



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 81- 242

Mr. John Shirley
Scott County Attorney
325 Main Street
Scott City, Kansas 67871

Re: Roads and Bridges -- County and Township Roads --
Use of Seismographic Equipment on County Roads

Synopsis: A county may not permit private companies to operate seismographic equipment on county roads unless the county owns the road in fee. An easement for a public road grants the right to use the property for public travel, but does not impair other rights retained by the landowner. Cited herein: K.S.A. 1980 Supp. 19-101a, K.S.A. 19-212.

* * *

Dear Mr. Shirley:

You have asked whether the board of county commissioners may enter into a contract with a private company to permit said company to conduct private seismographic operations from county roads. The operations apparently consist of stringing cables along the roads and mechanically thumping the ground to create vibrations. As we understand the procedure, these vibrations provide data to the company regarding the underground land formations of adjoining properties, thereby enabling the company to better determine which properties are more likely to have oil under them. You state that the seismographic company is willing to pay the county a certain amount of money for each mile of road the company uses in its operations, and that such use will not unreasonably interfere with the traffic on the road.

To answer your questions, it is first necessary to determine who owns the roads involved, since it is the owner of real property who has the right to sell or dispose of an interest in his property. See, Central Kansas Power Co. v. State Corporation Commission, 221 Kan. 505, 515 (1977); 63 Am.Jur.

2d Property §§32,35. In Kansas, public roads may be acquired by purchase, prescription, dedication or condemnation. Kratina v. Board of Commissioners, 219 Kan. 499 (1976). Generally, a county will acquire only an easement in the property for purposes of establishing a public road [Luttgen v. Ergenbright, 161 Kan. 183 (1946)], but the county may also hold the land in fee, depending upon the terms of the acquisition [Regier v. Ameranda Petroleum Corp., 139 Kan. 177 (1936)]. Hence, the facts of each case, i.e., the county's ownership of the roadway, portions thereof, or interest therein, will determine which rule of law is applicable.

If the county owns the property upon which the roads are located in fee simple, the board of county commissioners would have the power to establish procedures for use of the roads pursuant to K.S.A. 19-212, First, which gives the board the power "[t]o make such orders concerning the property belonging to the county as they may deem expedient, including the establishing of regulations, by resolution, as to the use of such property and to prescribe penalties for violations thereof." Since there are apparently no uniformly applicable state laws which address the use of seismic thumpers on county roads, the county would also have the authority to regulate the use of this equipment in the county by virtue of its home rule powers granted in K.S.A. 1980 Supp. 19-101a. We find nothing which would prohibit the county from collecting a fee in conjunction with such regulation.

If the county does not own the property upon which the road is located in fee but merely has an easement, a different conclusion must be reached. The Kansas Supreme Court adopted the language of the Restatement of Property, Servitudes, §450, p. 2901, in Smith v. Harris, 181 Kan. 237, 246 (1957) to define an easement thus:

"An easement is an interest in land in the possession of another which

"(a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists;

"(b) entitles him to protection as against third persons from interference in such use or enjoyment;

"(c) is not subject to the will of the possessor of the land;

"(d) is not a normal incident of the possession of any land possessed by the owner of the interest, and

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"(e) is capable of creation by conveyance."
(Emphasis in original omitted. New emphasis added.)

The county's easement exists for the purpose of providing a public road for public travel. Thus, the county is permitted to use or authorize the use of its easement in the property only for the purpose for which the easement was acquired.

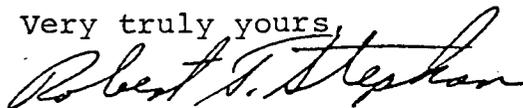
We do not believe that an easement granted for purposes of public travel can logically be extended to include seismographic operations within the permitted use. In State v. Greene, 5 Kan. App. 2d 698 (1981), the Kansas Court of Appeals was asked to determine whether protesters at an anti-nuclear demonstration who were standing on a county road intersection containing a railroad crossing easement could properly remain there. The protesters argued that they could stand in the intersection even though they were blocking the railroad tracks because they were on a public road. The court disagreed, stating:

"The public's right to use a public highway is the right to use it for purposes of travel. It does not encompass a right to deliberately deprive another person of the use of his property." Id. at Syl. ¶5.

Conducting seismic operations on a public road does not constitute travel. The seismographic company would have no greater right to use the road for purposes other than travel than any other member of the public. Therefore, the county cannot authorize the use of seismic thumpers upon county roads in which the county has only an easement for a public road because such use is not for purposes of travel. The landowner of the property would retain the power to authorize or refuse to authorize the seismographic company to use his property for its operations. See, Attorney General Opinion No. 79-234.

However, because seismic operations may impair or interfere with the flow of traffic on county roads, the county may exercise its police power to enact regulations necessary to protect the public safety.

Very truly yours,


ROBERT T. STEPHAN

Attorney General of Kansas


Brenda L. Hoyt
Assistant Attorney General

RTS:BJS:BLH:hle