Legally Relevant

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Constructing Water and Wastewater Pipelines in Road Rights-of-Way

Water utilities own and operate thousands of miles of water pipeline in rural Kansas. Obviously, most rural water district facilities are located outside of cities. Public wholesale water supply districts are likewise invariably built, at least in part, in rural areas as they connect their members to the wholesale supplies. Also, many cities have pipelines to transport water from remote water supplies to city facilities (and wastewater from the city to wastewater treatment facilities located outside the city).

Most of these pipelines are located in easements granted to the water (or wastewater) system for that purpose. Except for those rights granted by the easement, the landowner retains all of the other rights in the land.

There are many good reasons for placing facilities in easements owned by the water or wastewater system, not the least of which is that lenders such as the USDA Rural Development and the Kansas Department of Health and Environment's loan programs require that all or most all of such facilities be located in an easement in order to be eligible for funding. By having facilities located in easements, those facilities have the right to remain in that location for the duration of the easement (usually forever). Others, including the landowner, are not allowed to unreasonably interfere with the use of that easement. If changes occur that require the relocation of that easement or the pipeline located in that easement, such as the construction of a new bridge, the pipeline owner will have the right to be provided with a new easement and reimbursed for the costs of relocating that pipeline by the person requiring the change.

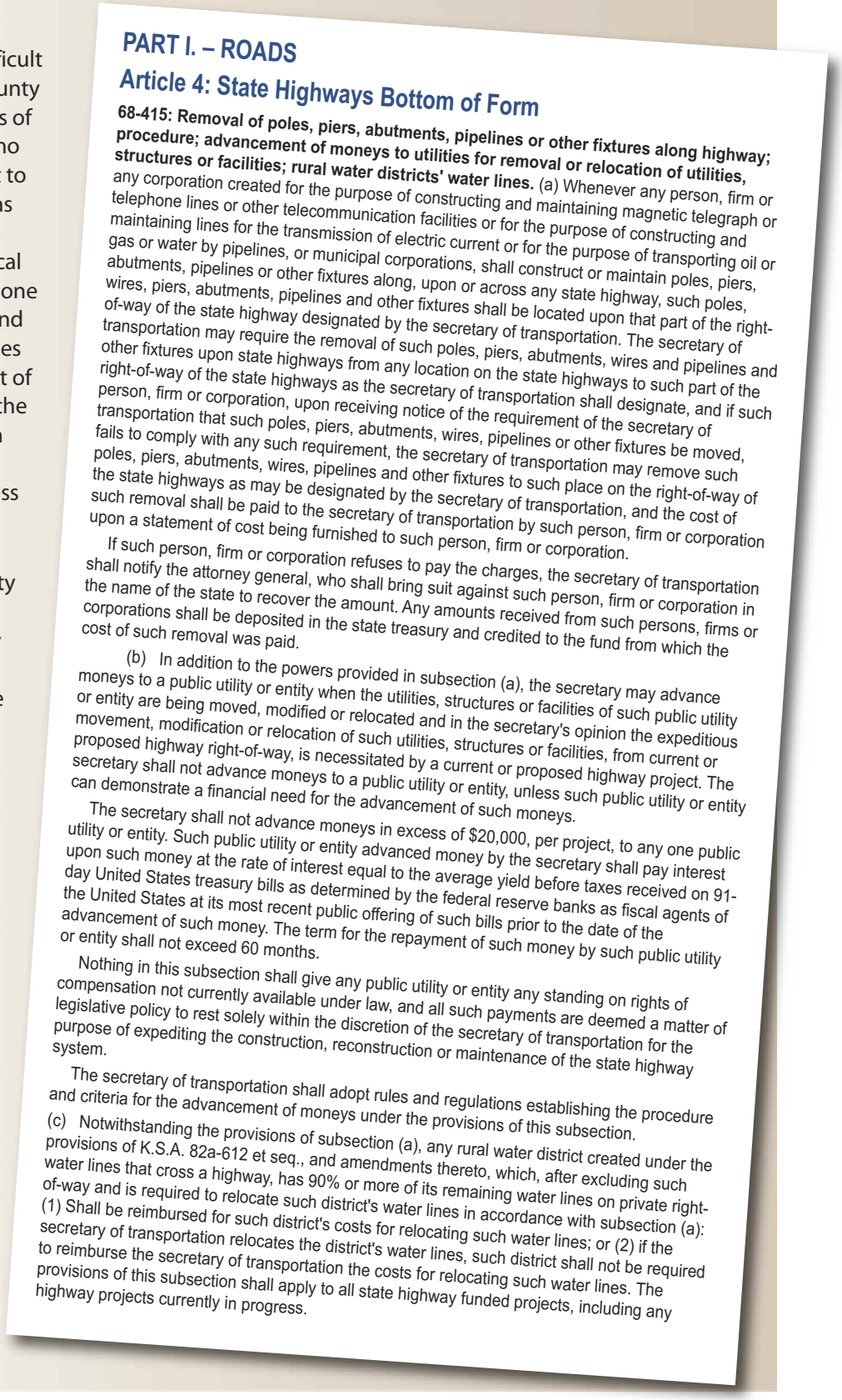
So what does a water or wastewater system do if it needs to locate a pipeline on land and the owner will not grant an easement? The answer can be to use eminent domain to acquire an easement. But in some cases that is impractical or impossible. So what about locating that portion of the pipeline in road or highway right-of-way?

County vs. state highway right-of-way

The rules are quite different for a county road as compared with a state highway right-of-way. The county's right to the use of the road is a form of easement. That is, the county has the right to make use of it, to allow the public to traverse the road, while the underlying landowner retains all other rights.

This can lead to conflict as it is difficult to determine whether use of the county road infringes on the property rights of the underlying landowner. There is no dispute that the public has the right to travel on the county road. Kansas has statutes that expressly allow for placement of telephone and electrical lines in right-of-way, but there is no one statute that says that public water and wastewater utilities can place facilities in rights-of-way without the consent of the underlying landowner. Despite the lack of an easy and simple answer in state law, Kansas courts have ruled that such utility providers have access to county road rights-of-way.

The reason for this is bound up in the history of development of county roads in Kansas. Early in the state's history, Kansas established a county road system that created rights-of-way on section lines throughout the state. At that time, the only use for these roads was for personal travel as public utilities were non-existent in rural areas. At the turn of the century all areas began to modernize and obtain utility services, and these utilities sought to use county road right-of-way to set poles to carry telephone wires and power lines. When disputes arose with the underlying landowners about these uses, the courts understood that the original grant of the road did not specifically include the right to establish utility lines in rights-of-way. Case law prior to 1904 interpreted the grant to the county as being limited to actual travel and provided that the proposed use could not interfere with the rights of the underlying landowner.



PART I. – ROADS

Article 4: State Highways Bottom of Form

68-415: Removal of poles, piers, abutments, pipelines or other fixtures along highway; procedure; advancement of moneys to utilities for removal or relocation of utilities, structures or facilities; rural water districts' water lines. (a) Whenever any person, firm or any corporation created for the purpose of constructing and maintaining magnetic telegraph or telephone lines or other telecommunication facilities or for the purpose of constructing and maintaining lines for the transmission of electric current or for the purpose of transporting oil or gas or water by pipelines, or municipal corporations, shall construct or maintain poles, piers, abutments, pipelines or other fixtures along, upon or across any state highway, such poles, wires, piers, abutments, pipelines and other fixtures shall be located upon that part of the right-of-way of the state highway designated by the secretary of transportation. The secretary of transportation may require the removal of such poles, piers, abutments, wires and pipelines and other fixtures upon state highways from any location on the state highways to such part of the right-of-way of the state highways as the secretary of transportation shall designate, and if such person, firm or corporation, upon receiving notice of the requirement of the secretary of transportation that such poles, piers, abutments, wires, pipelines or other fixtures be moved, fails to comply with any such requirement, the secretary of transportation may remove such poles, piers, abutments, wires, pipelines and other fixtures to such place on the right-of-way of the state highways as may be designated by the secretary of transportation, and the cost of such removal shall be paid to the secretary of transportation by such person, firm or corporation upon a statement of cost being furnished to such person, firm or corporation.

If such person, firm or corporation refuses to pay the charges, the secretary of transportation shall notify the attorney general, who shall bring suit against such person, firm or corporation in the name of the state to recover the amount. Any amounts received from such persons, firms or corporations shall be deposited in the state treasury and credited to the fund from which the cost of such removal was paid.

(b) In addition to the powers provided in subsection (a), the secretary may advance moneys to a public utility or entity when the utilities, structures or facilities of such public utility or entity are being moved, modified or relocated and in the secretary's opinion the expeditious movement, modification or relocation of such utilities, structures or facilities, from current or proposed highway right-of-way, is necessitated by a current or proposed highway project. The secretary shall not advance moneys to a public utility or entity, unless such public utility or entity can demonstrate a financial need for the advancement of such moneys.

The secretary shall not advance moneys in excess of $20,000, per project, to any one public utility or entity. Such public utility or entity advanced money by the secretary shall pay interest upon such money at the rate of interest equal to the average yield before taxes received on 91-day United States treasury bills as determined by the federal reserve banks as fiscal agents of the United States at its most recent public offering of such bills prior to the date of the advancement of such money. The term for the repayment of such money by such public utility or entity shall not exceed 60 months.

Nothing in this subsection shall give any public utility or entity any standing on rights of compensation not currently available under law, and all such payments are deemed a matter of legislative policy to rest solely within the discretion of the secretary of transportation for the purpose of expediting the construction, reconstruction or maintenance of the state highway system.

The secretary of transportation shall adopt rules and regulations establishing the procedure and criteria for the advancement of moneys under the provisions of this subsection.

(c) Notwithstanding the provisions of subsection (a), any rural water district created under the provisions of K.S.A. 82a-612 et seq., and amendments thereto, which, after excluding such water lines that cross a highway, has 90% or more of its remaining water lines on private right-of-way and is required to relocate such district's water lines in accordance with subsection (a): (1) Shall be reimbursed for such district's costs for relocating such water lines; or (2) if the secretary of transportation relocates the district's water lines, such district shall not be required to reimburse the secretary of transportation the costs for relocating such water lines. The provisions of this subsection shall apply to all state highway funded projects, including any highway projects currently in progress.

The court resolved this by employing a very common sense interpretation of the nature of any public right-of-way. The court considered that these utility services replaced travel on the roads and were actually just another type of public travel. If telephone lines were not strung on county rights-of-way, the parties would have no choice but to deliver messages by traveling on the road. If treated water could not be delivered through pipes, it would then have to be delivered by trucks using the road. The court determined that utility services were just a more modern way of traveling on the road, which was the intent of the grant of the right-of-way to the county. As such, it determined there was no distinction between use of the road by vehicles and use of the road by utility services.

Since that time, Kansas courts have repeatedly supported the use of county road right-of-way for utility services. Some statutes have been adopted over time that control placement of certain types of utilities in cities and rural areas, but for the most part the right to use the right-of-way still is based upon Kansas court rulings from 1904 and 1905.

Does the county have the right to grant a utility other rights in road rights-of-way without the underlying landowner's consent? For example, does the county have the right to grant a city the right to drill test water wells in road rights-of-way without the underlying landowner's consent? The answer is "no". This clearly exceeds the purpose for which the road right-of-way was originally granted, and has nothing to do with the transporting of persons or goods. The county could allow a city to drill test water wells in road rights-of-way, so long as such use did not unreasonably interfere with the use of the road, but the underlying landowner's permission would also be needed.

Rights, and responsibilities

If a waterline is in a county road right-of-way, who bears the cost of relocating that line for needed road improvements? This question highlights one of the real disadvantages of locating lines in county road rights-of-way. If the county needs to relocate the road, improve a bridge, or make repairs to the road or the ditch, it has the right to order the utility to relocate its lines. As confirmed by court cases and opinions of the Attorney General, the county will have no obligation to reimburse these relocation costs.

This description of the rights and obligations concerning county road rights-of-way contrasts with the state and federal highways where the Kansas Department of Transportation ("KDOT") owns the land. That is, unlike counties, KDOT does not have an easement for the right to allow the public to traverse the road, but instead owns the land and all of the rights related to it, with none of those being held by any underlying landowner. As a result, the state has the right alone to grant (or deny) the right to the use of the state road right-of-way under conditions prescribed by the Secretary of Transportation under state law.

Unlike the situation concerning county road right-of-way usage by water and wastewater utilities, the rights of such utilities to use state highway right-of-ways prescribed by state statutes. K.S.A. § 68-415 provides that water and wastewater lines can be placed in highway right of way, but the Secretary of Transportation can force the utility to move the lines if KDOT is making improvements to the road that require relocation of such facilities. There is a special rule in K.S.A. § 68-415(c) for rural water districts. If 90 percent of a rural water district's lines are in private (not state or county) rights-of-way/easements, KDOT will have to bear the expense of moving the lines. Note that this special rule does not extend to public wholesale water supply districts. As confirmed by the Attorney General in Opinion No. 96-53, even if a public wholesale water supply district otherwise met the 90 percent test, it is not entitled to reimbursement for relocation costs incurred in the course of a highway improvement project.

Conclusion

Use of public ways for the transport of water and wastewater is a long-established tradition in Kansas, and is the right of a public utility. Used properly, these rights can limit expense to cities and water districts and ensure the safe and economic transportation of water to the citizens of the state.