Current Issues Concerning Oil and Gas Industry
Use of County Road Easements and Related Issues

Laura J. Long
McAfee & Taft A Professional Corporation
Oklahoma City, Oklahoma

Temporary pipelines are often used during drilling and completion activities to transport water or other liquids to and from the drilling site. It is common for oil and gas companies to lay these pipelines within a county road easement, either under the roadways or along a ditch. This paper examines whether an Oklahoma landowner is entitled to compensation for use of the ditch over and above the compensation received for the road easement.

An owner of land bound by a highway is presumed to own the property to the center of the road, unless the contrary is shown. 69 Okla. Stat. § 1202. A roadway is generally an easement, while abutting landowners have a fee interest to the center of the road, burdened by the easement. Haworth v. Jantzen, 2006 OK 35, ¶ 12, 172 P.3d 193. When a landowner conveys a road easement to the county and the county pays full and fair compensation for that easement, the landowner is only entitled to receive additional compensation for that same land if it is used for purposes outside the scope of the original easement. Nazworthy v. Illinois Oil Co., 1936 OK 150, 54 P.2d 642. This means that when an oil and gas company places temporary pipelines along a county road easement, the company is only required to compensate the landowner if the pipelines constitute a new and additional servitude or burden beyond the easement’s original scope.

The states are anything but consistent in defining the original scope of a road easement. Some states narrowly construe the purpose of a road easement as serving a public benefit. In these states, landowners are entitled to additional compensation by a private entity if the easement use does not benefit the public at large. Other states, including Oklahoma, focus on the transportation purpose of the road easement, or the “highway use.” Thus, any activity designed to facilitate transportation of people or commodities is considered to be within the original purpose of the easement.

The Oklahoma Supreme Court has explained that “highway use” may be for public or private gain, and includes the passage, travel, traffic, transportation, transmission, and communication of people, commodities, and information. For example, private buses, taxis, freight trucks, and commercial businesses are all allowed to use the highways to transport people, commodities and information without restriction or compensation to the landowner.

A private pipeline is comparable to historically recognized modes of transportation for private gain. Much like a horse, car, or semi-truck, a pipeline is a natural extension of the purpose of a highway as a modern method of commodity transportation. And a highway
easement is being used for the same purpose – transportation of a product – no matter whether that product travels by barrel in a horse drawn wagon, in a tanker behind a semi-truck, or in a temporary pipeline. Because pipelines serve the transportation purpose of a highway, Oklahoma courts have historically considered pipelines to be a form of “highway use” that do not require compensation to the abutting landowner over and above the already compensated fair value of the highway easement.

I. **The Scope of a Road Easement in Oklahoma Includes All “Highway Use”**

   In the 1930s, the Oklahoma Supreme Court issued a series of decisions which defined the scope of a county road easement as including anything used for “highway use.” The Court held that road easements may be used for any and all “highway uses” without additional compensation to the owner of the lands over which the highway traverses. The Court further recognized that private pipelines along highways are part of the existing highway easement because they are consistent with “highway use.”

   A. *Nazworthy v. Illinois Oil Co.*, 1936 OK 150, 54 P.2d 642

   In 1936, the Oklahoma Supreme Court squarely addressed the issue of whether an abutting landowner is entitled to additional compensation for a pipeline laid along a highway within the boundaries of a highway easement. *Nazworthy* involved an oil pipeline built by a common carrier, but the Court’s analysis had little to do with the content of the pipeline or the type of company building it. The Court thoroughly analyzed the general theory behind its decision and ultimately held that the use of the highway for pipeline “is wholly within the primary law of the use of the highway and must be held to be no such additional burden or servitude as would entitle the abutting landowner to additional compensation for such use.” *Id.* at 646.

   The Court spent considerable time examining the purpose of the highway and the fact that the easement was taken to facilitate that purpose. The Court, quoting *McCann v. Johnson County Telephone Co.*, 76 P. 870 (Kan. 1904), explained,

   The purpose of the highway is the controlling factor. It is variously defined or held to be for passage, travel, traffic, transportation, transmission, and communication. It is a thoroughfare by which people in different places may reach and communicate with each other. The use is not to be measured by the means employed by our ancestors, nor by the conditions which existed when highways were first devised. The design of a highway is broad and elastic enough to include the newest and best facilities of travel and communication which the genius of man can invent and supply.
The Court noted that the methods of using public highways have expanded with the growth of civilization, starting as a footpath and evolving into today’s urban highways that are devoted to a variety of uses not known in former times and never dreamed of by the owners of the soil when the public easement was acquired. *Id.* at 644. “Hence, it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods . . . .” *Id.*

The Court explained that rights of the owners of lands along highways “must yield to the needs of the public generally with the expansion and growth of civilization as new methods and means of travel, transportation of persons, commodities, etc., and transmission of messages, intelligence, etc. are devised, developed, and expanded . . . .” *Id.* This principle endures, notwithstanding that the new uses include, not only new methods of travel, transportation and transmission by moving vehicles, etc., but the right to conduct and maintain permanent structures in and along the highway for improved methods of transportation, etc., by and for the benefit of the public in general; . . . and notwithstanding that such structures are erected and maintained by private corporations for private gain.

*Id.* (emphasis added).

The Court recognized that Oklahoma statutes regarding use of highways for oil pipelines supports this policy. “Our statutes constitute an interesting guide in so far as they indicate the general policy that, under proper supervision, our highways may be freely used for oil pipelines.” *Id.* Importantly, though, the Court did not limit its analysis to common carriers. Oklahoma statutes give every corporation, partnership, or other person the right to carry or transport its products through pipelines for hire. *Id.* The state also permits the private use of highways by persons operating busses for hire for the transportation of passengers, trucks transporting freight for hire, and “persons engaged in private commercial enterprise.” *Id.* at 645. “[A]t this time our highways are used by common carriers of oil in pipe lines, common carriers of passengers and freight by bus and truck, ‘motor carriers’ of other classification, and citizens in general travel and transportation, and all these together constitute the use of the highways for every individual and public convenience. . . .” *Id.* (emphasis added).

The Court also noted that a rule that allowed motor vehicles to use the highway to transport the oil, but that prohibited a pipeline from being laid under the highway to accomplish those same ends, imposed a greater burden upon the roadway easement. “[T]he more burdensome use of the highways [would be] a continuous line of vehicles carrying oil over the highway.” *Id.* However, a pipeline could carry that same oil “under the surface of the highway, almost unnoticeable to the average user of the highway, and less burdensome in operation.” *Id.*
The Court held that “new or different use of the highway, or new or different method of transmission or transportation, is but a further proper use of the highway in line with the general purpose of the highways . . . .” *Id.* The Court further explained that the landowner was “compensated for the taking of the highway,” and it does not follow “that he is additionally damaged by each different, new, or additional use of the highway for travel, transportation or transmission.” *Id.* at 646. As a result, the landowner is not entitled to any additional burden or servitude that would allow additional compensation for such use. *Id.*

**B. Other Oklahoma Supreme Court Decisions Regarding Laying Pipeline Upon Highway**

Three other cases were decided around the same time as *Nazworthy*, and all reached the same holding. *Okmulgee Producers & Manufacturers Gas Co. v. Franks*, 1936 OK 515, 60 P.2d 771, had similar facts as *Nazworthy*. The Oklahoma Supreme Court reversed the district court’s judgment in favor of the landowner as to those portions of the pipeline laid along the highway, and reiterated Oklahoma’s rule that the construction and maintenance of a pipeline along and under a state highway is not an additional servitude for which compensation must be paid to the owner of abutting land. *Id.*

*Anderson v. Illinois Oil Co.*, 1936 OK 142, 54 P.2d 646, was tried upon the same record as *Nazworthy* and involved the same questions. The Court concluded that “what was said in that case [*Nazworthy*] is applicable here.” *Id.*

The third case, *Stanolind Pipe Line Co. v. Winford*, 1936 OK 152, 54 P.2d 646, involved facts “similar to, but not identical with, the facts in *Nazworthy*,” with the principal difference being that a portion of the pipeline at issue was laid under a highway, while another portion was laid off the highway easement upon private lands. As to those portions laid under the highway easement, the Court reversed the judgment of the trial court, holding that the issue was “controlled by *Nazworthy*” and that “there is no liability as to that portion of the line laid under the highway.” *Id.*


In *Oklahoma Gas & Electric Company*, the United States District Court for the Western District of Oklahoma held that the erection of an electric line across land which had been allotted to the Kickapoo Indian tribe did not constitute an unwarranted use and servitude of the land.

The State of Oklahoma, through its Highway Commission, was granted permission to establish a public highway across the Indian land. The Highway Commission thereafter granted Oklahoma Gas & Electric Company a license and permit to construct and maintain electrical equipment over and along the highway. The plaintiff argued that the transmission of power for private, commercial purposes constituted an unwarranted use and servitude of the property.
The court relied on the fact that even though a private company installed the lines, it was at the direction and supervision of a state agency, the Highway Commission. The State had the authority to determine what constitutes a use of the highway, and in this case the State made the determination that the electric lines constituted highway use. The court recognized a split of opinion between the states but held that, based on *Nazworthy*, the Kansas Supreme Court case of *McMann, supra*, and the Supreme Court of Minnesota’s decision in *Cater v. Nw. Tel. Exch. Co.*, 63 N.W. 111 (Minn. 1895), the construction and maintenance of an electric line was not an additional servitude requiring compensation. *Id.* at 352.

This case was affirmed by the Tenth Circuit and by the United States Supreme Court. The United States Supreme Court stated, “It is not denied that under the laws of Oklahoma the use made of the highway by respondent, the State’s licensee, is a lawful and proper highway use, imposing no additional burden for which a grantor of the highway easement would be entitled to compensation.” *United States v. Oklahoma Gas & Elec. Co.*, 318 U.S. 206, 210-11 (1943). The Court then explained that the issue on appeal was whether the act that established public highways submits the proper scope of highway use to state law or local law. In addressing that issue, the Court analyzed Oklahoma law regarding the use of lines for private interest:

In construing this statute as to the incidents of a highway grant we must bear in mind that the Act contemplated a conveyance to a public body, not to a private interest. . . . It is said that the use here permitted by the State is private and commercial, and so it is. But a license to use the highway by a carrier of passengers for hire, or by a motor freight line, would also be a private and commercial use in the same sense. And it has long been both customary and lawful to stimulate private self-interest and utilize the profit motive to get needful services performed for the public. The State appears to be doing no more than that.

*Id.*

D. *Bogart v. CapRock Commc’ns Corp.*, 2003 OK 38, 69 P.3d 266

*Bogart* involved a telecommunications company’s installation of underground fiber optic cable on a public road easement. The landowner brought a class action suit against the company for installation of the cables without landowner’s permission or compensation. The company filed for summary judgment arguing that permission and compensation were not required under Oklahoma law. The Oklahoma Supreme Court affirmed summary judgment in favor of the company.

The Court recognized that the Oklahoma constitution and statutes authorize the company to lay lines telecommunications lines within highway or road easements in Oklahoma. *Id.* at 272. However, “the question remaining is to what extent, if any, the landowner must be
compensated.” *Id.* at 272. The issue was whether the “installation of fiber optic cables falls within the purpose for which the easement was initially granted.” *Id.* at 271-272. The Court quoted extensively from *Nazworthy, supra*, and held,

The teachings of *Nazworthy* and its progeny are decisive. It makes no difference whether the transmission is an oil pipeline or whether it is a fiber optic cable either use is included within the purpose of a public highway or road easement and, accordingly, neither use imposes an increased servitude or burden for which additional compensation is required.

*Id.* at 273. The Court did not distinguish or analyze the impact of being a public utility, but seemingly dismissed the issue as it focused on “the purpose for which the easement was initially granted.”

The Court cited sixteen cases from other states in a footnote string cite that reached the same conclusion. *Id.* at fn 26. The Court’s parenthetical explanations for each case demonstrate that the principle of “highway use” has been applied to allow sewer lines, telephone facilities, telephone lines, water pipes, electric transmission lines, pipelines, and poles and wires to be placed within an easement without additional compensation to the landowners. *Id.* The Court’s parenthetical also recognized the Arkansas, Iowa, Louisiana, and Mississippi have reached the opposite conclusion. *Id.*

E. *Vertex Holdings, LLC v. Cranke, II*, 2009 OK CIV APP 10, 217 P.3d 120

Up until 2008, all Oklahoma case law consistently recognized pipelines and other forms of transmission lines as being within the scope of the original road easement due to the transportation aspect of the pipeline. However, the Oklahoma Court of Appeals in *Vertex Holdings, LLC v. Cranke, II*, 2009 OK CIV APP 10, 217 P.3d 120, reached the opposite conclusion, and the Oklahoma Supreme Court denied cert. The appellate court held that a sewer line was not within the scope of the road easement and installation of the line required permission from the landowner.

In *Vertex*, the Delaware County Commissioners granted a developer permission to install an underground sewage transmission line along a public road. The sewage line connected a house in a subdivision to a nearby septic system and lateral lines. There is no indication that the developer compensated the County for this permission or permit. The appellate court recognized that the commissioner has authority to grant a private citizen a right to lay pipes under the surface of any road pursuant 69 Okla. Stat. § 1401(B). *Id.* at 124-125. However, the court relied on a 1982 Attorney General opinion, 14 Okla. Op. Att’y Gen. 1 (1982), in which the Attorney General believed that this authority requires permission of abutting landowners.
In the 1982 Attorney General opinion, the Attorney General opined that the purpose of a roadway easement is for “convenience of public travel” with a secondary and subordinate use for public utilities. 14 Okla. Op. Att’y Gen. at *2. Any use beyond those purposes may constitute an additional servitude. The Attorney General felt that a privately-owned saltwater disposal line operated for private gain in pursuit of private business objectives “cannot be said to contemplate the furtherance of a public use.” Id. at *3. The Attorney General believed that Nazworthy was distinguishable because the disposal line was “not a common carrier and is not aiding in the caring for the transportation problems of the state and its citizens.” Id. “[A saltwater disposal line] is used solely for the private proprietary purposes of an individual in producing oil and gas.” Id. The Attorney General then relied on the South Carolina case Benton v. Yarborough, 123 S.E. 204 (S.C. 1924) and concluded that the landowner is entitled to compensation.

The appellate court in Vertex agreed with the Attorney General and held that “while § 1401(B) authorizes counties to grant a private citizen the right to use a public road easement, a private use of such easement is nevertheless an additional servitude requiring consent of and compensation to the parties owning the fee interest below the roadway.” Vertex, 217 P.3d at 126.

The appellate court distinguished Bogart because the fiber optic cable in Bogart was for a public purpose. The court reasoned that because the cable in Bogart was for a public purpose and did not impose an additional servitude, that holding in Bogart therefore “suggests that the use of a public easement for a private purpose does impose an additional servitude.” Id.

II. Other Jurisdictions Consider Whether the Pipelines Provide a Public Benefit

Other jurisdictions are split on whether a landowner may be entitled to additional compensation for pipelines. States that refuse additional compensation are also split on the rationale for including the pipeline within the scope of the highway easement. Some states follow Oklahoma’s rationale and consider the “highway use,” other states require at least some perceived public benefit, while others consider a combination of both.


In Ziegler, the court: (1) permitted a water pipeline by a private corporation for profit; (2) presumed a public benefit because of an agreement with the Board of County Commissioners; and (3) recognized transporting water as a highway purpose.

The Board of County Commissioners granted a contract to Ohio Water Service Co., a private for-profit corporation, to lay a water pipeline for the purpose of providing water service and fire protection to a nearby school district and the occupants of plaintiff’s property. Id. at 729. The Supreme Court of Ohio recognized that highways are primarily for the use of the public in traveling from place to place. Id. at 731. “Although modern-day travel on our highways is predominately by motor vehicle, highways certainly are not limited to such use.” Id. “A denial of the use of a highway for the purpose of transporting water to areas where it is
needed, as in the instant case, would be a rejection of evolutionary change.” *Id.* The court held that the water pipeline is not an added burden on real property in which an easement for highway purposes has been given. *Id.*

The decision was not impacted by defendant’s profit motive, and the court deferred to the presumption that the County acts for the public purpose:

> We are aware that the defendant is a private corporation for profit. However, the project sought to be enjoined was undertaken pursuant to an agreement with the board of county commissioners and is, therefore, presumed to be for the public purpose. *Id.*


In *Bentel*, the Supreme Court of Idaho: (1) allowed a private sewer line to be installed under a public road easement without additional compensation; (2) recognized the right for water, gas and electricity pipelines on an easement; (3) found a public environmental benefit; and (4) held that a private benefit does not mean that a public interest is not being served.

The sewage lines at issue in *Bentel* were intended to carry sewage from a nearby city’s wastewater treatment plant as well as a private company’s fertilizer plant. The court first recognized that all public roads are subject to the statutory right to install utility services, and the installation of a sewage disposal pipeline does not, as a practical matter, involve an expansion of the easement or an increased burden on the servient estate. *Id.* at 1387. The court then dismissed the plaintiff’s argument that the pipeline was for the benefit of, and will be owned by a private corporation. *Id.* The court noted that “it is clear from the contract that the [city] will derive a direct and substantial benefit . . . .” *Id.* at 1387. Even if this were not so, the pipeline will produce local environmental benefits by reducing the amount of effluent discharge into the river. *Id.* at 1388. “Furthermore, there is a presumption that the governing body’s grant of use of a public easement is in the public interest. This Court has recognized in other contexts that the fact that a private party may reap a special benefit from governmental action does not itself militate against recognizing that the public interest is being served. Other jurisdictions agree.” *Id.* (internal citations omitted).

The court also noted that ownership of the pipeline by a private entity does not mean that domination of the easement itself falls into the hands of the private entity. *Id.* The county merely granted permission to lay the pipeline within its easement. *Id.* The county did not grant a permanent easement. *Id.*

The Court in *Amerada Hess*: (1) permitted a carbon dioxide gas distribution pipeline; (2) acknowledged a public benefit from not using large trucks on the highway; and (3) rejected the idea that the highway must serve the general public because the legislature did not specify public utilities when it granted authority for pipelines.

The State Highway Department granted Amerada Hess the right to construct and operate a carbon dioxide gas distribution pipeline within the easement granted by the landowners to the Department. *Id.* at 553. The landowners argued that Amerada Hess was a private corporation and not a utility, and therefore could not use the public highway for pipelines for its own profit. The New Mexico Supreme Court of Appeals disagreed with the landowner. The New Mexico statute permitting companies to lay pipeline underneath the highway is not limited to utilities and does not exclude pipelines for profit. *Id.* at 552. The court refused to read such a limitation when such a limitation was not provided in the statute. *Id.* Thus, the court recognized that “[b]y statute, a pipeline is also consistent with the permissible uses of a public highway easement.” *Id.* In addition, Amerada Hess “reasonably” suggested that the pipeline does constitute a public good, since it may be more preferable for the transportation of gas than the use of the highway itself. *Id.* at 553. Large trucks traveling on highways accelerate the road’s deterioration. *Id.* The Court recognized the presumption that the governing body’s grant of a public easement is in the public interest. *Id.* The Court further reasoned that the pipeline does not interfere with other surface uses such as grazing. *Id.*

The court, quoting *Herold v. Hughes*, 90 S.E.2d 451 (W. Va. 1955), stated that the easement for public road purposes includes all rights and privileges necessary or convenient to the use of the public in travel or transportation of properties of all kinds. *Amerada Hess*, 744 P.2d at 553. “We think that transportation of natural gas, whether by public utility or nonpublic utility, is transportation of property for public use.” *Id.* The plaintiff argued that the state highway could not be used for a private corporation not intending to serve the general public, but the court disagreed and held,

The legislature did not limit the Commission’s authority to the emplacement of pipelines, telephone and telegraph lines by utilities, and in the absence of a legislative limitation or constitutional challenge, we are unpersuaded by plaintiff’s argument.

*Id.* (emphasis original).

D. *State v. Homar*, 798 P.2d 824, 826 (Wyo. 1990)

In *Homar*, the Wyoming Supreme Court: (1) held that a public mass transit system is within the realm of permissible uses of a road easement; (2) emphasized the transportation of commodity function of a highway; and (3) recognized the public benefit.
The court reasoned that the easement embraces every reasonable method of travel over, under and along the right-of-way. *Homar*, 798 P.2d at 826. Commodities were initially provided by messengers and freight wagons, and “overhead transmission lines and underground pipelines are simply technologically advanced adaptions of traditional highway uses.” *Id.* “Like pipelines and transmission lines, the bus line provides an advancement in the more efficient use of transportation resources. Paramount to this use of the easement, as well as all others, is ensuring public safety.” *Id.* Having a safe place to load and unload passengers, and having a bus turnout is a legitimate use of the easement. *Id.*

E. *Box L Corp. v. Teton Cnty. ex rel. Bd. of Cnty. Commissioners of Teton Cnty.*, 92 P.3d 811, 817 (Wyo. 2004)

In *Teton*, the Wyoming Supreme Court: (1) held that an underground sewer line does not constitute an additional burden; and (2) considered a broad definition of public interest.

The court in *Teton* relied heavily on *Homar* and *Bentel, supra*, to find that private sewer lines constituted a form of highway use. As recognized in *Homar*, uses related to traffic movement over, under and along the right-of-way are within the scope of the easement and power lines and pipelines therefore do not increase the burden on the servient estate. *Id.* at 817. The court also found *Bentel* “particularly instructive” because it holds that the right to use an easement for an underground sewer line is not defeated solely because the sewer line is to be constructed by a private entity. *Id.*

The court then focused on the fact that the easement was in the public interest despite the fact that the private entity constructed the project and the private entity reaped a benefit from the project. *Id.* at 819. The court reasoned that “a proposed use of a public easement may be in the public interest despite the fact that a private entity intends to construct the project and despite the fact that a private entity may reap some benefit from the project. Similarly, a proposed use of a public road easement does not have to be intended to serve all the members of the general public to be in the public interest and to fit within the purpose of a public road easement.” *Id.*

F. Texas

Texas appellate courts are split and we have not yet seen a Texas Supreme Court case on the issue. The Texas Attorney General issued an opinion in 2000 that said road easements do not include a right to grant a further easement to install pipelines for private businesses. Tex. Att’y Gen. Op. JC-0238 (2000) citing *Hale County v. Davis*, 572 S.W.2d 63 (Tex. Civ. App.-Amarillo 1978, writ ref’d n.r.e.).

The Texas Court of Appeals- Corpus Christi ruled the other way. “Roadway easements include the use of the subsurface for sewers, pipelines and other methods of transmission and communication that serve the public interest. . . . By granting a roadway easement, a grantor necessarily grants an easement for those uses which have been recognized as being included as