

Legally (Relevant



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Frequently Asked Questions – Pipeline Easements

It seems that every city and rural water district in Kansas is faced with water pipeline easement issues from time to time. Many times, the easements are decades old, which can make those issues more complicated to deal with. This article will discuss several easement issues that utilities may face.

1. What happens if a landowner builds a structure over a pipeline easement or places an obstruction of some other kind over the easement?

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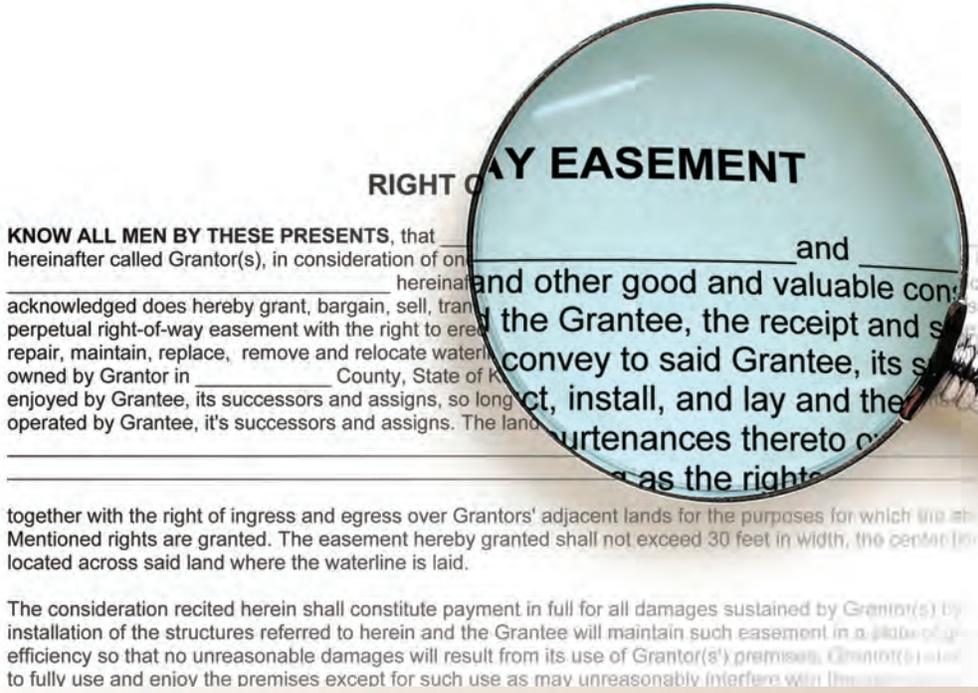
easement. That’s all well and good, but what does it take to constitute unreasonable interference? There are no hard and fast rules. If instances arise where the parties cannot work out their differences and a lawsuit is filed, courts will determine the unreasonable interference question on a case-by-case basis.

In one instance, for example, a Kansas court found that landowners unreasonably interfered with a natural gas company’s pipeline by developing a hog farming operation and constructing four buildings over the company’s pipeline over a period of years. The company had, on many occasions, informed the landowners not to construct the buildings, despite the delay in the company taking action on the unauthorized building, the court ordered the building to be removed. One of the court’s key findings was that repairing a leak to the pipeline would require demolition of all or part of the buildings.

In another instance, a Kansas court found that a large tree that was allowed to grow in a pipeline easement over the course of several decades constituted an unreasonable interference with a natural gas pipeline. The tree began to grow after the easement was granted. In 2012, a Kansas court ruled that the easement holder had the right to cut down the tree.

In a third instance, however, a Kansas court found that a garage that was built 41 inches from a gas pipeline did not unreasonably interfere with the easement in which the pipeline was built. A key

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finding in the case was that in the event repairs to the pipeline were necessary, there was sufficient room around the pipeline for repairs to be properly made.

Construction of pond dams on pipeline easements is a common problem in Kansas. These dams may add several feet of dirt over a buried pipeline. Situations may vary, but in many instances a dam such as this will be deemed to unreasonably interfere with the easement, especially if the easement owner can provide evidence from its contractor and engineer on the added time and difficulty in making a repair to a line under that much dirt, and the operator or manager explains the delays and impact on the pipeline if water service will be lost for an extended time.

What about driveways and parking lots that are constructed over water pipeline easements? Do they constitute unreasonable interference? What about objects such as large concrete blocks or an old railroad boxcar? Unfortunately, Kansas courts have not had a chance to address these situations.

What can we learn from the cases discussed above? First, although all the cases cited above involved gas pipelines, the general principles of those cases would likely apply to cases involving water pipelines. Second, although some delay in discovering and

acting on an obstruction may be inevitable, it is best to act diligently and promptly to protect the utilities interest in protecting its easements and avoid arguments from landowners that its too late to object because you acquiesced to the interference. Finally, as to new easements being taken, consider spelling out exactly what the owner can and cannot do with the land in the easement. If the owner is not to build buildings, construct pond dams, or plant a line of trees on the easement, expressly say so in the easement; if paved driveways are permitted, say that as well.

2. Assume that an easement grants a district the authority to construct “pipelines”, but that only one pipeline is constructed. What happens if the district wants to construct a second line in the easement 15 or 20 years later? Is the easement sufficient to allow the second line to be constructed?

The answer to this question is not clear in Kansas. Kansas courts establish a two-part test for determining the extent of the rights created by the grant of an easement. The first is the express language of the easement. In the question posed above, it is clear that the easement grants the right to lay more than one pipeline, so the first part of the test is met.

The second part of the test, however, is the extent of the use made by the city or rural water district when it was first granted the easement. In this case, the extent of the use made was to lay only one pipeline. Thus, the second part of the test would seem to limit the city or rural water district from laying another line in the future.

In the situation posed by the question above, one of the two tests is met and one is arguably not met. It is unclear how to resolve this seeming conflict. Cities and rural water districts may be met with resistance by landowners if they initially lay only one line under the easement language above and then attempt to lay a second line in the easement years later.

Courts from states other than Kansas indicate that resolving the apparent conflict may involve looking to the purpose of the easement and the intentions of the original parties to the easement. If the parties can't agree on these terms, a court might eventually have to do so if one of the parties filed a lawsuit. The utility may offer evidence to the effect that the purpose for the easement was to allow development of a water system to serve the area for many years to come, and that as needs change the easements need to be considered to be flexible enough to allow that purpose to be achieved through the installation of newer, larger or additional lines. The owner may contend the purpose was to install the line or lines built at the time, allowing them to be repaired and replaced as necessary; but that it was never intended to allow that use to expand to include an infinite number of lines and related equipment. The District Court Judge may have to decide, and in the meantime the utility may be blocked from proceeding with its project if a temporary injunction has been entered by the court.

Courts from other states also offer insight into how districts can improve their chances of being able to build a second pipeline under the terms of an easement. A court from another state granted a company the right to lay a second pipeline at a later

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date when the easement stated that the company had the right "from time to time ... to construct ... one or more additional lines of pipe approximately parallel with the first pipe." Other courts in other states have made similar findings. Thus, in the future, cities and rural water districts may want to consider adding similar language. If they do, a better case can be made that both parts of the Kansas test discussed above, have been met.

3. Should cities and rural water districts use "blanket easements"? If blanket

easements are not used, what are the alternatives?

There is some confusion over what constitutes a blanket easement. Kansas cases state that blanket easements are easements that don't describe the width, length or location of the easement. Thus, an easement allowing a city or rural water district to lay a water pipeline anywhere within a quarter section of land, for example, would be a true blanket easement. Such an easement would have no width (or length or location). The term "blanket easement" is also used in general conversation, however, to describe an easement that allows a pipeline to be laid anywhere within a piece of land, so long as the easement is a certain number of feet wide. Often, the width is described as something like the following: "30 feet in width, the centerline of which shall be the pipeline as laid." For purposes of our discussion, we'll consider both types of easements named above as "blanket easements".

The advantage of a blanket easement for cities and water districts is that it allows them to place a pipeline where they want to put it, allowing great flexibility during construction of the line. Trees and other obstructions can be avoided, for example. On the other hand, for a landowner, a blanket easement can be less than desirable. If a landowner grants a blanket easement, he may end up having a pipeline placed in a location that he does not like and which is inconvenient. Remember that a landowner cannot unreasonably interfere with an easement. Thus, if a

pipeline is laid where a landowner later wants to construct a barn, the landowner will likely be prohibited from constructing the barn over the pipeline.

However, note that for rural water districts state statutes may impact the true “blanket easement” problems described above. Per K.S.A. 82a-619b, a RWD is required to advise a landowner of the “exact location” of the proposed pipeline in an easement on an owner’s land. If the landowner requests that the line be located in a different place, the district is required to “negotiate” with the owner for the relocation of the line to the owner’s “satisfaction”. Any additional cost incurred as a result of altering the line location must be paid by the owner.

In any event, landowners often will only agree to grant what Kansas courts call “specific easements”. Specific easements state the width, length and location of the easement. Thus such pipeline easements often contain provisions that read something like the following: “... a perpetual easement thirty (30) feet in width adjoining the north road right-of-way line of X Road.” Such easements allow landowners more certainty as to where pipelines will be built, and as a result, minimize the effect the easement will have on the usefulness and value of their land without the need for the landowner to pay the cost of relocating a line in a blanket easement as provided by K.S.A. 82a-619b. For the utility, such an easement may be easier to obtain from the landowner, but confines the easement to only that thirty foot wide strip adjoining road right-of-way, and unless there is a some additional easement obtained, such as a temporary easement for constructing adjoining that thirty foot easement, the pipeline construction, all equipment, materials and excavated material must be confined to that thirty foot strip or the utility and its contractor may be liable for damages for trespass.

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4. Can an easement be exclusive, such that only one party can use the easement?

On occasion, cities or rural water districts have asked to have the exclusive right to use an area in which they have been granted an easement. Having such a right is extremely rare and would require the landowner to grant an “exclusive easement”. Exclusive easements allow only one party to use the easement. Unless an easement expressly states that it is exclusive and that only one party can use the land in question, the easement is not exclusive. Reasonable payment must be given to a landowner for an exclusive easement to be valid and enforceable.

If an easement is not exclusive, the landowner can grant easements to multiple parties to use the same area. Thus, landowners often grant cities or rural water districts the right to use an area where the landowner has already granted a telephone company, or other companies, the right to use the land for an easement. Generally, the easement holder who was granted the easement first will have priority in its use in the event of a conflict.

Conclusion

There are thousands of miles of waterlines built in easements in Kansas. Issues concerning easements are many and varied. The discussion above highlights some of the more common ones involving older form type easements. Consideration should be given in obtaining new easements to be more specific about what the utility and landowner can each expect to do and not do.

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