

# Legally (Relevant



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## Potential Conflicts in Use of Road Rights-of-Way for Pipeline Easements

**U**tilities depend on easements to transport water throughout their systems. Easements may also be utilized to connect to well fields, storage or wastewater treatment facilities.

Easements can be divided into two general categories: public and private. Public easements may be generally described as including streets, roads and utility easements. These are public in the sense that, subject to reasonable restrictions, they are available to utilities to transport their products and services. The owner of the

public easement (city, county, state) often has a process for utilities to follow in applying for a permit to authorize use of the public easement.

By contrast, private easements are interests in land and are owned by an individual utility. They can be exclusive, so that only the utility owning that private easement may use the land described by that easement for its pipelines or wires – although exclusive pipeline easements are extremely rare. Most private pipeline easements are non-exclusive, meaning that other utilities may also acquire easements on the same land and use those easements for their purposes so long as they do not unreasonably interfere with the prior easement owner's use.

Interference with a utility's use of easements can occur in a number of ways. For private easements these can include work by another utility that results in damage to facilities or construction of buildings, pond dams or other structures on the easement making it very difficult for the utility to fully use its easements. In a great many cases these interferences can be worked out, but there are times when court action is needed to protect the utility and its customers from those interferences.

The remainder of this article is concerned with problems that occur for the utility using public easement. The most common of these for rural water districts (RWDs), public wholesale water supply districts (PWWSDs), sewer districts and cities (with

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facilities located outside city limits) will involve use of roads and highway rights-of-way, including crossing of these roads and highways.

Discussion of the conflicts that can occur in use of public easements begin with this question: If public easements are readily available, why bother getting private easements? Most utilities are all too familiar with the time and expense that can be invested in researching, preparing, acquiring and recording these easements. If they are non-exclusive anyway, why not just use public easements and save all the time and expense of private easements?

The short answer for significant projects, such as those funded by USDA Rural Development or the Kansas Department of Health & Environment's Revolving Loan Funds, is that those funding agencies require that the facilities be built, or at least substantially built, in private easement. But there is a real reason for those requirements, as discussed more fully below: those funding agencies do not want their borrowers to face a crippling unexpected cost that could occur if that borrower finds itself having to pay to relocate those facilities because of a road, bridge or other project that requires utility line relocations. And that is exactly what can happen when the utility resorts to use of public easements, including road and highway rights-of-way, to build their facilities.

### **General Rule – The Utility Pays**

The general rule for utilities using public easements is that the county, township or highway department may require relocation of utilities located in those public easements and the system owning those facilities will bear the cost of that relocation. In effect, the owner of that right-of-way is accommodating the public utility by allowing it to use the right-of-way for utility purposes. The right of public utilities to use these rights-of-way for utility purposes are protected by state law. However, use of the right-of-way for a road is paramount, and the utility must remove or relocate facilities as necessary to allow the road to be repaired, widened or moved.

Many counties use a form of application and permit process to permit utilities to build in road rights-of-way. The permits usually make clear the utilities



A city in northeast Kansas recently installed a 6-inch pipeline in public right-of-way to provide water service to fourteen additional customers.

responsibility to relocate their facilities, at the utilities' expense, if required in order to allow for road work. This would include not only lines that run parallel to the road (rather than being in adjoining private easement), but also road crossings, road intersections, or otherwise.

Unlike county and township roads, most of which are actually in the form of roadway easements, most of Kansas Department of Transportation (KDOT) roads and right-of-way are wholly owned by KDOT. A state statute, K.S.A. § 68-415, allows KDOT to require removal/relocation of utility facilities located in state highway right-of-way as KDOT deems necessary. Essentially, utilities can occupy state highway right-of-way when and where allowed by KDOT, and must move those utility facilities whenever required by

KDOT. KDOT can relocate those facilities if the utility fails to do so, and can make a loan of up to \$20,000.00 to the utilities for it to pay the relocation costs. But, in any event, the utility is ultimately responsible for payment of those relocation costs.

There is an exception to this general rule that the utility pays for relocation costs for facilities in right-of-way. That exception is for KDOT required relocations, and applies only to RWDs whose waterlines, excluding those that cross a highway, have at least 90 percent of such lines located within private right-of-

### What happens to a private easement when road right-of-way expands to encompass that private easement?

Occasionally a road or bridge project will result in the expansion of the road right-of-way to take in private easement held by a utility. The new right-of-way may be acquired by purchase from the landowner or by use of eminent domain.

If the additional right-of-way is purchased from the landowner, and that land is subject to a previously granted private easement in favor of the utility, the new right-of-way will be considered to have been acquired subject to the utilities' easement. In effect, the new public right-of-way "overlays" the private easement – it does not replace it. The same is true if the additional right-of-way is taken by eminent domain. Unless the eminent domain case names the utility as a party owning an interest in the land being taken, and clearly indicates that the utilities' easement is being taken, the land will be deemed to have been taken "subject to" that easement. This is important because it means the utility in such a case does not have to relocate its facilities at the utilities' expense.

If the newly acquired right-of-way has been purchased by a county for a road widening project that requires relocating of the waterlines, the county would have to pay for that relocation cost. The rights of the utility under these circumstances will last for as long as the old private easement allows – probably forever.

Advice to utilities is to keep good records and make notes on the map or the electronic file in order to avoid falling in to the trap that just because the county engineer's map shows this land is in road right-of-way that the utility has no right to reimbursement for relocation costs.

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way. RWDs that satisfy this requirement, which is to say almost all RWDS, are entitled to have their lines relocated at KDOT's expense. If the RWD relocates those lines, KDOT is required to reimburse the RWD for those costs, and if KDOT relocates the lines the RWD is not required to reimburse KDOT for those costs.

Note that this state law goes on to provide that this provision for costs of relocation of RWD lines to be paid by KDOT "shall apply to all state highway funded projects . . ." This appears to expand the duty for KDOT to pay RWD relocation costs to extend beyond just KDOT right-of-way, but to include many city and county projects funded by KDOT. As many city and county projects are funded by KDOT, this provision in K.S.A. § 68-415 warrants special attention to relocation costs related to those projects.

### Conclusion

There are important differences between private and public easements. Obtaining of private easements can be time consuming and expensive, but their value in the long run can make those costs more than worthwhile.

The rules concerning use of public easements, such as road and highway rights-of-way, are governed by state statutes. Generally, those statutes allow utilities to use those rights-of-way so long as the utility does not adversely affect the use of the right-of-way for road purposes, and the utility will be required to relocate those facilities, at the utilities' expense, as the owner of the right-of-way may require. The exception to this rule is for RWDs being required to relocate facilities for state highway funded projects, in which case KDOT must pay those costs.

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