surrounding the deed's execution and the subsequent conduct of the parties.

Real Property Law > Deeds > Construction & Interpretation
[HN14] Ambiguity in a deed is resolved against the grantor.

Real Property Law > Deeds > Construction & Interpretation
Real Property Law > Deeds > Types > Quit Claim Deeds
Real Property Law > Deeds > Types > Warranty
[HN15] A quitclaim deed differs from a warranty or bargain and sale deed only as to the extent, if any, of the warranties which accompany the transfer of property. An exception in a quitclaim deed has the same legal effect as an exception in any other form of deed.

Real Property Law > Limited Use Rights > Easements > General Overview
Transportation Law > Rail Transportation > Lands & Rights of Way
[HN16] The **incidental use** doctrine states that a railroad may use its easement to conduct not only railroad-related activities, but also any other incidental activities that are not inconsistent and do not interfere with the operation of the railroad. The doctrine's underpinning lies in the unique nature of **railroad right of way** easements, which often are deemed to include exclusive control of all the land within the lines.

Communications Law > Related Legal Issues > General Overview
Transportation Law > Rail Transportation > Lands & Rights of Way
[HN17] The right of telecommunications companies to lay their lines in **railroad rights of way** is both constitutionally and statutorily based.

Communications Law > Related Legal Issues > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings
Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > General Overview
Transportation Law > Rail Transportation > Lands & Rights of Way

[HN18] In an apparent effort to ensure the development of communications systems in the State of Washington, the Washington Constitution makes two explicit allowances for telecommunication companies. First, it provides that railroad corporations organized or doing business in the State shall allow telegraph and telephone corporations and companies to construct and maintain telegraph lines on and along the rights of way of such railroads and railroad companies. Wash. Const. art XII, § 19. Second, it extends the right of eminent domain to all telegraph and telephone companies. Finally, the Washington Constitution provides that the legislature shall, by general law of uniform operation, provide reasonable regulations to give effect to this section.

Communications Law > Related Legal Issues > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings
Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > General Overview
Transportation Law > Rail Transportation > Lands & Rights of Way
[HN19] In the exercise of its constitutional authority and mandate, the Washington Legislature has enacted legislation executing Wash. Const. art. XII, § 19 by designating railroads as "post roads" and requiring railroad corporations to permit telecommunication companies to maintain lines on the right of way. Wash. Rev. Code § 80.36.050.

Communications Law > Related Legal Issues > General Overview
Real Property Law > Eminent Domain Proceedings > General Overview
Real Property Law > Limited Use Rights > Easements > General Overview
Transportation Law > Rail Transportation > Lands & Rights of Way
[HN20] Any telecommunications company, or the lessees thereof, doing business in the State of Washington, shall have the right to construct and maintain all necessary telecommunications lines for public traffic along and upon any public road, street, or highway, along or across the right-of-way of any railroad corporation, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and any other necessary fixture of their lines, in such manner and at such points as not to incommode the public use of the railroad or highway, or interrupt the navigation of the waters: provided, that when the right-of-way of such corporation has not been acquired by or through any grant or donation from the United States, or this State, or any county, city, or town therein, then the right to construct and maintain such lines shall be secured only by the exercise of right of eminent domain, as provided by law. Wash. Rev. Code § 80.36.040.

Real Property Law > Eminent Domain Proceedings > General Overview
[HN21] Each and every owner, encumbrancer, or other person are parties to an eminent domain proceeding, and all of their interests and potential damages are discerned. Wash. Rev. Code §§ 8.20.010, 8.20.080.

Constitutional Law > General Overview
Governments > Legislation > Effect & Operation > General Overview
[HN22] Where an issue may be resolved on statutory grounds, a court will avoid deciding the issue on constitutional grounds.

Real Property Law > Torts > Trespass to Real Property
Torts > Premises Liability & Property > Trespass > General Overview
[HN23] A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it.

Evidence > Judicial Notice > Adjudicative Facts > Proceedings in Other Courts
[HN24] A court cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties.

SUMMARY: Nature of Action: The owner of property crossed by a railroad right-of-way through which an

underground fiber optic transmission line was installed sought to quiet title to the right-of-way and alleged trespass, conversion, and the violation of a statute that provides for liability and damages for injury to land and property. The plaintiff also alleged a violation of civil rights actionable under 42 U.S.C. § 1983 and violations of chapter 80.36 RCW and Const. art. I, § 16.

Superior Court: The Superior Court for Yakima County, No. 00-2-01550-9, Heather K. Van Nuys, J., on August 10, 2001, and July 11, 2002, entered summary judgments in favor of the plaintiff, ruling that the original right-of-way deed conveyed an easement interest, not fee simple title; that the telecommunications company could use the railroad right-of-way for its fiber optic cable, but must provide just compensation through an eminent domain proceeding; that the rail line has not been abandoned; and that placement of the fiber optic transmission line within the right-of-way constituted a trespass.

Court of Appeals: The court *affirmed* one judgment, *reversed* the other, and *remanded* the case for further proceedings at 121 Wn. App. 714, 91 P.3d 104 (2004), holding that the trial court did not abuse its discretion by finding "no just reason for delay" and in certifying the case as final for purposes of appeal, that the original deed created an easement only and did not transfer the right-of-way in fee to the railroad, and that placement of the fiber optic transmission line through the right-of-way is an **incidental use** of the right-of-way that places no additional burden on the servient estate and does not constitute a trespass.

Supreme Court: Holding that the original deed conveyed only an easement interest in the right-of-way but that the placement of the fiber optic transmission line through the right-of-way requires an eminent domain proceeding under statutes governing telecommunications companies, the court *affirms* the decision of the Court of Appeals in part, *reverses* it in part, and *remands* the case to the superior court for further proceedings.

HEADNOTES WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] Appeal -- Decisions Reviewable -- Multiple Claims or Parties -- Partial Judgment -- Right of Appeal -- No Reason for Delay -- Declaration -- Propriety Any doubt as to whether CR 54(b) and RAP 2.2(d) were properly invoked to allow appellate review of a partial summary judgment does not prevent an appellate court from addressing the merits of the appeal inasmuch as certification for review is not jurisdictional and the court may nonetheless accept review in its discretion under RAP 2.3(b).

[2] Deeds -- Construction -- Intent of Parties -- In General A court's principal aim when construing a deed is to ascertain and enforce the intent of the parties thereto.

[3] Deeds -- Railroads -- Right-of-Way -- Conveyance -- Easement or Fee -- Use of Term "Right-of-Way" -- Presumption Where language in the granting clause of a statutory warranty deed conveys a definite strip of land to a railroad company but limits the grant by stating that the land is "*to be used* by [said company] as a right of way for a railway forever," the deed is presumed to convey an easement only, not fee simple title.

[4] Deeds -- Railroads -- Right-of-Way -- Conveyance -- Easement or Fee -- Factors Where a deed conveying property to a railroad company for **railroad right-of-way** purposes contains elements characteristic of both a fee and an easement conveyance, the parties' intent as to the nature of the estate conveyed may be determined by analyzing the deed language, the form of the deed, the surrounding circumstances of the conveyance, and the subsequent conduct of the parties. In analyzing the deed language, courts should consider the factors set forth in *Brown v. State*, 130 Wn.2d 430, 924 P.2d 908 (1996). The use of "right-of-way" language to describe the purpose of the conveyance, a habendum clause that uses the terms "right-of-way" and "strip of land," and language in the granting clause reciting that the grantor grants to the railroad company "the perpetual right to construct, maintain and operate a railway or railways over and across" the described property strongly indicate the parties' intent to convey an easement, not a fee interest.

[5] Deeds -- Railroads -- Right-of-Way -- Conveyance -- Easement or Fee -- Reverter Clause -- What Constitutes A statement in a deed conveying property to a railroad company for **railroad right-of-way** purposes that the "aforesaid covenants and agreements on the part of [the company] shall run with said granted right of way and be binding upon said company, and its successors and assigns, so long as a railway may be maintained by it or them, over and across said premises" relates solely to the company's deed covenants and agreements and does not constitute a reverter clause.

[6] Deeds -- Construction -- Ambiguity -- Against Grantor -- In General An ambiguity in a deed is resolved against the grantor.

[7] Deeds -- Railroads -- Right-of-Way -- Conveyance -- Exception -- Effect on Servient Estate -- Intent of Parties An exception for a **railroad right-of-way** in a description of property conveyed by deed does not necessarily effect a reservation of the servient estate if the language used is ambiguous, the circumstances of the conveyance suggest a conveyance of the entire property was intended, and there is no evidence of an intent by the grantor to reserve from the conveyance any interest in the servient estate.

[8] Telecommunications -- Railroads -- Right-of-Way -- Telecommunications Lines -- Installation -- Governing Law The right of a telecommunications company to lay a telecommunications line in a **railroad right-of-way** is governed by Const. art. XII, § 19 and RCW 80.36.010. -050.

[9] Telecommunications -- Railroads -- Right-of-Way -- Telecommunications Lines -- Installation -- Eminent Domain Proceeding -- Necessity Under RCW 80.36.040, a telecommunications company may not place a telecommunications line along or across a **railroad right-of-way** that was conveyed to the railroad company by a private party unless the telecommunications company exercises the power of eminent domain granted by Const. art. XII, § 19 and RCW 80.36.010. A telecommunications company's placement of a telecommunications line along or across a privately granted **railroad right-of-way** without exercise of the eminent domain power constitutes a trespass.

[10] Evidence -- Judicial Notice -- Record of Separate Judicial Proceedings -- Same Parties A court may not, while deciding one case, take judicial notice of the record of another independent and separate judicial proceeding, even if it is between the same parties.

COUNSEL: *Kevan T. Montoya* (of *Velikanje Moore & Shore, P.S.*), for petitioner.

James S. Berg (of *James S. Berg, P.L.L.C.*) (*Mark C. Laughlin* of *Fraser Stryker Meusey Olson Boyer & Bloc*, of counsel), for respondent.

JUDGES: Authored by Bobbe J. Bridge. Concurring: James Johnson, Gerry L. Alexander, Richard B. Sanders, Tom Chambers, Mary Fairhurst. Dissenting: Barbara A. Madsen, Charles W. Johnson, Susan Owens.

OPINION BY: BOBBE J BRIDGE

OPINION

En Banc.

[17]** [*256]** P1 Bridge, J. -- Level 3 Communications, LLC (Level 3), is a telecommunications company doing business in Washington State. In an effort to expand its infrastructure, Level 3 installed a fiber optic telecommunication cable on a railroad line in Yakima, Washington. At issue here is Level 3's installation of cable on a **railroad right of way** transpiercing land belonging in fee to Kershaw **[***2]** Sunnyside Ranches, Inc. Level 3 negotiated and received

[18]** permission from the line operator and right of way holder, Yakima Interurban Lines Association (Yakima Interurban), and the Burlington Northern and Santa Fe Railway Company (BNSF), which had retained contractual rights to an easement for underground cable but did not receive permission from nor grant compensation to Kershaw Sunnyside Ranches for the installation of the cable line. In response, Kershaw Sunnyside Ranches brought suit seeking to quiet title and alleging trespass, conversion, and statutory and constitutional violations for Level 3's placement of the cable.

[*257] P2 The superior court, in two summary judgment orders, found (1) that the 1905 right of way deed between the parties' predecessors in interest conveyed an easement interest in the relevant strip of land and not fee simple title and (2) that Level 3's placement of the fiber optic cable within the right of way constituted a trespass. The Court of Appeals affirmed the first determination, that the deed created an easement interest, but reversed the trespass claim, finding that the presence of the cable was a permissible **incidental use** for which no additional compensation **[***3]** was due to Kershaw Sunnyside Ranches.

P3 We now affirm in part and reverse in part the Court of Appeals decision. First, like the superior court and the Court of Appeals, we hold that the 1905 deed conveyed only an easement interest in the right of way. Second, we hold that Washington statutes governing telecommunications companies require an eminent domain proceeding in this context and thus reverse the Court of Appeals application of the **incidental use** doctrine and find the presence of the fiber optic cable constitutes a trespass.

I

Facts and Procedural History

P4 On October 5, 1905, Edward A. (E.A.) and Ora A. Kershaw recorded a right of way deed, memorializing,

> NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, That we, the said E.A. Kershaw and Ora A. Kershaw . . . for and in consideration of the sum of [$ 1,000.00] . . . and other good and valuable considerations including the covenants of the [Railway] . . . do hereby give, grant, sell, confirm and convey to the said . . . NORTH YAKIMA & VALLEY RAILWAY COMPANY, a Corporation, its successors or assigns, a strip of land seventy five feet wide, in, along, over and through the hereinafter described land in Yakima County, Washington **[***4]** . . . to be used by [the Railway] as a right of way for a railway forever, together with the perpetual right to construct, maintain and operate a railway or railways **[*258]** over and across the same. Said strip of land being a certain strip of land seventy five feet wide across [setting forth location and referencing as already "staked out"].

Clerk's Papers (CP) at 654. The habendum clause to the deed provides:

> TO HAVE AND TO HOLD The said right of way, strip of land, easements, privileges and appurtenances to it, the said NORTH YAKIMA & VALLEY RAILWAY COMPANY, its successors or assigns, forever, Provided, it is understood and agreed that second party its successors or assigns, shall, at its or their own proper cost and expense, provide and maintain over and across said **railroad and right of way** four suitable and convenient crossings of sufficient width to permit the use thereof of wagons, hay rakes and other ordinary farm machinery, in passing to and from the portions of said premises separated by said **railroad and right-of-way**, with proper approaches and one of which shall be an open crossing, provided with proper cattle guards, and the others may be provided with convenient **[***5]** and suitable gates, which shall be provided and maintained by second party, its successors or assigns. . . . [A]lso, it is understood and agreed, that second party, its successors or assigns shall erect and maintain a good and lawful fence on each side of its right of way over and across said described premises . . . [and] provide suitable means and ways for conducting over and across its said right of way and under its said railroad, any and all water necessary for the proper irrigation of said premises. . . .
>
> **[**19]** It is understood and agreed that the aforesaid covenants and agreements on the part of second party shall run with said granted right of way and be binding upon said company, and its successors and assigns, so long as a railway may be maintained by it or them, over and across said premises.

CP at 585-87; *see also* CP 654-55. On June 24, 1914, the North Yakima & Valley Railway Company deeded its interest to the Northern Pacific Railroad, predecessor in interest to BNSF. On February 18, 1999, BNSF and BNSF Acquisition,

Inc., by quitclaim deed, conveyed their interest in the rail corridor encompassing the disputed right of way to Yakima Interurban, reserving to **[***6]** itself "an exclusive, permanent **[*259]** easement for construction, reconstruction, maintenance, use and/or operation of one or more longitudinal pipelines for . . . telecommunication or fiber optic communication lines." CP at 589-98.

P5 Level 3 and BNSF then entered into a master right of way agreement whereby BNSF granted Level 3 the right to construct and operate "fiber optic cables on the [**railroad right of way**] that traverses" the Kershaw Sunnyside Ranches property. CP at 606. On October 22, 1999, Level 3 concluded a construction and restoration agreement with Yakima Interurban and thereafter installed fiber optic cable approximately 42 inches underground on the **railroad right of way**. [1] CP at 285, 316, 606, 637.

1 The trial court corrector noted that discussion of subsurface rights is irrelevant to the issues presented here. *See* CP at 9.

P6 Over the past century, the Kershaw property has also changed hands but maintained ownership within the family. On January 20, 1960, Ora Kershaw quitclaimed the Kershaw property **[***7]** to her son Ronald E. Kershaw, specifically excepting the "right-of-way of the Northern Pacific Railway," predecessor in interest to BNSF. CP at 731-32. In 1986, Ronald and Betty Kershaw transferred the real property to the family business, Kershaw Sunnyside Ranches. The real estate contract memorializing this transfer, in describing the property conveyed, again excepted from the transfer the "right of way of the Northern Pacific Railway." CP at 726. At the present time, Kershaw Sunnyside Ranches owns approximately 80-90 acres on the site transpierced by the **railroad right of way**.

P7 On June 15, 2000, Kershaw Sunnyside Ranches filed this action against Level 3, Yakima Interurban, BNSF, and the State seeking to quiet title and alleging trespass, conversion, and violation of RCW 4.24.630 (liability and damages to land and property). On September 28, 2001, Kershaw Sunnyside Ranches amended its complaint to further allege violation of 42 U.S.C. § 1983, chapter 80.36 **[*260]** RCW (telecommunications eminent domain procedure), and article I, section 16 of the Washington Constitution. [2]

2 Level 3 contends here that because Kershaw Sunnyside Ranches failed to plead a taking occurred, it cannot do so on appeal. However, the first amended complaint clearly argues that the fiber optic line constituted a taking of the Kershaw property "without just compensation" citing to both the fifth amendment to the United States Constitution and article I, section 16 of the Washington Constitution. CP at 863-64.

[*8]** P8 Both parties moved for partial summary judgment, and on August 10, 2001, the superior court entered an order finding (1) that the 1905 deed "transferred only a right of way for a railroad, not a fee simple interest;" (2) that Level 3 could use the **railroad right of way** for its fiber optic cable, but must provide just compensation through an eminent domain process; and (3) that the "rail line has not been abandoned." CP at 158-59. Following Kershaw Sunnyside Ranches' subsequent motion for summary judgment on the issue of trespass, on July 2, 2002, the superior court issued an order that Level 3 "did not have the authority to bury its fiber-optic telecommunications cable in the right of way . . . without paying just compensation" to Kershaw Sunnyside Ranches, that the fiber optic cable "[was] not an **incidental use** of the **railroad**" **right of way**, and therefore Level 3 trespassed on plaintiff's property when it buried the cable. CP at 10. As part of the July 11, 2002 order, the judge additionally found that, as to the rulings made in that order and the order of August 10, 2001, "there is no just reason for delay" and "expressly determined that a final judgment, as **[**20]** to both Orders, shall; **[***9]** issue from which an immediate appeal may be taken." CP at 10; *see* CR 54(b).

P9 Both parties filed a notice of appeal with Division Three of the Court of Appeals. In response, the Court of Appeals commissioner ordered the case remanded to the trial court with instructions to enter written findings on the issue of

appealability "address[ing] the *Schiffman/Lindsay* factors [3] as set forth in *Pepper v. King County*, 61 Wn. App. 339, 351-353, 810 P.2d 527 (1991)." CP at 983-84. On remand, **[*261]** the superior court entered an amended order addressing RAP 2.2(d) and the five *Schiffman/Lindsay* factors as instructed by the commissioner. CP at 972-77.

3 *See Schiffman v. Hanson Excavating Co.*, 82 Wn.2d 681, 687, 513 P.2d 29 (1973); *Lindsay Credit Corp. v. Skarperud*, 33 Wn. App. 766, 772, 657 P.2d 804 (1983).

P10 The Court of Appeals thereafter accepted review and affirmed in part and reversed in part the superior court's rulings. *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n*, 121 Wn. App. 714, 725, 737, 91 P.3d 104 (2004). **[***10]** The Court of Appeals held (1) that the trial court did not abuse its discretion in finding "'no just reason for delay'" and in certifying the case as final, (2) that the 1905 deed created only an easement and did not transfer the right of way in fee to the railroad, and (3) that Level 3's placement of the fiber optic cable on the **railroad right of way** is an **incidental use** of the right of way which places no additional burden on the servient estate and thus the placement of the cable does not constitute trespass. *Id.* at 724, 737.

[1] P11 Kershaw Sunnyside Ranches petitioned this court to review the trial court's CR 54(b) certification and the finding that the cable constituted an **incidental use** of the right of way easement. Level 3, in its answer, cross-petitioned for review of the Court of Appeals holding that the 1905 deed created only an easement interest. We granted review as to all issues. [4]

4 As a preliminary matter regarding the procedural issue, the parties dispute whether the superior court's August 10, 2001 and July 11, 2002 partial summary judgment orders were properly appealable. *See* CP at 8-11, 154-59. The trial court certified the orders as final pursuant to CR 54(b), permitting an immediate appeal. Kershaw Sunnyside Ranches asserts that the "novel issue" this case raises does not support an appeal under CR 54(b) and further that no "danger of hardship or injustice" was alleviated by an immediate appeal. Pet. for Review at 11-12 (citing *Doerflinger v. N.Y. Life Ins. Co.*, 88 Wn.2d 878, 882, 567 P.2d 230 (1977)). Level 3 counters that Kershaw Sunnyside Ranches has failed to show the trial court abused its discretion in finding "no just reason for delay." While there is some doubt as to whether CR 54(b) and RAP 2.2(d) were properly invoked in this case, these issues are not jurisdictional and do not prevent us from addressing the merits. *Cf. Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 882-83, 652 P.2d 948 (1982) (court sua sponte raised the issue of appealability under CR 54(b) and found that the trial court's decision was not final but nevertheless treated the case as one for discretionary review and rendered a decision on the merits). *See also* RAP 2.3(b).

In spite of the above dispute, the Court of Appeals nevertheless had authority to accept review pursuant to RAP 2.3(b), we have granted review of that decision, and we thus now decline Kershaw Sunnyside Ranches' plea to this court to dismiss this case solely on procedural grounds. *Cf. Glass*, 97 Wn.2d at 882-83.

[*11]** **[*262]** II

Deed Conveyances

P12 The parties first dispute the nature of the estate the railroad acquired as the grantee to the 1905 deed. As part of the August 10, 2001 order on summary judgment, the trial court ruled that the 1905 deed "transferred only a right of way for a railroad, not a fee simple interest." CP at 158. The Court of Appeals affirmed, holding that the language "'to be used . . . as a right of way for a railway'" specified the purpose of the grant and indicates the creation of only an easement. *Kershaw Sunnyside Ranches*, 121 Wn. App. at 727 (quoting CP at 585). It further deemed a reverter clause to exist in the deed and considered that clause to be persuasive evidence the parties intended to create only an easement. *Id.* Finally, the court concluded the 1960 quitclaim deed between Ora and Ronald Kershaw, and its exception of the **railroad right of way**, to be consistent with the conclusion that the 1905 deed created only an easement. **[**21]** *Id.* at 728. Level 3 asserts that the Court of Appeals erred in finding only an easement interest, noting that statutory warranty deeds are presumed to convey fee simple and contending that Kershaw Sunnyside **[***12]** Ranches has failed to satisfy

its burden to show it conveyed a lesser estate. Specifically, Level 3 contends the Court of Appeals erred in failing to apply the seven factors enumerated in *Brown v. State*, 130 Wn.2d 430, 438, 924 P.2d 908 (1996), which it argues weigh in favor of finding a fee simple conveyance. Kershaw Sunnyside Ranches supports the trial court and Court of Appeals interpretation of the deed.

[2] P13 [HN1] When construing deeds, our principal aim is to effect and enforce the intent of the parties. *See, e.g.*, *Brown*, 130 Wn.2d at 437. Throughout the 20th century, railroad deeds posed a recurring problem for courts, prompting our court to opine that "[t]he authorities are in hopeless conflict" and, in large part, "cannot be reconciled." *Swan v.* **[*263]** *O'Leary*, 37 Wn.2d 533, 535, 225 P.2d 199 (1950). [5] In response to these conflicting authorities, in 1950 the *Swan* court attempted to lay down a bright-line rule governing **railroad rights of way** by interpreting the then seminal case *Morsbach v. Thurston County*, 152 Wash. 562, 278 P. 686 (1929) [6] as follows:

> We think when [*Morsbach*] is critically read **[***13]** and considered with the precise question we have before us in mind, it is clear that we adopted the rule that [HN2] *when the granting clause of a deed declares the purpose of the grant to be a right of way for a railroad the deed passes an easement only, and not a fee with a restricted use, even though the deed is in the usual form to convey a fee title.*

Swan, 37 Wn.2d at 537 (emphasis added). The court then applied this principle to find that a quitclaim deed conveying, "'*for the purpose of a* ***Railroad right-of-way*** *. . . a strip of land 50 feet in width*,'" conveyed only an easement and not a fee interest. *Id.* at 534, 537.

> 5 Nevertheless, this court's consistent focus has been to enforce the [HN3] "intent of the parties" which we have deemed "of paramount importance." *Brown*, 130 Wn.2d at 437. The analytical approach espoused in *Brown*, while often fact determinative, has largely reconciled the conflicting presumptions and case law and, remaining focused on "the intent of the parties," we build upon that approach today. *Id.*
>
> 6 *Morsbach* concerned a dispute over whether a right of way deed created a fee or easement interest in a railroad line transversing a parcel of property in Thurston County. 152 Wash. at 562. The right of way in question had been long since abandoned and was subsequently conveyed to the State and then to the county for the purposes of building a county road. *Id.* at 563. This court held that the deed language, conveying a "'right of way for the construction of [a] railroad'" and the corresponding property description, demonstrated the parties' intent to pass only an easement interest to the railroad. *Id.* at 566. It so held in spite of the warranty nature of the deed. *Id.* at 564-65. As such, the court held that the easement reverted to the fee property owners upon abandonment. *Id.* at 575.

[*14]** P14 In 1979, *Veach v. Culp*, 92 Wn.2d 570, 599 P.2d 526 (1979) followed the *Swan* principle when interpreting a deed conveying a "'certain lot, piece, or parcel of land'" and describing the property as a "'right-of-way one hundred feet wide.'" *Id.* at 572. Despite explicitly conveying a "certain . . . parcel of land" the court held that the use of the term "right-of-way" in the granting clause trumped the other considerations and reflected intent to create an easement only. *Id.* at 572-74.

[*264] P15 Again, in 1986, this court considered the effect of a **railroad right of way** deed. *Roeder Co. v. Burlington N., Inc.*, 105 Wn.2d 567, 716 P.2d 855 (1986). As here, at issue was the extent of the interest the deed conveyed. One of the deeds analyzed in that case conveyed, *by statutory warranty deed*, a "50-foot-wide strip of property." *Id.* at 569. The granting clause specifically conveyed "'for all railroad and other right of way purposes, certain tracts and parcels of land . . . .'" *Id.* Based on the deed language, the court concluded that "[s]ince the granting clause of the . . . deed declares the purpose **[***15]** of the grant to be a right of way for a railroad, the deed passes an easement, not a fee." *Id.* at 571. "[A]bsent persuasive evidence of intent to the contrary," the court found *Morsbach*, **[**22]** *Swan*, and *Veach* compelled it to read the "right of way" purpose language to find only an easement was transferred. *Id.* at 572.

P16 Most recently, in 1996, this court again attempted to address the "considerable disarray" of decisions addressing whether particular railroad deeds convey fee simple or easements. *Brown*, 130 Wn.2d at 437. In *Brown*, this court noted the general rule that [HN4] where a party conveys property via a statutory warranty deed and the granting clause conveys a definite strip of land, courts "must find that the grantor [] intended to convey fee simple title unless additional

language in the deed[] clearly and expressly limits or qualifies the interest conveyed." *Id.; see also* [HN5] RCW 64.04.030 ("[e]very deed in [warranty] form . . . shall be deemed and held a conveyance in fee simple to the grantee"). Thus, [HN6] a party wishing to prove that such a deed conveys only an easement interest **[***16]** has the burden of showing less than fee simple title was intended to be conveyed. *Id.* at 438. Attempting to reconcile this presumption with the principle espoused in *Roeder*, *Swan*, and *Morsbach*, the court stated that where the deed uses the term "'right of way' *as a limitation or to specify the purpose of the grant*," such a grant generally conveys only an easement. *Id.* at 438-39 (emphasis added) (recognizing that [HN7] this court has given "special significance to the words 'right **[*265]** of way' in railroad deeds"). Thus, *Brown* established that, [HN8] generally, when the granting document uses the term "right of way" as a limitation or to define the purpose of the grant, it operates to "clearly and expressly limit[] or qualif[y] the interest conveyed." *Id.* at 437.

[3] [4] [5] P17 However, the *Brown* court partially qualified this rule when, in the following discussion, it stated that, [HN9] rather than merely "identifying the purpose of the conveyances," reviewing courts should ascertain the parties' intent by performing a deed-by-deed inquiry into the interests conveyed based on (1) the particular language of the deed, (2) the form of the deed, **[***17]** and (3) the surrounding; circumstances and subsequent conduct of the parties. *Id.* at 438-40 (citing *Scott v. Wallitner*, 49 Wn.2d 161, 162, 299 P.2d 204 (1956)). The court then set forth multiple factors [HN10] courts should consider in reading railroad deed language:

> (1) whether the deed conveyed a strip of land, and did not contain additional language relating to the use or purpose to which the land was to be put, or in other ways limiting the estate conveyed; (2) whether the deed conveyed a strip of land and limited its use to a specific purpose; (3) whether the deed conveyed a right of way over a tract of land, rather than a strip thereof; (4) whether the deed granted only the privilege of constructing, operating, or maintaining a railroad over the land; (5) whether the deed contained a clause providing that if the railroad ceased to operate, the land conveyed would revert to the grantor; (6) whether the consideration expressed was substantial or nominal; and (7) whether the conveyance did or did not contain a habendum clause, and [any] other considerations suggested by the language of the particular deed.

Id. at 438 (citing *Swan*, 37 Wn.2d at 535-36). **[***18]** Thus, this court's most recent exercise in interpreting railroad deeds has continued to place substantial significance on the use of right of way language but also emphasizing consideration of other relevant factors.

P18 Turning to the deed at issue here, according to *Morsbach*, *Swan*, *Veach* and *Roeder* the language in the granting clause purporting to convey a "strip of land seventy **[*266]** five feet wide, in, along, over and through the hereinafter described land in Yakima County, Washington . . . to be used by [the North Yakima Valley Railway Company] as a right of way for a railway forever," CP at 654, presumptively operates to convey an easement only. *Brown* did not purport to overrule these cases, rather it distinguished them on the limited basis that none of the deeds at issue in *Brown* possessed language relating to the *purpose* of the grant or limiting the estate conveyed. 130 Wn.2d at 439-40. Here, the 1905 deed states that the conveyance is "*to be used by* [the North Yakima & Valley Railway Company] *as a right of way for a railway*." CP at 654 **[**23]** (emphasis added). Like the cases finding an easement, and unlike the deeds in *Brown* the **[***19]** word "right of way" is used to establish the purpose of the grant and thus presumptively conveys an easement interest.

P19 In this context, this case is nearly indistinguishable from *Roeder*, where a statutory warranty deed conveying a "strip of property" "'for all railroad and other right of way purposes'" was determined to have created an easement. 105 Wn.2d at 569. However, *Roeder* did not end its analysis there, but rather looked to see if persuasive contrary evidence existed. *Id.* at 572-73. This is also appropriate here.

P20 *Brown* refined the principle relied on in *Morsbach*, *Swan*, *Veach*, and *Roeder* and suggests a more thorough examination of the deed is appropriate. Here the deed appears to contain elements characteristic of both a fee and easement conveyance. In short, the deed is in statutory warranty form, which carries a presumption of conveying fee, *Brown*, 130 Wn.2d at 438, but contains the words "right of way" in both the granting clause and the habendum clause, which we have stated presumptively evinces the parties' intent to convey only an easement. *Roeder*, 105 Wn.2d at 569, 571-72 (applying **[***20]** presumption in favor of easement in spite of statutory warranty nature of deed); *Swan*, 37

Wn.2d at 537. We thus consider whether additional analysis of the deed language using the *Brown* **[*267]** factors, set forth above, sheds any light on the parties' intent.

Application of *Brown/Swan* Factors

P21 *"Strip of Land" v. "Right of Way*": Examining the deed in light of the *Brown / Swan* factors 1 through 4 provides only slight insight. [7] The granting clause purports to convey "a *strip of land* seventy five feet wide, in, along, over and through" the Kershaw property. CP at 654 (emphasis added). It then establishes that the conveyance is "*to be used by* [the Railway] *as a right of way for a railway* forever, together with the perpetual right to construct, maintain and operate a railway or railways over and across the same." *Id.* (emphasis added). The conveyance most closely resembles the second *Brown* factor -- a deed "convey[ing] a strip of land and limit[ing] its use to a specific purpose." *Brown*, 130 Wn.2d at 438. The 1905 deed explicitly conveyed a certain "strip of land" but specifically set forth that it was **[***21]** "to be used . . . as a right of way." CP at 654. The use of the "right of way" language to describe the *purpose* of the conveyance evinces intent to convey an easement. *Cf. Roeder*, 105 Wn.2d at 571-72. [8] Therefore, consistent with the *Swan* presumption, consideration of these first four factors favors the creation of an easement interest. *Swan*, 37 Wn.2d at 537; *see also Brown*, 130 Wn.2d at 438-39 (affirming the "special significance to the words 'right of way' in railroad deeds").

7 *See supra* p. 265.

8 Considering the fourth *Brown* factor -- "whether the deed granted only the privilege of constructing, operating, or maintaining a railroad over the land," *Brown* 130 Wn.2d at 438-- while the deed did grant the railroad the "right to construct, maintain and operate a railway," it also granted a certain "strip of land." CP at 654. As such, we do not find that "*only*" such a privilege was granted. *Brown*, 130 Wn.2d at 438 (emphasis added).

[*22]** P22 *Reverter Clause:* The fifth factor instructs that the presence of a reverter clause is strong evidence an easement was intended. The Court of Appeals deemed the deed's final paragraph to be "a reverter clause that expressly **[*268]** states the grant would remain in effect only 'so long as a railway may be maintained' by the railroad." *Kershaw Sunnyside Ranches*, 121 Wn. App. at 728 (quoting CP at 587). In reaching this conclusion, the Court of Appeals ignored the context of this phrase and the other relevant language in the deed. In fact, the phrase relied on by the Court of Appeals is immediately preceded by a detailed listing of covenants agreed to by the North Yakima & Valley Railway Company. These include covenants that the railway or its successors, at their own expense, will construct and maintain specific crossings, erect and maintain a fence, provide means **[**24]** for transferring water over the right of way sufficient for all irrigation, and construct and maintain a spur. CP at 655. The deed then concludes that "the aforesaid covenants and agreements on the part of [the North Yakima & Valley Railway Company] shall run with said granted right of way and be binding upon **[***23]** said company, and its successors and assigns, so long as a railway may be maintained by it or them, over and across said premises." *Id.* By its plain language the phrase relied on by the Court of Appeals relates *only* to the North Yakima & Valley Railway Company's covenants, not the railway's use of the right of way. The 1905 deed does not contain a reverter clause. Thus, this factor is inapplicable in this instance and does not favor one interpretation over the other.

P23 *Consideration:* Next we examine whether the consideration was substantial. Here, the North Yakima & Valley Railway Company paid the Kershaws $ 1,000 for the right of way. CP at 654. In 1905, this was likely a substantial sum. *Cf. Brown*, 130 Wn.2d at 444 (finding $ 1,310 to be substantial). [9] While the record lacks detail regarding the actual value of the easement versus fee, the amount of monetary consideration here favors a fee, although not conclusively so. *See Brown*, 130 Wn.2d at 442 (giving little **[*269]** weight to this factor when value of easement or fee simple cannot be ascertained from the record).

9 *But see Roeder Co. v. K&E Moving & Storage Co.*, 102 Wn. App. 49, 56, 4 P.3d 839 (2000) (noting the "nominal consideration" of $ 1 "does not reveal much"), *review denied*, 142 Wn.2d 1017, 16 P.3d 1264 (2001).

[*24]** P24 *Habendum Clause:* The seventh factor requires us to examine the language used in the habendum clause. Here, the habendum clause recites that E.A. and Ora Kershaw conveyed "TO HAVE AND TO HOLD the said right of way, strip of land, easements, privileges and appurtenances to it, the said North Yakima & Valley Railway Company, its successors or assigns, forever." CP at 654-55. The use of both "right of way" and "strip of land" in this clause could be construed as presenting an ambiguity. *Id.* However, by reciting "right of way, strip of land, easements, privileges and appurtenances to it," *id.*, it more reasonably attempts to convey a fee by encompassing all the potential sticks in the bundle. Thus, we conclude the habendum clause favors finding a conveyance of fee title.

P25 *Other Language:* Finally, we look to any other language in the deed which is indicative of the parties' intent. The deed contains language in both the granting and habendum clause which implies the North Yakima & Valley Railway Company, and its successors in interest, acquired the strip of land in perpetuity. [10] It is impossible to tell from the deed itself whether this language is indicative: of a fee **[***25]** or simply intends to create a perpetual easement. *See Swan*, 37 Wn.2d at 534 (court finds easement even though deed also conveyed "strip of land" "forever" -- although conveyance was by quitclaim deed rather than warranty deed). Thus, it is inconclusive.

10 *See* CP 654-55 (habendum clause recites that the conveyance is "forever" and the granting clause purports to convey a "right of way for a railway *forever*, together with the *perpetual right* to . . . operate a railway" (emphasis added)).

P26 The language most indicative of an easement is the phrase, in the granting clause, which recites that the Kershaws also granted the North Yakima & Valley Railway Company "the perpetual right to construct, maintain and operate a railway or railways over and across the same." CP at 654. If the Kershaws intended to grant fee title to the land, there would have been no need to also grant any **[*270]** rights associated with the land, as the North Yakima & Valley Railway Company would have owned those rights due solely **[***26]** to their status as fee holders. However, if only an easement was intended, it makes sense that that language was included to specify the rights which attached to the land and the agreed-to, permissible use of the same.

P27 In sum, *Brown* establishes that [HN11] use of a statutory warranty deed creates a presumption that fee simple title is conveyed. However, our previous cases, which *Brown* does not overrule, and in fact incorporates, establish that [HN12] whether by quitclaim or **[**25]** warranty deed, language establishing that a conveyance is for right of way or railroad purposes presumptively conveys an easement and thus provides the "additional language" which "expressly limits or qualifies the interest conveyed." *Brown*, 130 Wn.2d at 437. In examining the language of the deed, while there is some conflicting language, there is insufficient evidence to overcome the presumption that an easement was created. [11] In fact, the language, specifically granting the railroad the "right to construct, maintain and operate a railway or railways over and across the same" strongly supports the presumption in favor of an easement. CP at 654. This conclusion is consistent with *Morsbach*, *Swan* **[***27]** , *Veach* and *Roeder* and at the same time maintains *Brown's* instruction that reviewing courts perform a thorough examination of railroad deeds based on *Brown's* enumerated factors. [12] **[*271]** While the use of the term "right of way" in the granting clause is not *solely* determinative of the estate conveyed, it remains highly relevant, especially given the fact; that it is used to define the purpose of the grant. Weighing the other language in the deed, we find the language of the 1905 deed suggests the parties' intent to convey only an easement interest to the railroad. We thus affirm the Court of Appeals decision that Yakima Interurban possesses an easement interest in the right of way.

11 Level 3 asserts a recent Division One case, *Ray v. King County*, 120 Wn. App. 564, 86 P.3d 183, *review denied*, 152 Wn.2d 1027, 101

P.3d 421 (2004), which applied the *Brown* factors to a railroad deed and found a fee simple conveyance, is analogous here and we should apply the same analysis. However, while the *Ray* deed did include the phrase "right of way" it did so only to the extent that it stated it was conveying a "right of way strip." *Id.* at 572. The *Ray* court thus found no presumption in favor of an easement and applied the *Brown* factors to reach its conclusion that a fee interest was transferred. Here, the deed specifically established the *purpose* of the grant when it stated the land was "to be used by [the Railway] as a right of way for a railway." CP at 654. This creates a presumption in favor of an easement which was not present in *Ray*.

[*28]**

12 [HN13] In addition to the deed language, we may also look to the circumstance surrounding the deed's execution and the subsequent conduct of the parties. *See, e.g., Brown*, 130 Wn.2d at 438; *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 739, 844 P.2d 1006 (1993); *Roeder*, 105 Wn.2d at 572-73. The parties draw our attention to only one such circumstance, disputing the relevancy of the 1960 deed conveying the property from Ora to her son. *See* CP at 731-32. The quitclaim deed specifically excepted the "right-of-way of the Northern Pacific Railway." CP at 731-32. The Court of Appeals found that this exception provided little insight as it "logically could have been an expression of the parties' understanding that Ronald Kershaw's fee interest was subject to the railroad's easement." *Kershaw Sunnyside Ranches*, 121 Wn. App. at 728. It reasoned that Level 3's argument would be more persuasive had the exception excepted the right of way "'in terms of acres of land'" as opposed to simply the "right of way." *Id.* (quoting *King County v. Rasmussen*, 299 F.3d 1077, 1087 (9th Cir. 2002)).

The Court of Appeals correctly concluded that the exception, as drafted, is ambiguous and conveys no clear and express evidence of the parties' intent 55 years earlier. Because the subsequent conduct of the parties does not provide a clear contrary intent, the language of the deed as discerned above controls, *cf. Brown*, 130 Wn.2d at 438 (citing *Scott*, 49 Wn.2d at 162), and we find the 1905 deed created an easement interest.

[*29]** Effect of Exception in 1960 Deed

P28 A separate question regarding Kershaw Sunnyside Ranches' standing with respect to the right of way arises from the 1960 deed. Specifically, Level 3 asserts that Kershaw Sunnyside Ranches has no interest in the right of way, contending any potential interest was not conveyed in the 1960 deed passing title from Ora Kershaw to her son, Ronald Kershaw, because it excepted the "right-of-way of the Northern Pacific Railway." [13] CP at 731-32.

13 This question is separate and distinct from the issue discussed in note 11, *supra*, where the parties disputed whether the 1960 deed was instructive in discerning the parties' intent in 1905. Here, the parties dispute the effect of the 1960 deed itself on ownership of the right of way easement.

Additionally, Kershaw asserts that Level 3 is raising this issue for the first time on appeal. However, Level 3 made the same argument to the trial court in its motion for summary judgment. CP at 572-73.

[6] [7] P29 "[W]hen construing a deed, the intent **[***30]** of the parties is of paramount importance." *Brown*, 130 Wn.2d at **[*272]** 437. **[**26]** In addition, [HN14] ambiguity in a deed is resolved against the grantor. *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 745, 844 P.2d 1006 (1993). In holding that Kershaw Sunnyside Ranches was the servient property owner, the trial court implicitly found that Ora Kershaw did not intend to reserve her interest in the **railroad right of way** and all her interest transferred to her son. [14] Here, Level 3 relies on *Harris*, where we held that a similar exception in a deed did operate to reserve the grantor's interest in the right of way. 120 Wn.2d at 746. However, *Harris* contained evidence of the grantor's intent to except the right of way not present here, most specifically the grantor's subsequent conveyance of the right of way to a third party and the grantor's broker's declaration that the grantor intended to reserve its interest in the right of way. *Id.* at 735, 742, 744.

14 The Court of Appeals analysis of this dispute is unsatisfactory. It erroneously relies on the nature of the deed as a quitclaim deed for the proposition that it conveyed "'all the then existing legal and equitable rights of the grantor'" and thus included Ora Kershaw's rights in the right of way. *Kershaw Sunnyside Ranches*, 121 Wn. App. at 728-29 (quoting RCW 64.04.050) (ostensibly distinguishing *Harris* on the basis that it involved a statutory warranty deed). However, [HN15] a quitclaim deed differs from a warranty or bargain and sale deed only as to the extent, if any, of the warranties which accompany the transfer of property. An exception in a quitclaim deed has the same legal effect

as an exception in any other form of deed.

[*31]** P30 As the Court of Appeals points out, the 1960 deed's exception is ambiguous; in addition to operating to reserve an interest in the grantor, it "logically could have been an expression of the parties' understanding that Ronald Kershaw's fee interest was subject to the railroad's easement." *Kershaw Sunnyside Ranches*, 121 Wn. App. at 728. This later interpretation is supported by Ora Kershaw's further "except[ion]" of a road and state highway. CP at 731. While the deed purports to except these lands, it could just as reasonably be interpreted to reference them because of the significant nature of the easements present. [15] Here the circumstances of the transfer, one from mother to son, **[*273]** suggest a conveyance of the entire property was intended. Moreover, unlike in *Harris* there is no evidence in the record that Ora Kershaw intended to reserve any interest in the property nor that she later attempted to convey that interest. Recognizing that the trial court found an intent to transfer the underlying interest, resolving the apparent ambiguity against the grantor, and finding no intent akin to that present in *Harris* we hold Ora Kershaw intended to quitclaim all **[***32]** her interest in the Kershaw property and did not intend to reserve to herself any interest in the **railroad right of way**.

15 Even absent ambiguity, this court, unlike in statutory or contract construction cases, has consistently examined the circumstances surrounding the transfer and subsequent conduct of the parties, regardless of ambiguity, if helpful in ascertaining the parties' intent, which is "of paramount importance." *Brown*, 130 Wn.2d at 437-38.

P31 We thus hold that the 1905 deed conveyed an easement to the railroad and not fee simple. Additionally, we hold that Ora Kershaw, by the 1960 deed, did not reserve in herself any rights in the right of way and that all said rights transferred to her son and then to Kershaw Sunnyside Ranches.

III

Trespass Claim

P32 Finally, we determine whether the underground cable on the Kershaw Sunnyside Ranches property constitutes a trespass. The parties expend much energy disputing the application of the **incidental use** doctrine. [HN16] The **incidental use** doctrine **[***33]** "states that a railroad may use its easement to conduct not only railroad-related activities, but also any other incidental activities that are not inconsistent and do not interfere with the operation of the railroad." Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 ECOLOGY L.Q. 351, 421 (2000) (Wright & Hester). The doctrine's underpinning lies in the unique nature of **railroad right of way** easements, **[**27]** which often are deemed to include "'exclusive control of all the land within the lines.'" *Id.* (quoting *Grand Trunk R.R. v. Richardson*, 91 U.S. (1 Otto) 454, 468, 91 U.S. 454, 23 L. Ed. 356 (1875)).

[*274] P33 The trial court rejected Level 3's contention that the fiber optic lines were an **incidental use**. Centering its analysis on whether the "**incidental use**" is reasonably necessary to the operation of the railroad, and finding that "[i]ncidental rights should be limited to facilitating construction, maintenance and operation of the railroad," CP at 18, the trial court determined that the buried fiber optic line here **[***34]** is not an **incidental use**. *Id.* at 974. It thus concluded that Level 3's line constituted a trespass. *Id.* at 19, 974.

P34 The Court of Appeals found no trespass and rejected the trial court's strict reliance on the relationship between the alleged **incidental use** and railroad operations. Rather, it held that the **incidental use** doctrine applies so long as "the use is 'not . . . inconsistent with the public use to which the highways are dedicated,'" *Kershaw Sunnyside Ranches*, 121 Wn. App. at 733 (quoting *State ex rel. York v. Bd. of County Comm'rs*, 28 Wn.2d 891, 905, 184 P.2d 577 (1947)), and further that revenue from such placement "indirectly serves a railroad purpose." *Id.* The focus of the Court of Appeals

decision then was whether the **incidental use** created an additional burden on the servient estate; it concluded it did not. *Id.* at 733-37. In sum, the trial court and Court of Appeals conducted very different analyses in determining whether a trespass occurred; the trial court framed the issue as whether the cable was within the scope of the original easement as reasonably necessary to further a railroad purpose while the Court of Appeals **[***35]** framed the issue as whether the cable created an additional burden on the servient fee owner.

[8] P35 Before considering the conflicting views of the common law **incidental use** doctrine suggested by the parties and employed by the lower courts, we should first examine our relevant constitutional and statutory provisions. [HN17] The right of telecommunications companies to lay their lines in **railroad rights of way** is both constitutionally and statutorily based. [HN18] In an apparent effort "to ensure the **[*275]** development of communications systems in Washington," [16] the Washington Constitution makes two explicit allowances for telecommunication companies. First, it provides that "[r]ailroad corporations organized or doing business in this state shall allow telegraph and telephone corporations and companies to construct and maintain telegraph lines on and along the rights of way of such railroads and railroad companies." CONST. art XII, § 19. Second, it extended the right of eminent domain to all telegraph and telephone companies. *Id.* Finally, the constitution provides that "[t]he legislature shall, by general law of uniform operation, provide reasonable regulations to give effect to this section." **[***36]** *Id.*

16 ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION A REFERENCE GUIDE 195 (2002).

[9] P36 [HN19] P36 In exercise of this constitutional authority and mandate, our legislature has enacted legislation executing article XII, section 19 by designating railroads as "'post road[s]'" and requiring railroad corporations to permit telecommunication companies to maintain lines on the right of way. RCW 80.36.050. Additionally, our legislature established that,

> [HN20] [a]ny telecommunications company, or the lessees thereof, doing business in this state, shall have the right to construct and maintain all necessary telecommunications lines for public traffic along and upon any public road, street or highway, along or across the right-of-way of any railroad corporation, and may erect poles, posts, piers or abutments for supporting the insulators, wires and any other necessary fixture of their lines, in such manner and at such points as not to incommode; the public use of the railroad **[***37]** or highway, or interrupt the navigation of the waters: PROVIDED, That when the right-of-way of such corporation has not been acquired by or through any grant or donation from the United States, or this state, or any county, city or town therein, then the right to construct and maintain such lines shall be secured **[**28]** only by the exercise of right of eminent domain, as provided by law . . . .

RCW 80.36.040. The qualifying section of RCW 80.36.040, beginning with the words "PROVIDED, That" defines the **[*276]** scope of the telecommunication companies' rights. It establishes that when the railroad has acquired rights to a certain right of way through a government grant, a telecommunications company "shall have the right to construct and maintain all necessary telecommunications lines" along or across that **railroad right of way**. *Id.* However, if the railroad did not acquire the particular right of way via a government grant, i.e., a private party conveyed the right of way to the railroad by deed, then the "right to construct and maintain such lines *shall* be secured *only* by the exercise of right of eminent domain, as provided **[***38]** by law." [17] *Id.* (emphasis added).

17 This provision, distinguishing rights of way acquired by government grant from those acquired from private individuals and requiring that telecommunication companies exercise their eminent domain powers for the latter, has been the law of this state since 1890. *See* LAWS OF 1890, § 5, at 292-93, *codified at* REM. REV. STAT. § 11352, *recodified by* LAWS OF 1961, ch. 14 § 80.36.040 *at* RCW 80.36.040.

P37 Applying these constitutional and statutory principles to Level 3's fiber optic cable on the right of way transpiercing the Kershaw Sunnyside Ranches' property, it is evident that RCW 80.36.040 obligated Level 3 to exercise its eminent domain powers to secure the right to lay its line. [18] E.A. and Ora Kershaw privately deeded the right of way to the North

Yakima & Valley Railway Company and as such the proviso to RCW 80.36.040 controls. This explicit statutory framework, rather **[***39]** than the alternative common law "**incidental use** doctrine," governs our analysis. Absent the clarifying language in RCW 80.36.040, the Court of Appeals analysis may be sufficiently compelling to find the telecommunications cable an **incidental use** and conclude no compensation was due Kershaw Sunnyside Ranches; however its presence dictates the result here. Level 3 was required to exercise its eminent domain powers in securing the right to construct and maintain its lines on the **railroad right of way**. In so doing, the railroad's property rights and those of the fee owner would have been taken into account **[*277]** as [HN21] "each and every owner, encumbrancer or other person" are parties to an eminent domain proceeding, and all their interests and potential damages are discerned. RCW 8.20.010, .080.

18 Level 3's construction of this statutory provision in its briefing completely ignores the proviso requiring the eminent domain proceeding. *See, e.g.*, Br. of Appellant Level 3, at 26.

[*40]** P38 Based on statutes governing this exact circumstance, giving effect to article, XII, section 19 of the Washington Constitution, we reverse the Court of Appeals on this issue. [19] The unambiguous language of RCW 80.36.040 requires an eminent domain proceeding in this context. Therefore, we affirm the trial court's conclusion that, absent an eminent domain action, Level 3's placement of the fiber optic cable within the right of way constituted a trespass. [20], [21] It certainly is possible that no additional burden will be imposed on the servient estate and only nominal **[**29]** if any damages would be found, yet that is a factual determination to be made in such a proceeding and not here.

19 We decide today only that RCW 80.36.040 mandates an eminent domain proceeding in this context. We do not decide whether article I, section 16 of the Washington Constitution or the fifth amendment of the United States Constitution would similarly mandate such a proceeding or appropriate compensation. *See, e.g., Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000) ([HN22] "Where an issue may be resolved on statutory grounds, the court will avoid deciding the issue on constitutional grounds.").

[*41]**

20 *Cf.* RESTATEMENT (SECOND) OF TORTS § 161 (1965)([HN23] "A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it."); *see also* cf. *Keesling v. City of Seattle*, 52 Wn.2d 247, 253-54, 324 P.2d 806 (1958) (recognizing distinction between eminent domain failure and trespass but permitting imposition of liability under alternate theory).

21 *But see* Wright & Hester, *supra*, at 414 (pointing out that if a railroad has exclusive control of the surface of the right of way, the owner of the servient property presumably could neither authorize nor prohibit access to the physical domain necessary to lay the underground cable in the first place). While this observation may or may not be true, it does not address the current presence of the underground cable nor the relevancy of RCW 80.36.040.

P39 We thus reverse the Court of Appeals and hold that because BNSF's predecessor **[***42]** in interest did not receive the **railroad right of way** through a government grant, Level 3 was required to exercise its eminent domain powers before laying the fiber optic cable within the right of way. The current presence of the lines constitutes a trespass.

[*278] IV

Motion to Strike

[10] P40 In its supplemental brief, Level 3 cites to and discusses a recent decision of the federal Surface Transportation Board (STB) denying Kershaw Sunnyside Ranches' application for adverse abandonment. *Yakima Interurban Lines Ass'n -- Adverse Abandonment -- In Yakima County, WA*, 2004 STB LEXIS 741 (Nov. 19, 2004). Kershaw Sunnyside Ranches moves this court to strike this reference as facts not presented to the trial court, irrelevant,

and an inappropriate citation to an unpublished opinion. Level 3 defends its use of the STB decision by pointing out that the STB has exclusive jurisdiction over rail line abandonment and further asserts the citation reflects legal authority, not impermissible facts not in the record. We have recently stated that [HN24] "we cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties. **[***43]** " *In re Adoption of B.T.*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003) (in review of adoption proceeding court declined to take judicial notice of superior court order in dependency action of same child). We thus grant Kershaw Sunnyside Ranches' motion to strike.

V

Conclusion

P41 We affirm in part and reverse in part the Court of Appeals decision. First, we affirm the Court of Appeals conclusion that the 1905 deed conveyed an easement interest to North Yakima & Valley Railway Company and that the 1960 deed from Ora to Ronald Kershaw does not indicate otherwise nor reserve the interest in the right of way to Ora Kershaw. Next, as to the placement of the telecommunications line, we reverse the Court of Appeals and hold that RCW 80.36.040 legally obligated Level 3 to **[*279]** institute an eminent domain proceeding prior to burying its line, and the current placement of such line, absent such a proceeding, constitutes a trespass. We remand to the superior court for further proceedings.

Alexander, C.J., and Sanders, Chambers, Fairhurst, and J.M. Johnson, JJ., concur.

DISSENT BY: MADSEN

DISSENT

P42 MADSEN, J. (dissenting) -- Although the majority claims that it merely "builds" upon Justice Charles W. Johnson's comprehensive approach in *Brown v. State*, 130 Wn.2d 430, 924 P.2d 908 (1996), **[***44]** majority at 263 n.5, that is unfortunately not true. Instead it tears down the framework constructed there. *Brown's* analysis provides a framework for resolving the question whether a grant in a deed to a railway is of an easement or fee simple interest. The crucial starting point is the presumption that "where the original parties utilized the statutory warranty form deed and the granting clauses convey definite strips of land, [the court] *must find* that the grantors intended to convey *fee simple title* unless additional language in the deeds clearly and expressly limits or qualifies the interest conveyed." *Brown*, 130 Wn.2d at 437 (emphasis added). Whether a property owner has met the burden of showing intent that an easement, instead, has been conveyed, and thus has overcome the presumption, is determined according to a three-part analysis identified in *Brown.* This inquiry includes, among other things, examination of any language that relates to purpose or use or otherwise limits the conveyance, as well as language indicating conveyance of aright of way rather than a strip of land. *Id.* at 438. Thus, the parties' use of the words "right of way" **[***45]** in a deed is accounted for in *Brown's* analysis.

P43 The majority expressly recognizes that *Brown* "has largely reconciled the conflicting **[**30]** presumptions and case law" that had previously led to disarray and conflicting decisions in this area. Majority at 263 n.5. But the majority then proposes the existence of two opposing presumptions, **[*280]** i.e., the presumption in *Brown* that a fee simple has been conveyed arising from use of a statutory warranty deed form and language conveying a strip of land, and a second presumption not included in *Brown*, i.e., that an easement has been conveyed arising from use of the words "right of way" in the granting and habendum clauses. Both presumptions cannot be applied in the same case in any coherent way, because if there is no other evidence of intent contrary to the presumption, the presumption dictates the result. This must be so because, in a case like this one, the first presumption would lead to the conclusion that a fee simple interest was conveyed, while the second presumption would lead to the conclusion that an easement interest was conveyed.

P44 The majority thus embraces conflicting presumptions and so returns the law to the state of disarray **[***46]** that

preceded *Brown.* Given that the court in *Brown* exhaustively examined the case law in this area and carefully and thoughtfully set forth an analysis designed to provide for consistent, thorough, and careful decision making, it is unfortunate that the majority departs from *Brown* under the guise of "building" on that analysis.

P45 Not only is the majority's approach inconsistent with *Brown,* it is inconsistent with legislative intent. RCW 64.04.030, which provides the form for a statutory warranty deed, states, like its predecessor statutes did, that a warranty deed substantially in the form provided and "'duly executed, shall be deemed and held a conveyance in fee simple.'" *See also Darrin v. Humes,* 60 Wash. 537, 538, 111 P. 767 (1910) (citing and quoting REM. & BAL. CODE § 8747 (a predecessor to RCW 64.04.030) which stated that "a warranty deed, when 'duly executed, shall be deemed and held a conveyance in fee simple'"); LAWS OF 1886, § 3, at 177-78 (same language). Thus, when this court in *Brown* declared that the starting presumption for a deed in statutory warranty form is that a fee simple **[***47]** was conveyed, it carried **[*281]** out the intent manifest in the warranty deed statute. [22] But the majority, in concluding that use of the words "right of way" gives rise to a second presumption that trumps the presumption of a fee simple conveyance, ignores long standing express legislative intent.

22 The court in *Brown* observed that "[t]he statutory form alleviated drafting and interpretation problems manifest under the prior system." *Brown,* 130 Wn.2d at 437 n.5.

P46 Finally, the majority's approach is unnecessary. As mentioned, the analysis set out in *Brown* adequately addresses the effect of the parties' use of the words "right of way" in the deed and provides for consideration of whether use of these words shows intent to convey an easement. There is no need to resort to a second presumption arising from use of those words in the granting and habendum clauses.

P47 Correct application of the framework in *Brown,* beginning with the presumption that a fee simple interest was conveyed and then **[***48]** considering all the factors and circumstances that the court identified in *Brown* for deciding whether that presumption has been overcome, leads to the conclusion that the original parties to the 1905 deed intended that the deed convey a fee simple interest, not an easement. Accordingly, I dissent.

P48 Moreover, even if one assumes for the sake of argument that an easement rather than a fee was conveyed, the installation by Level 3 Communications, LLC (Level 3), of a fiber optic telecommunication cable on the railroad line was a permissible **incidental use** for which no additional compensation was due to Kershaw Sunnyside Ranches, Inc. (Kershaw). The majority's conclusion that the **incidental use** doctrine does not apply rests on its erroneous view that a proviso in RCW 80.36.040 applies and requires Level 3 to exercise the right of eminent domain before installing underground lines along the right of way. But the; proviso does not apply where it is the railroad's right to use its "easement" that is at issue, as here, rather than a telecommunications company's right to utilize the right of way.

[*282] **[**31]** ANALYSIS

P49 It is undisputed that the 1905 deed between the parties' **[***49]** predecessors in interest was in the form of a statutory warranty deed. The deed conveyed "a strip of land seventy five feet wide, in, along, over and through the hereinafter described land . . . [s]aid strip of land being a certain strip of land seventy five feet wide across" and describing the location of the land. Clerk's Papers (CP) at 654. Thus, the deed carries the presumption of a conveyance of a fee simple interest because it was in the form of a statutory warranty deed and conveyed a definite strip of land. *See Brown,* 130 Wn.2d at 437; RCW 64.04.030. Accordingly, the question is whether there is sufficient evidence to overcome this presumption and show that the conveyance of an easement, instead, was intended. This determination is to be made by applying the three-part analysis set out in *Brown.* First, the language of the deed is examined under factors set out in *Brown* and derived from *Swan v. O'Leary,* 37 Wn.2d 533, 535, 225 P.2d 199 (1950). Significantly, the court in *Brown* specifically and expressly said that these factors must be considered to determine "whether the property owners have met their **[***50]** burden of showing that the original parties intended to adapt the statutory form to grant"

an easement rather than a fee simple. *Brown,* 130 Wn.2d at 438 Thus, the court in *Brown* contemplated that these factors are not, contrary to the majority's characterization, majority at 265, mere guidelines for reading railroad deed language, but instead they are utilized to decide whether the presumption that a fee simple was conveyed has been overcome.

P50 The factors are:

> (1) whether the deed conveyed a strip of land, and did not contain additional language relating to the use or purpose to which the land was to be put, or in other ways limiting the estate conveyed; (2) whether the deed conveyed a strip of land and limited its use to a specific purpose; (3) whether the deed conveyed a right of way over a tract of land, rather than a strip **[*283]** thereof; (4) whether the deed granted only the privilege of constructing, operating, or maintaining a railroad over the land; (5) whether the deed contained a clause providing that if the railroad ceased to operate, the land conveyed would revert to the grantor; (6) whether the consideration expressed was substantial or nominal; and **[***51]** (7) whether the conveyance did or did not contain a habendum clause, and many other considerations suggested by the language of the particular deed.

Brown, 130 Wn.2d at 438 (citing *Swan*, 37 Wn.2d at 535-46). In addition to applying these factors and considering the language of the deed, a court must also consider the circumstances surrounding the execution of the deed and the subsequent conduct of the parties to decide whether the presumption of a fee simple conveyance has been overcome. *Id.*

P51 Turning first to the language of the deed and considering the first and second *Brown-Swan* factors, the deed conveys a definite strip of land, 75 feet wide. The granting clause also states that the land is "to be used . . . as a right of way for a railway forever, together with the perpetual right to construct, maintain and operate a railway or railways over and across the same." CP at 654. Use of the term "right of way," in and of itself, does not establish intent to grant an easement only because "a railroad can own rights of way in fee simple or as easements." *Brown*, 130 Wn.2d at 440. However, if the term is used to mean a limitation **[***52]** on the use of the property, then it may indicate intent to convey an easement. *Brown*, 130 Wn.2d at 440-41, 441-42. There is thus ambiguity in the granting clause because, while it describes conveyance of a strip of land, it also refers to use of a right of way for railroad purposes. With respect to the third factor, however, and conversely, the deed did not convey merely a right of way over a tract of land but instead conveyed a definite strip of land.

P52 Given such ambiguity, the use of the term "right of way," even as a limitation on use of the land, does not necessarily favor the conclusion that an easement was conveyed. Instead, *Brown* is clear that while such language **[*284]** may determine the outcome *in a particular case*, the outcome depends upon **[**32]** all of the language in the deed considered in light of the *Brown-Swan* factors, the circumstances surrounding the execution of the deed, and the subsequent conduct of the parties. It must be remembered that while the court in *Brown* recognized that language respecting a grant of a right of way for the purpose of a railway is significant, and may indicate intent that an easement has been conveyed, *Brown* does not **[***53]** state that any presumption of an easement thereby arises. *Brown* in fact contemplates that the court will no longer rely on conflicting presumptions as the majority unfortunately does. Instead, *Brown* emphasizes, as does the warranty deed statute, RCW 64.04.030 and its predecessors, that the starting point in this case is the presumption that a fee simple interest was conveyed.

P53 Turning to the fourth factor, while the granting clause states that the railroad is granted the "right to construct, maintain and operate a railway" over the land, the deed does not state that *only* this privilege is granted. As to the fifth factor, there is no language in the deed providing that if the railroad ceased to operate, the land would revert to the grantor. [23] The absence of a reverter clause does not render this *Brown-Swan* factor inapplicable, contrary to the majority's view, majority at 268, but instead favors the conclusion that a fee simple interest was conveyed. Indeed, the deed here not only does not contain a reverter clause, it affirmatively states that the land is to be held by the grantee, its successors or assigns "forever." CP at 654. The sixth **[***54]** factor concerns the consideration for the conveyance. Here, the consideration expressed, $ 1,000, was a substantial amount of money in 1905 when the deed was executed. *See Brown*, 130 Wn.2d at 444 (consideration of $ 1,310 expressed in a deed executed between 1906 and 1910 was substantial). The seventh factor relates to **[*285]** whether a habendum clause exists. The 1905 deed contains a habendum clause that favors conveyance of a fee simple because it recites that the grantors conveyed "TO HAVE AND

TO HOLD the said right of way, *strip of land*, easements, privileges and appurtenances to it . . . *forever*." CP at 654-55 (emphasis added). The majority agrees this factor favors the grant of a fee simple interest. In addition, the deed sets out obligations of the railroad to construct and maintain crossings over the strip of land. As the court in *Brown* observed, such securing of easements to the grantors is consistent with conveyance of a fee simple and would likely be unnecessary if the railroad only held a right of way as an easement. *Brown*, 130 Wn.2d at 442 n.9.

23 The Court of Appeals erroneously concluded that the 1905 deed contains a reverter clause. The language relied on by the Court of Appeals in the final paragraph of the deed instead contains the railroad's obligation to uphold certain covenants and agreements so long as a railroad is maintained.

[*55]** P54 Contrary to the majority's conclusion, application of the *Brown-Swan* factors to the language of the deed does not lead to the conclusion that the presumption that a fee simple interest was conveyed has been overcome. This is particularly so given the conveyance of a definite strip of land, the affirmation that the strip of land was to be held by the grantee, its successors and assigns "forever," and the substantial consideration expressed in the deed. The parties have not presented evidence of any circumstances surrounding the execution of the deed or subsequent conduct of the parties that overrides the presumption either. [24]

24 While Level 3 contends that there is evidence of subsequent conduct that favors the conclusion that a fee simple interest was conveyed, I disagree. In 1960 one of the original grantors quitclaimed her share in the Kershaw property to her son and specifically excepted the "right-of-way of the Northern Pacific Railway [the successor to the grantee's interest]." CP at 731-32. In 1986 the son and his wife transferred their interest to the family business, again excepting the right of way. CP at 726. The exceptions are equally consistent with that interest being an easement or a fee simple. The best that can be said of these exceptions is that whatever interest was held by Northern Pacific, it was not conveyed by the original grantor to her son or by her son to the family business.

[*56]** P55 I would hold that the 1905 deed conveyed a fee simple interest.

P56 Even if, however, one assumes that an easement was conveyed instead, Level 3's installation of underground fiber optics cables **[**33]** along the **railroad right of way** is a permitted use under the **incidental use** doctrine. The majority, **[*286]** however, misapplies RCW 80.36.040 to preclude the cable installation absent Level 3's exercise of the right of eminent domain. The problem with the majority's approach is that it mixes up the rights of telecommunications companies and the separate rights of railroad companies.

P57 Under article XII, section 19 of the Washington Constitution a telecommunications company has the right to construct and maintain telegraph and telephone lines within the state through the power of eminent domain. RCW 80.36.010 implements this constitutional grant of eminent domain power. RCW 80.36.030 provides that telecommunications companies may appropriate land necessary for its telecommunications lines, including portions of railroad companies' rights of way. RCW 80.36.040 provides that telecommunications **[***57]** companies have the right to construct and maintain telecommunications lines for public traffic on any public road, street, or highway and along any railroad corporations' rights of way. RCW 80.36.050 declares that every railroad operating in the state is a "post road," and the corporation or company owning the railroad must allow telephone and telegraph companies to construct and maintain lines along the right of way. The proviso in RCW 80.36.040 relied on by the majority provides, however, that if the grant of a right of way to the railroad was not a public grant, the right to construct and maintain lines along the **railroad right of way** can be obtained only through exercise of the power of eminent domain.

P58 In contrast, the **incidental use** doctrine concerns the right of a railroad company to use its easement to conduct not only railroad related activities but also any other incidental activities that are not inconsistent with and do not interfere with the operation of the railroad. Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails,*

Utility Licenses, and the Shifting Scope of Railroad Easements from **[***58]** *the Nineteenth to the Twenty-First Centuries,* 27 ECOLOGY L.Q. 351, 421 (2000). Thus, where a railroad company enters an agreement with a third party telecommunications company to install fiber optic cable **[*287]** along the **railroad's right of way**, the question is not whether the telecommunications company has lawfully exercised its right to install the cable, but rather whether the railroad company has lawfully exercised its right as holder of the easement to permit an **incidental use** of its right of way. A different question would be presented if the railroad company did not agree to installation of the cable -- in such a case the provisions of the constitution and the statutes regarding a telecommunications company's right to install the cable along a **railroad's right of way** would come into play, and whether the telecommunications company would need to exercise the right of eminent domain would depend upon whether the grant of the right of way to the railroad was a public grant.

P59 As a result of confusing the two distinct lights, the majority has applied a statutory proviso that does not apply in this case at all.

P60 Because the proviso in RCW 80.36.040 **[***59]** does not apply, the question remains whether installation of fiber optic cable is a use that is permitted under the **incidental use** doctrine. Underlying the **incidental use** doctrine as it applies to **railroad rights of way** is the principle that such rights of way are unique and often include "'exclusive control of all the land within the lines.'" Wright & Hester, 27 ECOLOGY L.Q. at 421 (quoting *Grand Trunk R.R. v. Richardson*, 91 U.S. (1 Otto) 454, 468, 23 L. Ed. 356 (1875)); *see Morsbach v. Thurston County*, 152 Wash. 562, 569, 278 P. 686 (1929) ("[a] **railroad right of way** is a very substantial thing . . . more than a mere right of passage . . . more than an easement"); *N. Pac. Ry. Co. v. Tacoma Junk Co.*, 138 Wash. 1, 6, 244 P. 117 (1926) (quoting *Roby v. N.Y. Cent. & Hudson River R.R.*, 142 N.Y. 176, 180, 36 N.E. 1053 (1894), with approval for the proposition that the owner of the railroad easement is "'entitled to the exclusive use, possession, and control of the land, and the owner of the fee has no right to use, occupy, or interfere with the same in any manner whatever'").

[*288] **[**34]** P61 In *State ex rel. York v. Board of County Commissioners*, 28 Wn.2d 891, 903, 184 P.2d 577 (1947), **[***60]** the **incidental use** doctrine was applied in this state to public highway rights of way. There, fee owners over whose property certain streets and roads ran as easements sought a writ of mandamus compelling a county board to rescind franchise agreements that allowed an electric company to install power lines on the public roads. The court held that highways are dedicated to the public use, and "[s]ubject to this primary use, highways may be put to any of the numerous **incidental uses** suitable to public thoroughfares, and with those uses the owner of the abutting land has no right to interfere." *Id.* at 903. The court explained that for the **incidental use** doctrine to apply, the use "must have some element of public benefit, and must not be inconsistent with the public use to which the highways are dedicated." *Id.* at 905. The landowners are entitled to compensation only if the **incidental use** creates an "unreasonable encroachment["] on their interests. *Id.* at 903.

P62 While the parties have not cited Washington cases where the **incidental use** doctrine has been applied to **railroad rights of way**, the doctrine should apply. RCW 80.36.050 **[***61]** designates **railroad rights of way** as "post roads," as noted. The legislature has thus equated them to public roads and highways. This court has also treated **railroad rights of way** as "public highway[s], created for public purposes." *Lawson v. State*, 107 Wn.2d 444, 449, 730 P.2d 1308 (1986) (citing *Puget Sound Elec. Ry. v. R.R. Comm'n*, 65 Wash. 75, 84, 117 P. 739 (1911)). By analogy to cases involving public highways, installation of fiber optic cable along a **railroad right of way** is an **incidental use** that imposes no additional burden on the servient estate. *See McCullough v. Interstate Power & Light Co.*, 163 Wash. 147, 148, 150-51, 300 P. 165 (1931) (installation along public highways of poles and wires for carrying electricity is an **incidental use** for public highways and poses no additional burden on servient estate). Fiber optic cable lines have an element of public benefit, and their installation is not **[*289]** inconsistent with the public use to which **railroad rights of way** are dedicated. Given the railroad's exclusive right to use its easement, no additional burden is imposed on the servient estate. Other courts have concluded that **[***62]** installation of fiber optic cable along a **railroad right of way** does not exceed the scope of the easement or constitute an additional burden on the servient estate. *See, e.g., Int'l Paper Co. v. MCI Worldcom Network Servs., Inc.* 202 F. Supp. 2d 895, 899-903 (W.D. Ark. 2002); *Hynek v. MCI World Commc'ns, Inc.*, 202 F. Supp. 2d 831, 834-39 (N.D. Ind. 2002); *Mellon v. S. Pac. Transp. Co.*, 750 F. Supp. 226,

229-31 (W.D. Tex. 1990).

P63 I would hold that the installation of fiber optic cable along the right of way is a permitted **incidental use** and that therefore the installation of the underground cable along the right of way did not constitute a trespass. Level 3 was not required to exercise its eminent domain power before laying the fiber optic cable within the right of way.

P64 For the reasons stated, I dissent from the majority opinion.

C. Johnson and Owens, JJ., concur with Madsen, J.

FOCUS - 3 of 11 DOCUMENTS

BIJOU IRRIGATION DISTRICT, Plaintiff-Appellant, v. THE EMPIRE CLUB, a general partnership; ERVIN L. MICHAELSON and JOHN ROTH (Lease purchase from Ervin L. Michaelson); ROSE IRENE CAMPBELL and STEPHEN CAMPBELL; B.J. PEGGRAM and FRANCIS E. PEGGRAM; TERRY CHAPMAN and CONNIE CHAPMAN; CHARLES B. RUMSEY; VIOLET L. PETERSON; LEE D. THOMPSON; HARRY KOHLER; ROBERT L. WALTNER; CAROL J. WALTNER; RAYMOND R. RICHARDSON; GORDON A. PRICE; BETTY B. PRICE; and ALL UNKNOWN PARTIES WHO CLAIM ANY INTEREST IN THE SUBJECT MATTER OF THIS ACTION, Defendants-Appellees. IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF BIJOU IRRIGATION DISTRICT, IN MORGAN AND WELD COUNTIES; BIJOU IRRIGATION DISTRICT, Applicant-Appellee/Cross-Appellant, v. THE EMPIRE CLUB, a general partnership; ERVIN L. MICHAELSON; JOHN ROTH; JOE RUMSEY; CHARLES B. RUMSEY; LEE D. THOMPSON; HARRY KOHLER; ROBERT L. WALTNER; CAROL J. WALTNER; RAYMOND R. RICHARDSON; BETTY PRICE; and GORDON PRICE, Opposers-Appellants/Cross-Appellees, and CITY AND COUNTY OF DENVER, acting by and through its Board of Water Commissioners; CITY OF THORNTON, COLORADO; and VIOLET L. PETERSON, Opposers-Appellees, and ALAN BERRYMAN, DIVISION ENGINEER, WATER DIVISION 1, Appellee

Nos. 89SA302, 89SA209

Supreme Court of Colorado

804 P.2d 175; 1991 Colo. LEXIS 4; 21 ELR 21461; 15 BTR 52

January 14, 1991

SUBSEQUENT HISTORY: [1]** Rehearing Denied February 4, 1991.

PRIOR HISTORY: Appeal from District Court, Morgan County; Honorable Joseph J. Weatherby, Judge.

Appeal from District Court, Water Division No. 1; Honorable Robert A. Behrman, Judge.

DISPOSITION: JUDGMENT AFFIRMED IN PART AND REVERSED IN PART; JUDGMENT REVERSED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant water district challenged the decision of the District Court, Morgan County (Colorado), which entered judgment in favor of appellee landowners in the district's suit for declaratory judgment. In a related action, appellant landowners challenged the decision of the District Court, Water Division No. 1 (Colorado), which entered judgment in favor of appellee district on its application for a decree changing its water storage use.

OVERVIEW: A water district (district) filed suit against landowners, seeking a declaratory judgment enjoining the landowners' use of a reservoir. The district court entered judgment in favor of landowners, holding that the district had an easement for the reservoir but did not have the right to exclusive use of the reservoir. The district appealed. The court held that the district had an easement but determined that landowners had the right to make private use of the stored water for recreational purposes. The district also filed an application to change its water storage use. The trial court granted the change of water rights. The landowners appealed. The court held that the district was precluded from obtaining a change of its water storage rights to recognize the additional use of the water for recreational purposes.

OUTCOME: The court affirmed in part and reversed in part the declaratory judgment. The court reversed the judgment granting the change of water rights.

CORE TERMS: reservoir, easement, landowner, irrigation, rights of way, stored, recreational, water rights, decree, piscatorial, storage, declaratory judgment, ditch, beneficial use, right to use, appropriation, diverted, servient, surface, right-of-way, ownership, estoppel, recreational purposes, appropriator, subsidiary, railroad, site, public lands, incidental uses, incidental

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Civil Procedure > Judicial Officers > Judges > General Overview
Governments > Courts > Judges
[HN1] Water judges in the district courts have exclusive jurisdiction of water matters within the division, and no judge other than the one designated as a water judge shall act with respect to water matters in that division. Colo. Rev. Stat. § 37-92-203(1). Water matters include only those matters which art. 92 and any other law shall specify to be heard by the water judge of the district courts. Thus, an action for determination of a water right or a change of water right, each of which concerns the right to use of water, is a water matter within the exclusive jurisdiction of the water judge. § 37-92-302(1). An action to determine ownership of a water right, however, is not committed to the exclusive jurisdiction of a water judge but is within the general jurisdiction of the district courts of this state.

Governments > State & Territorial Governments > Water Rights
Real Property Law > Zoning & Land Use > Judicial Review
[HN2] The construction of instruments of grant or conveyance and the identification of the legal rights transferred and retained pursuant to such instruments are matters traditionally within the jurisdiction of the district courts of Colorado even when construction of an instrument will have an incidental impact on the use of water on the land.

Governments > State & Territorial Governments > Water Rights
[HN3] See 43 U.S.C.S. § 946.

Real Property Law > Limited Use Rights > Easements > Interference
[HN4] The owner of the servient estate continues to enjoy all the rights and benefits of proprietorship consistent with the burden of the easement.

Governments > State & Territorial Governments > Water Rights
Real Property Law > Limited Use Rights > Easements > Interference
[HN5] Unless the grant conveying an easement specifically characterizes the easement as exclusive, the grantor of the easement retains the right to use the property in common with the grantee. This principle, however, is limited to circumstances in which use of the property by the owner of the servient estate is consistent with the rights of the easement holder. The holder of the servient estate may not unreasonably interfere with the superior right of the person owning the easement. Conversely, the owner of the easement, or dominant estate, may do whatever is reasonably necessary to permit full use and enjoyment of the easement.

Contracts Law > Consideration > Promissory Estoppel
Real Property Law > Common Interest Communities > Condominiums > Condominium Associations
[HN6] The doctrine of estoppel requires more than mere delay. Estoppel requires (1) full knowledge of the facts; (2) unreasonable delay in the assertion of available remedy; and (3) intervening reliance by and prejudice to another.

Governments > State & Territorial Governments > Water Rights
Real Property Law > Water Rights > Beneficial Use
Real Property Law > Water Rights > Nonconsumptive Uses > Fishing
[HN7] A change of water right includes a change in the type of use. Colo. Rev. Stat. § 37-92-103(5). Implicitly, any such use must be a beneficial use, for appropriation is based on application of waters of the state to beneficial use. § 37-92-103(3)(a). Impoundment of water for recreational purposes, including fishery or wildlife is a beneficial use. § 37-92-103(4).

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JUDGES: En Banc. Justice Lohr.

OPINION BY: LOHR

OPINION

[*178] These cases are consolidated for issuance of a single opinion to resolve a dispute over recreational use of Empire Reservoir between Bijou Irrigation District ("District"), the entity organized to administer water appropriated and stored in the reservoir, and private parties who own land underlying the reservoir ("Landowners").

In 1983 the District filed suit against the Landowners **[**3]** in Morgan County District Court for declaratory judgment, and to quiet title, enjoin the Landowners' use of the reservoir, and recover damages for trespass. We refer to this case, no. 89SA302, as the declaratory judgment action. The district court entered judgment in favor of the Landowners on April 23, 1987, holding that the District has an easement for the reservoir but does not have the right to exclusive use of the reservoir for recreational and piscatorial purposes. The district court further held that the Landowners have the right to use the surface of the reservoir in a reasonable manner in common with the District, thus ruling against the District on its injunction and trespass claims. The District appealed the judgment. [1] We affirm in part and reverse in part.

1 We accepted jurisdiction pursuant to § 13-4-109, 6A C.R.S. (1987), prior to final determination by the Colorado Court of Appeals, based on a certification by that court that the case raises issues of first impression that have significant public interest and involves legal principles of major significance.

[4]** On April 27, 1987, the District filed an application in the District Court for Water Division 1 for a decree changing its water storage originally obtained for the beneficial use of irrigation, to recognize as additional beneficial uses its historical use of water stored in the reservoir for recreational and piscatorial purposes. We refer to this case, no. 89SA209, as the water court action. The water court held that the District has the authority under the laws of this state to "operate, maintain and control the water diverted and stored in 'Empire Reservoir' [under its existing decrees] for recreational and piscatorial purposes." It found that the requested change described uses "necessary and incidental" to the diversion and storage of water for the purpose of irrigation, that the requested change would not result in any enlarged use of the decrees, and that the change would produce no material injury to other appropriators on the South Platte River. Accordingly, the water court entered judgment granting the change of water rights, [2] **[*179]** but expressly providing that the decree does not affect "any concurrent non-exclusive right which the underlying land owners may have to make use **[**5]** of the surface of the reservoir, or any part thereof, for recreational or piscatorial purposes." The Landowners appeal the judgment granting the change of water rights, and the District cross-appeals on the issue of concurrent use of the surface of the reservoir by the Landowners. We reverse the judgment granting the change of water rights. The cross-appeal is controlled by our decision in the declaratory judgment action.

2 The water court recognized the same appropriation dates as specified in the original decrees and described the newly decreed uses as follows:

Use of Water:

The use of the waters stored in Empire Reservoir under the hereinabove described decrees for the incidental purpose of recreational and piscatorial purposes. The use of said waters stored under the said described decrees shall be limited to the volume and amounts of those waters as historically stored in said reservoir under said decrees for irrigation purposes, and that this decree shall in no way enlarge the time, method and volumes of water stored under said decrees in accordance with the historical practices of said diversions and storage for irrigation purposes.

[6]** The rights and obligations at issue in these cases are those vested in the parties under the statutes and legal instruments governing their relationships. These cases do not present issues concerning any rights that may exist or be created in the public to make use of Empire Reservoir. *See* n.17, below.

I.

Empire Reservoir is located in the Colorado counties of Weld and Morgan. It covers almost 2,100 acres and is used as storage for irrigation water by Bijou Irrigation District, which supplies water to approximately 200 farmers in northeastern Colorado for irrigation of approximately 19,000 acres of land. The dams impounding the reservoir water are made of earth and are classified as high hazard dams by the office of the Colorado State Engineer. The District is a municipal corporation organized on April 12, 1905, pursuant to the Irrigation District Law of 1905, § 37-41-101 to -160, 15 C.R.S. (1990). The District acquired its interest in that portion of the reservoir site at issue here on May 9, 1907, from the United States of America pursuant to the Act of March 3, 1891, authorizing grants of rights of way for irrigation and now codified at 43 U.S.C. § 946 (1988). The District's **[**7]** right to divert water from the South Platte River and store it in the reservoir for the purpose of irrigation was recognized by judicial decrees setting forth the following amounts and priorities:

(1) Priority No. 24 -- 37,709 acre-feet -- appropriation date 5/10/05

(2) Priority No. 79-A -- 30 feet gauge height -- appropriation date 5/18/05

(3) Priority No. 34-R -- 37,709 acre-feet -- appropriation date 12/31/29.

The Landowners own property adjacent to and underlying portions of the reservoir. They derive their titles through patents from the federal government. The Landowners acquired their property with notice of the District's interest and took title subject to that interest. A small portion of the remaining land beneath the reservoir is owned by the District. The balance, making up the majority of the land underlying the reservoir, is owned by the Bureau of Land Management and by the State of Colorado. [3]

3 On March 7, 1944, the State of Colorado granted a right of way to the District for that part of the reservoir site on state lands in Section 36, Township 4 North, Range 61 West of the 6th Principal Meridian. The District stipulated with the State in the declaratory judgment action that the State owns fee title to all state lands underlying the reservoir and agreed that the relief sought in that action would not adversely affect Colorado's property rights.

[8]** Historically, both the District and the Landowners have used the reservoir for recreation. The general public has also used the reservoir to a limited extent for that purpose. Some of the Landowners have sold commercial memberships for recreational use of the reservoir, and the District also has leased rights to private clubs for these purposes. It is the expanding commercial use by the private Landowners that led the District to seek a declaratory judgment recognizing its right to prohibit or control all use of the reservoir by the Landowners. [4]

4 The District adduced testimony at the trial of the declaratory judgment action about problems concerning the impairment of the structural integrity of earth-fill dams that can result from motor vehicle travel on the dams and displacement of concrete, rocks and tires used for rip-rap on the embankments. The District's evidence suggested, however, that the principal precipitating cause of the litigation was the District's difficulty in obtaining liability insurance. The district court specifically held that the availability of liability insurance was not relevant to the issues presented for resolution.

[9]** **[*180]** We first consider the issues presented by the declaratory judgment action and then address those arising from the water court action.

II.

The Morgan County District Court held that the District's interest in the land underlying the reservoir is an easement. We agree. We do not agree, however, that a right to use the surface of the reservoir by the Landowners follows from that conclusion.

A.

As a preliminary matter we must address the District's assertion that the trial court in the declaratory judgment action lacked jurisdiction to rule on the right to use the surface of water stored in the reservoir because it involves a water matter. [HN1] Water judges in the district courts "have exclusive jurisdiction of water matters within the division, and no judge other than the one designated as a water judge shall act with respect to water matters in that division." § 37-92-203(1), 15 C.R.S. (1990). "Water matters" include "only those matters which [article 92] and any other law shall specify to be heard by the water judge of the district courts." *Id.* Thus, an action for determination of a water right or a change of water right, each of which concerns the right to use of water, is a water **[**10]** matter within the exclusive jurisdiction of the water judge. *See id.;* § 37-92-302(1), 15 C.R.S. (1990); *Humphrey v. Southwestern Development Co.,* 734 P.2d 637, 640-41 (Colo. 1987). An action to determine ownership of a water right, however, is not committed to the exclusive jurisdiction of a water judge but is within the general jurisdiction of the district courts of this state. *Humphrey,* 734 P.2d at 641.

The declaratory judgment action does not directly involve either the right to use of water or the ownership of a water right. Instead, it relates to the nature and scope of interests in the land upon which the Empire Reservoir is situated based on the construction of a grant by which the District acquired its right to build and maintain the reservoir. [HN2] The construction of instruments of grant or conveyance and the identification of the legal rights transferred and retained pursuant to such instruments are matters traditionally within the jurisdiction of the district courts of this state even when construction of an instrument will have an incidental impact on the use of water on the land. *See, e.g., Navajo Development Co., Inc. v. Sanderson,* 655 P.2d 1374, 1376 (Colo. 1982) **[**11]** (action for breach of warranties in a deed conveying water rights brought in district court); *Atchison v. Englewood,* 193 Colo. 367, 370, 568 P.2d 13, 15-16 (1977) (action for reformation of agreement concerning preemptive right to purchase land and water rights brought in district court); *Raber v. Lohr,* 163 Colo. 485, 486, 431 P.2d 770, 771 (1967) (action requiring construction of quit claim deed conveying water right brought in district court); *Gilpin Investment Co. v. Perigo Mines Co.,* 161 Colo. 252, 257, 421 P.2d 477, 478 (1966) (quiet title action over land, mineral rights and water rights brought in district court); *Thompson v. Blanchard,* 116 Colo. 27, 28, 178 P.2d 422, 423 (1947) (action involving title to land, water rights and easement for an irrigation lateral brought in district court). The fact that the legal rights and burdens incident to the various interests in a reservoir site may preclude a particular beneficial use of water at that location does not convert the determination of such rights and burdens into a "water matter." We hold that the **[**12]** Morgan County District Court had jurisdiction to determine the ownership interests in the site for the Empire Reservoir.

B.

The District obtained the right to use the portion of the reservoir site at issue here by a federal grant pursuant to the Act of March 3, 1891, authorizing grants of rights of way for irrigation. The nature and extent of the District's rights to the reservoir site, therefore, must be determined by construction of the grant. The 1891 Act, as amended prior to the grant to **[*181]** the District in 1907, provided in pertinent part:

[HN3] That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company [5] formed for the purpose of irrigation . . . to the extent of the ground occupied by the water of any reservoir . . . and fifty feet on each side of the marginal limits thereof. [6]

Ch. 561, § 18, 26 Stat. 1101 (1891). [7]

5 The provision was amended in 1917 to add "or drainage district" after "canal or ditch company," ch. 184, § 1, 39 Stat. 1197, and in 1926 to substitute "canal ditch company, irrigation or drainage district" for "canal or ditch company or drainage district," ch. 409, 44 Stat. 668.
[13]**

6 The statute provided for filing of the articles of incorporation of the company and a map of the reservoir with the Secretary of the Interior.

Ch. 561, § 18, 26 Stat. 1101 (codified as amended at 43 U.S.C. § 946 (1988)) and § 19, 26 Stat. 1102 (codified as amended at 43 U.S.C. § 947 (1988)). After approval of the map by the Secretary, and notation of such approval on plats in the Secretary's office, "all such lands over which such rights of way shall pass shall be disposed of subject to such right of way." Ch. 561, § 19, 26 Stat. 1102 (codified as amended at 43 U.S.C. § 947 (1988)).

7 Now codified, with amendments, as 43 U.S.C. § 946 (1988). 43 U.S.C. § 946 was repealed in 1976 with respect to public land administered by the Bureau of Land Management and land in the National Forest system. Federal Land Policy and Management Act of 1976, Pub. L. 94-579, § 706(a), 90 Stat. 2793 (codified as 43 U.S.C. §§ 1701-1784 (1988)). The 1976 Act established new guidelines for grants of rights of way and gave the Secretary of the Interior authority to issue grants on BLM land and the Secretary of Agriculture similar authority over National Forest land. Pub. L. 94-579, § 501(a), 90 Stat. 2776 (codified as 43 U.S.C. § 1761 (1988)). The 1976 Act specified, however, that "nothing in this title shall have the effect of terminating any right-of-way . . . heretofore issued." Pub. L. 94-579, § 509(a), 90 Stat. 2781 (codified as 43 U.S.C. § 1769 (1988)).

[14]** In 1921 the United States Supreme Court, interpreting the 1891 Act, stated in dictum [8] that "the right of way intended by the act was neither a mere easement nor a fee simple absolute, but a limited fee on an implied condition of reverter in the event the grantee ceased to use or retain the land for the purpose indicated in the act." *Kern River Co. v. United States*, 257 U.S. 147, 152, 42 S. Ct. 60, 66 L. Ed. 175 (1921). In support of this conclusion, the Court cited *Rio Grande Western R. Co. v. Stringham*, 239 U.S. 44, 36 S. Ct. 5, 60 L. Ed. 136 (1915), in which essentially identical language in the 1875 Act granting rights of way to railroads [9] was construed as conveying a limited fee. [10] *Kern River*, 257 U.S. at 152.

8 The irrigation company in *Kern River* had used the land obtained pursuant to the 1891 Act for the sole purpose of electric power generation. *Kern River*, 257 U.S. at 150. The Court held that the grant was conditioned on use for the main purpose of irrigation with all other uses subsidiary. *Kern River*, 257 U.S. at 153. Construction of the condition, *not* the distinction between an easement and a fee, was necessary for that holding.

[15]**

9 The 1875 Act provides in pertinent part:

That the right of way through the public lands of the United States is hereby granted to any railroad company . . . to the extent of one hundred feet on each side of the central line of said road.

Ch. 152, § 1, 18 Stat. 482.

10 In *Stringham*, the Court stated that a legal interest granted by the 1875 Act "and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee." *Stringham*, 239 U.S. at 47.

In 1942 the United States Supreme Court reconsidered the nature of a railroad grant under the 1875 Act construed in *Stringham* and held that Congress intended to grant only an easement. *Great Northern Railway Co. v. United States*, 315 U.S. 262, 271, 62 S. Ct. 529, 86 L. Ed. 836 (1942). The court noted that in 1871, in response to public disfavor, Congress discontinued its policy of granting land subsidies **[**16]** to railroads in favor of a grant of a mere "right of passage." 315 U.S. at 275. The Court declined to follow *Stringham*, which had not considered the legislative history. 315 U.S. at 279. The Court also found persuasive the fact that subsequent to administrative interpretation of the 1875 Act as providing for grants of easements, Congress **[*182]** indicated approval by "repeating the language of the Act in granting canal and reservoir companies rights of way by the Act of March 3, 1891," the statute at issue here. 315 U.S. at 275. Moreover, the Court noted that the 1875 Act provided that upon notation of the location of a right of way on the plats in the local land office, "all such lands *over* which such right of way shall pass shall be disposed of *subject to* such right of way," a reserved right of disposition "wholly inconsistent with the grant of a fee." *Great Northern*, 315 U.S. at 271 (emphasis added in *Great Northern).* The 1891 Act contains language identical to the quoted provision of the 1875 Act. Act of March 3, 1891, ch. 561, § 19, 26 Stat. 1102 (codified as amended at 43 U.S.C. § 947 (1988)). The Court **[**17]** also observed that the 1875 Act is "subject to the general rule of construction that any ambiguity in a grant is to

be resolved favorably to a sovereign grantor." *Great Northern,* 315 U.S. at 272 (citing *Caldwell v. United States,* 250 U.S. 14, 20-21, 39 S. Ct. 397, 63 L. Ed. 816 (1919)).

We hold that *Great Northern* provides compelling authority for construction of the 1891 Act as authorizing grants of easements, not limited fees. *Great Northern* effectively overruled *Stringham,* [11] the basis for the statement in *Kern* that a limited fee was intended by the 1891 Act. In doing so, it reviewed legislative history not considered by the Court in *Kern.* Importantly, *Great Northern* made specific reference to the 1891 Act as reflecting approval of the administrative interpretation of the 1875 Act as providing for grants of easements. 315 U.S. at 275; *see, e.g.,* House Report No. 2790, 54th Cong. 2d Sess. (1897) (including letter from the Assistant Commissioner of the General Land Office of the Department of the Interior reflecting this administrative interpretation). Additionally, the language of the 1875 Act providing that disposition of lands **[**18]** over which a right of way shall pass shall be subject to the right of way is identical to a provision in the 1891 Act under which the District acquired its rights. [12] Although not controlling, we also find it persuasive that Department of the Interior regulations approved in 1900 (30 L.D. 325) concerning grants pursuant to the Act of 1891 state that "the act is not in the nature of a grant of lands; it does not convey an estate in fee in the right of way." Quoted in *Homer E. Brayton,* 31 L.D. 364, 365 (July 2, 1902); *see also Grindstone Butte Project,* 18 IBLA 16, 19 (Nov. 7, 1974) ("the right-of-way under the Act was in the nature of an easement" (citing *Great Northern)); Fred Markle,* 6 IBLA 52, 54 (May 18, 1972) ("Since the decision of the Supreme Court in *Great Northern Railway Co. v. United States, . . .* rights-of-way granted under the March 3, 1891, Act have been considered by this Department to be easements rather than limited fees in the land."). [13] Thus, we conclude that the District holds an easement to land underlying the reservoir. [14]

11 In declining to follow *Stringham* the Court stated that the "conclusion [in *Stringham]* is inconsistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation. We therefore do not regard it as controlling." *Great Northern,* 315 U.S. at 279.

[19]**

12 We acknowledge that the 1875 Act construed in *Great Northern* contained a provision not present in the 1891 Act, described as follows in *Great Northern:*

Section 2 adds to the conclusion that the right granted is one of use and occupancy only, rather than the land itself, for it declares that any **railroad whose right of way** passes through a canyon, pass or defile "shall not prevent any other railroad company from the *use and occupancy* of the said canyon, pass, or defile, for the purposes of its road, *in common* with the road first located."

315 U.S. at 271 (emphasis appearing in *Great Northern).* As we understand *Great Northern,* this provision was supportive of, but not essential to, the Court's decision.

13 The Federal Land Policy and Management Act of 1976, which provides authority for new grants of rights of way over public land, expressly defines "right-of-way" to include "easement, lease, permit or license to occupy, use, or traverse [certain] public lands." Pub. L. 94-579, § 103(f), 90 Stat. 2746 (codified as 43 U.S.C. § 1702 (1988)).

14 The conclusion that the 1891 Act should be construed to authorize grants of easements rather than limited fees is consistent as well with Colorado cases holding that the term "right of way" is generally construed to describe an easement. *See Hutson v. Agricultural Ditch & Reservoir Co.,* 723 P.2d 736, 739 (Colo. 1986) ("In the absence of additional descriptive language, 'right-of-way,' when used to describe an ownership interest in real property, is traditionally construed to be an easement."); *Lincoln Savings and Loan Association v. State,* 768 P.2d 733, 735 (Colo. App. 1988) ("deeds which in the granting clause convey a right-of-way over, across, or upon certain lands devolve a right only, and are generally construed as creating an easement.").

[20] [*183] C.**

The conclusion that the District holds an easement rather than a limited fee does not end our inquiry. The question remains whether the Landowners' interests in the land include the right to use of the overlying appropriated water for recreational purposes. We hold that they do not.

The extent of the Landowners' interests as owners of the servient estate is limited by the scope of the District's rights under its easement. " [HN4] The owner of the servient estate continues to enjoy all the rights and benefits of proprietorship *consistent with the burden of the easement." Barnard v. Gaumer,* 146 Colo. 409, 412, 361 P.2d 778, 780 (1961) (emphasis added). *See also Osborn & Caywood Ditch Co. v. Green,* 673 P.2d 380, 383 (Colo. App. 1983) ("the owner of the land burdened by an easement . . . must not unreasonably interfere with the superior right-of-way of the person possessing the easement"); Restatement of Property § 486 (1944) ("The possessor of land subject to an easement created by conveyance is privileged to make such uses of the servient tenement as are **[**21]** not inconsistent with the provisions of the creating conveyance."). The rights of an easement holder are defined by the nature and purpose of the easement. *Barnard v. Gaumer,* 146 Colo. at 412, 361 P.2d at 780. In determining the nature and purpose of the District's easement, we look first to the language of the statute by which it was created.

The 1891 Act provided for grants of rights of way "to any canal or ditch company formed for the purpose of irrigation." Ch. 561, § 18, 26 Stat. 1101. Such rights of way were "for the purpose of irrigation, but not for any other purpose." *Kern River,* 257 U.S. at 151. In 1898 additional legislation was adopted to provide that such rights of way "may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation." Act of May 11, 1898, ch. 292, § 2, 30 Stat. 404. The "main and controlling purpose" is irrigation, and all other uses are subsidiary. *Kern River,* 257 U.S. at 154-55.

The scope of the District's rights as defined **[**22]** by the easement's nature and purpose necessarily includes construction and maintenance of the reservoir and storage of water appropriated for irrigation. The critical question is whether the District's right to store water in the reservoir is exclusive of any right by the Landowners to use the reservoir for recreational purposes. We conclude that it is. We acknowledge the familiar principle that [HN5] "unless the grant conveying an easement specifically characterizes the easement as 'exclusive,' the grantor of the easement retains the right to use the property in common with the grantee." *Bergen Ditch & Reservoir Co. v. Barnes,* 683 P.2d 365, 367 (Colo. App. 1984); *accord Barnard v. Gaumer,* 146 Colo. at 412, 361 P.2d at 780. This principle, however, is limited to circumstances in which use of the property by the owner of the servient estate is consistent with the rights of the easement holder. *See Barnard,* 146 Colo. at 412-13, 361 P.2d at 780; *Skidmore v. First Bank of Minneapolis,* 773 P.2d 587, 589 (Colo. App. 1988). The holder of the servient estate may not unreasonably interfere with **[**23]** the superior right of the person owning the easement. *Osborn & Caywood Ditch Co.,* 673 P.2d at 383. "Conversely, the owner of the easement, or dominant estate, may do whatever is reasonably necessary to permit full use and enjoyment of the easement." *Id.*

The federal grant of the reservoir easement to the District is not characterized as **[*184]** exclusive under the 1891 Act or its pertinent amendments. Therefore, we must determine whether the use of the reservoir by the Landowners for recreational purposes is consistent with the nature and purpose of the grant. The purpose in question is the storage of water for irrigation.

The District uses the reservoir to store water diverted from the South Platte River by exercise of its three storage decrees. Although we have stated that water once diverted becomes the personal property of the appropriator, *Brighton Ditch Co. v. Englewood,* 124 Colo. 366, 373, 237 P.2d 116, 120 (1951), this somewhat overstates the scope of the right. [15] The principle, when applied to appropriation for storage and later application to beneficial use, was more accurately characterized in *Fort Morgan,* where we stated **[**24]** that "the justice of allowing reservoir companies *to control the water which they have diverted* is not to be questioned; but it should be borne in mind that they do not own the water, but have only a right to its use." 71 Colo. at 262, 206 P. at 395 (emphasis added). Thus, in *Fort Morgan* we held that a reservoir company retains no ownership right over in-basin water that seeps from its reservoir. *Id.* The company, however, does have a right to control the water that remains stored in the reservoir.

15 *E.g.,* water diverted by exercise of a storage right must ultimately be applied to the beneficial use for which the water was appropriated.

See Handy Ditch Co. v. Greeley & Loveland Irrigation Co., 86 Colo. 197, 199, 280 P. 481, 481 (1929). Also, to the extent stored water from in-basin sources escapes through seepage, the appropriator has no right to recapture it. *Fort Morgan Co. Reservoir & Irrigation Co. v. McCune*, 71 Colo. 256, 262, 206 P. 393, 395 (1922).

[25]** The practical considerations incident to administration of a reservoir and application of these waters to irrigation use support recognition of the right of the appropriator to control the stored water. In administering water stored in a reservoir to maximize beneficial use, it is sometimes necessary to lower or raise the water level significantly in a short period of time. [16] These rapid fluctuations in water level can create hazards for users of the reservoir. This makes it essential that the reservoir owner have control of use of the reservoir in order to protect the reservoir users. A reservoir owner also is liable for damage caused by waters escaping from a reservoir as the result of negligence. § 37-87-104(1), 15 C.R.S. (1990). It is essential for purposes of public protection and liability control, therefore, that the reservoir owner carefully monitor the condition of the dams, maintain only that amount of water in storage consistent with safety, and assure that the processes of filling and discharging from the reservoir do not create hazards for reservoir users. These considerations undoubtedly provide the rationale for our long established acceptance of the principle set **[**26]** forth in *Fort Morgan*, 71 Colo. at 262, 206 P. at 395, that reservoir companies have the right to control the water that they have diverted. We conclude as a matter of law that use of Empire Reservoir for recreational purposes by owners of the servient estate is inconsistent with the right of the District under its easement to store water over which it has the right of control and would unreasonably interfere with the exercise of that right.[17]

16 In argument to this court, counsel for the District remarked that the water level in Empire Reservoir "goes up and down like mad." The evidence at the trial in the declaratory judgment action was that the reservoir water level varied widely during the cycle of filling the reservoir and discharge to meet irrigation needs.

17 In reaching this result, we have relied to a great extent on Colorado cases setting forth general principles of the law of easements. The Landowners have argued that federal law, not state law, should be applied. We have discovered nothing to suggest that any federal law applicable to construing the scope of easements granted under the 1891 Act is at variance with the general principals set forth in our own cases.

[27]** We believe that a reservoir company's long-recognized right to control stored water, based as it is on the practical considerations in administration and safe storage of this water, militates against recognition of a right in the Landowners to make private **[*185]** recreational use of water stored in Empire Reservoir. [18]

18 The Landowners are asserting private rights, not public rights, and we have no occasion to determine the nature and extent of any public rights that may exist or be created for use of Empire Reservoir. Moreover, neither the State of Colorado nor the Bureau of Land Management is a party to the declaratory judgment action, and any rights to use of the reservoir that might be asserted by these landowners are not at issue in this case.

D.

The Landowners also rely on *People v. Emmert*, 198 Colo. 137, 597 P.2d 1025 (1979), and *Bergen Ditch & Reservoir Co. v. Barnes*, 683 P.2d 365 (Colo. App. 1984), in support of a conclusion that the District's right of way does **[**28]** not exclude their use of the reservoir for recreational purposes. The Landowners' reliance on these cases is misplaced. *Emmert* recognized that land underlying non-navigable streams is subject to private ownership and that persons floating on a raft across that land without permission of the landowner are guilty of criminal trespass. This result followed from the proposition that "the ownership of the bed of a non-navigable stream vests in the owner the exclusive right of control of everything above the stream bed, subject only to constitutional and statutory limitations, restrictions and regulations." 198 Colo. at 141, 597 P.2d at 1027. In the present case, however, the District has the right to control of

water that it has diverted from its natural course incident to exercise of its storage rights. *See* Part IIC of this opinion. The rights of the Landowners, holders of the servient estate, are limited to conduct consistent with and not unreasonably interfering with the rights of the District as owner of the dominant estate. The facts of appropriation, diversion from the natural stream and right of control of the stored water distinguish this case **[**29]** from *Emmert.*

In *Bergen Ditch* a landowner had granted a reservoir company an easement over private land to overflow and use that land as part of the reservoir. 683 P.2d at 366. The Colorado Court of Appeals concluded that the landowner's successor held a right in common with the reservoir company to make reasonable use of that part of the surface of the reservoir overlying the land burdened by the easement. 683 P.2d at 366-67. That holding followed from the conclusion that the private easement granted to the reservoir company to flood a portion of the landowner's land was nonexclusive. Furthermore, *Bergen Ditch* limited use by the landowner to reasonable use of only that portion of the reservoir overlying his land. In contrast, we have concluded that the private use of Empire Reservoir is inconsistent with the federal grant of a right of way for irrigation to the District. An evaluation of whether *Bergen Ditch* correctly construed the private easement would require review of the evidentiary record, particularly the instrument by which the easement was granted. That record is not before this court. However, *Bergen Ditch*, based as it **[**30]** is on construction of an instrument granting a private easement, is not necessarily contrary to our holding that the Landowners have no right to recreational use of the water stored in Empire Reservoir pursuant to a federal grant.

The considerations leading to recognition of the right of the District to control stored waters are directly related to assuring that the waters can be safely, effectively and efficiently administered to maximize beneficial use for irrigation purposes, the primary purpose of the federal grant. Accordingly, we hold that the Morgan County District Court erred when it held that the Landowners "have the right to use the surface, in common and in a reasonable manner, with the District."

E.

The Landowners, however, assert that by acquiescence in their historical use of the reservoir the District is now estopped from seeking relief. The brief answer to this contention is that it was not ruled on by the district court. However, the facts found by the district court do not establish the elements of a claim of estoppel.

[*186] We have held that [HN6] the doctrine of estoppel requires more than mere delay. *Manor Vail Condominium Association v. Vail*, 199 Colo. 62, 64, 604 P.2d 1168, 1170 (1980). **[**31]** Estoppel requires "'(1) full knowledge of the facts; (2) unreasonable delay in the assertion of available remedy; and (3) intervening reliance by and prejudice to another.'" *Id.* (quoting *Herald Company v. Seawell*, 472 F.2d 1081 (10th Cir. 1972)). The district court found that the District had knowledge of historical use of the reservoir by the Landowners. The court, however, did not make findings concerning unreasonable delay or prejudice. The findings do indicate increased use and, in particular, increased private commercialization over time -- factors important in determining the reasonableness of delay. On this record we can only conclude that the Landowners failed to make the necessary showing to support a claim for estoppel.

III.

A.

We next consider the challenges to the decree of the water court granting the District's application for a change of water rights to recognize recreational and piscatorial uses of the stored water by the District. The water court held that the District has sufficient power and authority under Colorado law "to operate, maintain and control" the water diverted and stored in Empire Reservoir under its storage decrees for recreational **[**32]** and piscatorial purposes. The court also found that these uses were necessary and incidental to the primary use of irrigation and that the District has devoted and applied the water stored in Empire Reservoir to such **incidental uses** from the "date of inception" of the storage decrees. The court found that recreational and piscatorial use would result in no enlarged use and that such **incidental uses** would not cause material injury to other appropriators on the South Platte River. The decree specifies that it does not

enlarge the time, method or volume of storage.

The Landowners and others objected to the District's application for recognition of recreational and piscatorial purposes under its storage decrees. On appeal, they assert that the District, under the doctrine of collateral estoppel, was bound by the Morgan County District Court's conclusions in the declaratory judgment action that (1) the District's authority under Colorado law is limited to administration of stored water for irrigation; and (2) recreational and piscatorial use of the stored water by the District is not within the scope of the subsidiary uses recognized in the 1891 Act. Furthermore, if the District is not **[**33]** precluded by collateral estoppel from obtaining its desired change of water rights, the Landowners challenge the authority of a district organized under the Irrigation Law of 1905 to appropriate and store water for recreational and piscatorial purposes, and assert that the evidence does not support the water court's conclusion that recreational and piscatorial purposes are necessary and **incidental uses** of the waters stored for irrigation purposes.

[HN7] A change of water right includes a change in the type of use. § 37-92-103(5), 15 C.R.S. (1990). Implicitly, any such use must be a beneficial use, for appropriation is based on application of waters of the state to beneficial use. § 37-92-103(3)(a), 15 C.R.S. (1990). Impoundment of water "for recreational purposes, including fishery or wildlife" is a beneficial use. § 37-92-103(4), 15 C.R.S. (1990). We believe, however, that unless the owner of a water right can legally put water to a particular new use, the use cannot be recognized as beneficial. *Cf. Colorado River Water Conservation District v. Vidler Tunnel Water Company*, 197 Colo. 413, 594 P.2d 566 (1979) (intent to appropriate cannot be recognized **[**34]** unless the purported appropriator has an intent to apply water to beneficial use itself or legally represents others committed to make such actual beneficial use). In the present case, the District wishes to put the water stored from time to time in Empire Reservoir to private use for recreational and piscatorial purposes. Such a use at that location, however, would exceed the scope of its easement granted by the United States in 1907.

[*187] The Act of May 11, 1898, listed three specific uses of canal and reservoir rights of way: water transportation, domestic purposes, and development of power, each "subsidiary to the main purpose of irrigation." Ch. 292, § 2, 30 Stat. 404. In addition it authorized rights of way "for purposes of a public nature." Ch. 292, § 2, 30 Stat. 404. This public purposes authorization is also subject to the dominant purpose of irrigation. *Kern River Co.*, 257 U.S. at 153. The statute makes no provision for a private use other than the ones specifically mentioned. *See* Act of March 3, 1891, ch. 561, § 21, 26 Stat. 1102;[19] *Zelph S. Calder*, 81 I.D. 339, 345 (1974) (Act of May 11, 1898, does not authorize **[**35]** private uses for stock watering or fish culture). Accordingly, for the District to make such uses of the stored water would overburden the easement and would intrude on the rights of the Landowners as owners of the servient estate. Under these circumstances, we believe that the District was precluded from obtaining a change of its water storage rights in Empire Reservoir to recognize the additional and **incidental use** of the water for recreational and piscatorial purposes. For this reason, we reverse the judgment of the water court recognizing a right in the District to apply the stored water to these uses.[20]

19 The cited statute, as now codified at 43 U.S.C. § 949 (1988), provides:

Nothing in sections 946 to 949 of this title shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

This provision has been construed to apply to reservoirs as well as canals and ditches. *Zelph S. v. Calder*, 81 I.D. 339, 345 (1974).

20 No challenge has been raised to the standing of the Landowners to object to the District's application for change of water rights. The Landowners do not assert injury to any water rights of their own. *See* § 37-92-305(3), 15 C.R.S. (1990) (an application for a change of water right shall be approved "if such change . . . will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right."). Where, as here, objectors such as the Landowners assert that the owner of the water right cannot make the requested uses without impermissibly burdening the objector's own legal rights, we conclude that general principles of standing authorize the objectors to raise that limited challenge to the application. *See Wimberly v. Ettenberg*, 194 Colo. 163, 168, 570 P.2d 535, 539 (1977) (standing requires injury in fact to a legally protected interest); *accord, e.g., Maurer v. Young Life*, 779 P.2d 1317, 1323 (Colo. 1989); *O'Bryant v. Public Utilities Commission*, 778 P.2d 648, 652-53 (Colo. 1989). We also conclude that the issue was adequately presented to

> the water court by introduction of the Morgan County District Court's judgment in the declaratory judgment action in which the court noted that to declare that the District has exclusive authority to use Empire Reservoir for recreational and piscatorial purposes "appears contrary to the subsidiary use recognized in 43 U.S.C. § 951 [codifying relevant provisions of the Act of May 11, 1898]."

[36]**

[37]** Our disposition of the issue makes it unnecessary to determine whether an irrigation district organized under the Irrigation Law of 1905 has the authority to appropriate water for recreational and piscatorial use incident to an appropriation for the primary purpose of irrigation. It is also unnecessary to determine the merit of the objectors' collateral estoppel contentions or its argument that the evidence does not support the recognition of use of the District's storage right for these incidental purposes.

B.

The District cross-appealed the judgment in the water court action to challenge the water court's statement that "nothing in this decree shall be deemed to [affect] any concurrent non-exclusive right which the underlying land owners may have to make use of the surface of the reservoir, or any part thereof, for recreational or piscatorial purposes." This language does not purport to create any right in the Landowners. Any suggestion that the Landowners may have such rights is inconsistent with our holding in the portion of this opinion relating to the declaratory judgment action, and we disapprove **[**38]** any such suggestion.

IV.

We affirm the judgment of the Morgan County District Court in the declaratory **[*188]** judgment action to the extent that it holds that the District owns an easement rather than a limited fee for the operation and maintenance of Empire Reservoir. We reverse the judgment of that court to the extent that it holds that either the District or the Landowners have rights to make private use of the stored water for recreational and piscatorial purposes. We remand the declaratory judgment action to the district court for entry of a decree consistent with the views expressed in this opinion.

We reverse the judgment of the water court granting a change of water rights to recognize a right in the District to make **incidental use** of its storage decrees for recreational and piscatorial purposes.