

February 11, 2022

House Committee on Agriculture
Kansas Legislature
300 SW 10th St,
Topeka, KS 66612

Subject: Hearing on House Bill 2531

Members of the Committee on Agriculture:

I'm writing this testimony in opposition to House Bill No. 2531. My firm represents various farmers, ranchers, and landowners across Kansas, and specifically clients of that type in Phillips and Norton Counties who will be negatively affected by this bill.

As written, this bill will allow or make it easier for nefarious parties—under the guise of pursuing “agricultural activity”—to trespass across their neighbors’ property and install pipelines for their private benefit.

As you're well aware, basic property law dictates that any private party wishing to install a pipeline across land they do not own must obtain an easement from the landowner. Contrary to popular belief, installing such a pipeline in the county road right-of-way does not absolve the private party of this requirement; it merely adds the additional requirement that such party *also* get approval of the county commission to install the pipeline in a way that doesn't affect the county's right-of-way. In other words, the issuance of a permit by the county does not in any way imply an easement on public or private property.

Because of those tenets of property law, it's unclear the purpose of this bill. In the most charitable reading, it can be seen as an attempt to streamline the county permit process, which brings up the question of is this a solution looking for a problem.

Read in a less charitable way, this appears to be an attempt to give private parties the same status as public utilities, without any benefit to the public. “In Kansas, the authority to place public utilities in road right-of-way has been established by a series of Kansas Supreme Court decisions and were best summarized by *Mall v. C. & W. Rural Elec. Coop. Association Inc.*, 213 P.2d 993,996 (Kan. 1950). These court cases generally allow the use of highway right-of-way by public utilities, provided that it does not ‘seriously impede or endanger public travel or unnecessarily interfere with the reasonable use of the highway by other members of the public and there is no invasions of the rights of the owners of abutting lands.’ There are specific statutory provisions for electric cooperatives (KSA 17-4601 et seq.), sewerage corporations (KSA 17-623), telegraph and telecommunications companies (KSA 17-1901 et seq.). State statutes allow cities to have franchise agreements with utility companies which authorize these utilities to

occupy the city's right-of-way for a fee, and provide service to city customers (KSA 12-2001 et seq.). State statutes do not allow counties to have franchise agreements. In 2002 there was legislative activity in this area, and KSA 17-1902 was revised to address issues related to competition between telecommunication companies and the difficulty sometimes encountered by new providers. This law specifically addresses telecommunication lines in cities, but is generally used as a guide by cities and counties on relationships and procedures with other types of utilities."ⁱ

This bill seems to be an attempt to put a farmer or rancher in the same position as a public utility, in that they can install pipelines in the county's right-of-way. The big difference being that public utilities provide a general public benefit, while this law purely benefits private actors.

Read in the harshest light, this bill is a violation of due process and a taking by the government. The bill creates an automatic approval of a pipeline if no action is taken within 60 days, and includes no notice provision to notify affected landowners, which is a serious due process problem. In addition, the bill retroactively approves any pipelines previously installed, *regardless of whether the owner of the pipeline has an easement from the underlying landowner*. This amounts to a taking of private property; making "legal" a pipeline installed under illegal trespass and taking the real property of the affected landowner for the benefit of the pipeline owner.

The exact scenario envisioned by this bill has already happened. Further, it must be acknowledged that this bill appears to be for the direct benefit of a certain prominent landowner and hog farmer in Phillips County, Mr. Terry Nelson, who has already attempted to install a pipeline across his neighbor's land, in the county right-of-way. In 2021, in *Rodney L. Ross, et al. vs. Norman Terry Nelson, et al.*, case number 2019-CV-14, in Phillips County District Court, "a Phillips County jury awarded two landowners a total of \$134,000 in actual damages after Mr. Nelson illegally installed pipe on their property to transfer a mixture of urine and manure from a confined-animal facility so it could be sprayed on fields from irrigation pivots."ⁱⁱ Punitive damages are still to be determined. A summary of the proceedings from the *Kansas Reflector* is attached to this testimony as Exhibit A.

To fix the deficiencies of this bill, the Committee should amend it to specifically reference Kansas law acknowledging that easements from landowners adjoining county rights-of-way are still the law of the land and are required for anyone wishing to install pipeline on land they don't own. In addition, the Committee should adopt Oklahoma's model for oil and gas pipelines which requires operators to negotiate damages with the landowner prior to commencing operations, or else face treble damages. See 52 OK Stat § 52-318.5 (2020), attached as Exhibit B.

The bottom line is that this bill flies in the face of what the law has been in Kansas for the past 161 years. At best this bill obfuscates basic property law by implying that easements aren't necessary and only the county's permission is required to construct a pipeline across another's land. At worst, it is a naked taking of private property for the benefit of other private actors.

For those reasons, on behalf of our farm and ranch clients across the state and specifically in Norton and Phillips counties, we oppose House Bill No. 2531 and respectfully request the Committee vote down this bill.

Kindest Regards,



Gabe Hubbard, for the firm,
on behalf of clients of
Graber & Johnson Law Group, LLC

ⁱ *Guide For Accommodating Utilities Within Right-Of-Way For Counties & Small Cities In Kansas*, Kansas Local Technical Assistance Program (LTAP) Kansas University Transportation Center, March 2007

ⁱⁱ "Phillips County jury sticks hog producer with \$134,000 judgment in rare trespassing case",

<https://kansasreflector.com/2021/08/05/phillips-county-jury-sticks-hog-producer-with-134000-judgment-in-rare-trespassing-case/#:~:text=TOPEKA%20%E2%80%94%20Phillips%20County%20jury,on%20fields%20from%20irrigation%20pivots>. Retrieved February 11, 2022

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Exhibit A

Phillips County jury sticks hog producer with \$134,000 judgment in rare trespassing case

Lawsuit stems from illegal pipe used to move liquified manure to fields

By: [Tim Carpenter](#) - August 5, 2021 9:40 am



A Phillips County jury awarded landowners \$134,000 after a prominent Kansas hog producer illegally installed pipe on their property to transfer liquified waste from a confined-animal facility so it could be sprayed on fields from irrigation pivots. A judge hasn't set punitive damages against Terry Nelson, of northcentral Kansas. (Scott Olson/Getty Images)

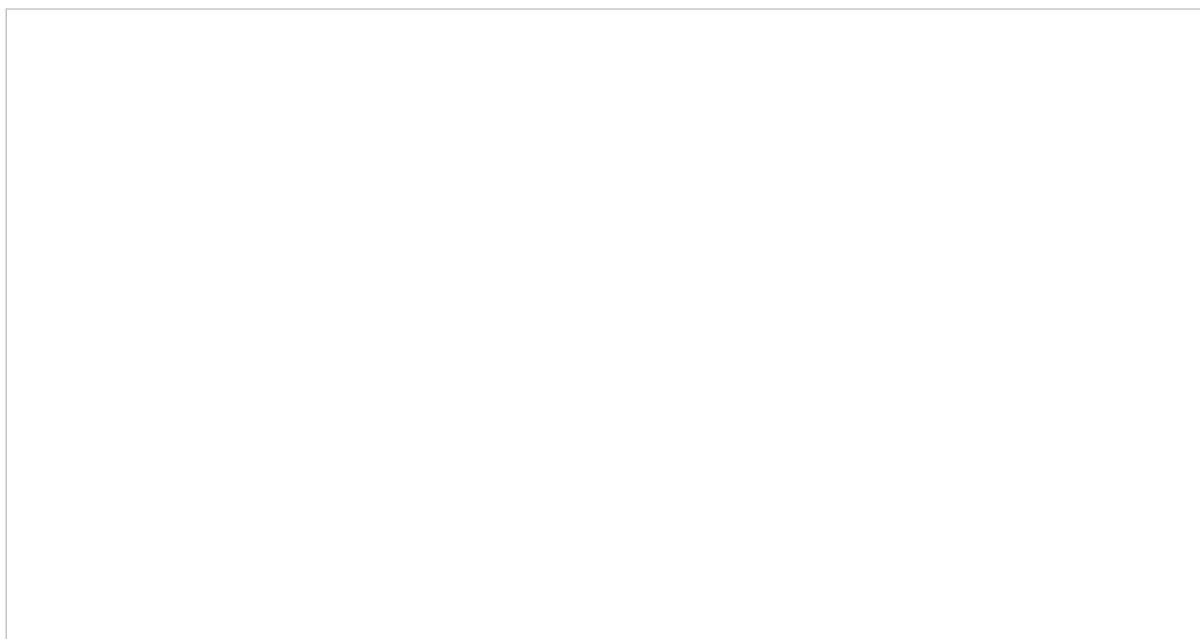
TOPEKA — A Phillips County jury awarded two landowners a total of \$134,000 in actual damages after a prominent Kansas hog producer illegally installed pipe on their property to transfer a mixture of urine and manure from a confined-animal facility so it could be sprayed on fields from irrigation pivots.

The judge has not determined punitive damages against defendant Terry Nelson, [who has operated a far-flung hog operation](#) based in Phillips County and suffered a colossal barn fire four years ago that killed thousands of pigs.

The Nelson family also has been at the center of years of legal conflict involving the Kansas Department of Health and Environment, Kansas Livestock Association and the Sierra Club regarding construction and operation of confined animal feeding operations, or CAFOs, in northcentral Kansas along the border with Nebraska.

Plaintiffs Laura Field as well as Rodney and Tonda Ross, who raise corn and soybeans on their farm, were awarded \$65,000 each from Nelson for trespassing. That portion of the July 22 judgment was based on unauthorized placement of miles of underground pipe on the plaintiffs' land.

In addition, the jury awarded plaintiffs \$2,000 after concluding Nelson created a nuisance by allowing liquified waste sprayed on fields to drift onto neighboring property.



Kansas hog producer Terry Nelson, pictured with his daughter-in-law, Julia Nelson, lost a Phillips County jury trial in which two plaintiffs were awarded \$134,000 in damages after the Nelsons trespassed on their land to install pipe used to carry hog waste to fields. (Screen capture/Kansas Reflector)

In an interview Wednesday, Rodney Ross said Nelson installed the pipe in early 2019 without permission of landowners and Nelson warned people there was nothing anyone could do about it. Nelson misled KDHE to conceal spraying of waste when the wind blew fluid and odor at the Ross home located about 180 feet away, Rodney Ross said.

The spraying was so intrusive the smell was as strong inside the home as it was outside, he said. The waste lured an army of flies to exterior siding of the house, Rodney Ross said.

He said Nelson had ceased spraying waste on that ground and removed hogs from barns about 1 mile from the Ross homestead.

“The air is fresh. You can stand to be in your own yard,” said Rodney Ross, who welcomed the jury verdict. “I like the outcome. It’s exactly what we wanted.”

Wichita attorney David Traster, of the Foulston Siefkin firm, said in court filings Nelson operated his agricultural businesses lawfully under KDHE approval. Traster argued the 2019 lawsuit should have been dismissed due to the statute of limitations.

Nelson agreed his business produced hog waste, Traster said, but denied the operation involved a “civil conspiracy” to outwit KDHE and damage property values of neighboring farmers.

Traster filed a counterclaim seeking more than \$75,000 because the plaintiffs undermined profitability of Nelson’s hog business. In other words, the defense lawyer said, the plaintiffs caused “economic injury, including but not limited to, additional costs and expenses, loss of profit, loss of time responding to frivolous and malicious complaints and damage to the counterclaim plaintiffs goodwill and reputation.” That counterclaim was voluntarily withdrawn.

Randy Rathbun, a Wichita attorney representing the Ross family and Field, said Nelson’s hog business caused loss of property value and peace of mind for his clients by unilaterally deciding to transport liquid waste and apply it to fields. He specifically addressed the Ross property.

“The peaceful and quiet enjoyment of their home has been ruined by hog waste drifting onto them and their property from south winds,” Rathbun said in court documents. “At times, the horrible stench of hog manure is as bad in their house as it is in their front yard.”

The cocktail originating at CAFOs operated by Nelson funneled through the pipe installed along county roads on property held by Field and the Ross family.

Rathbun said in court filings Nelson created a byzantine roster of legal entities and “corporate fictions” to mystify regulators at KDHE. The state agency turned a blind eye to Nelson’s conduct by asserting it didn’t have oversight of the movement of waste from one site to another, Rathbun said.

In 2017, fire killed about 9,000 pigs and destroyed hog barns owned by the Nelson family. Nelson sought to rebuild a Husky Hogs breeding facility near Prairie Dog Creek. KDHE granted expedited permits for that work, but the state agency later issued cease and desist orders to Nelson to stop construction of additional hog facilities that hadn’t been permitted by KDHE.

KDHE fined Nelson for ignoring orders to halt construction in Phillips and Norton counties. Consent agreements later signed by representatives of the Nelson family’s hog operations, based in Long Island, Kansas, reduced the penalty to \$34,000.

In addition, the Nelson family collaborated with the Kansas Livestock Association to test a theory that ownership of CAFOs could be divided to elude restrictions on setbacks from surface water and habitable structures such as homes, churches and schools. Half of a Nelson facility would be owned by Terry Nelson and half by Julia Nelson, his daughter-in-law.

The Sierra Club filed a lawsuit in 2018 that argued KDHE was complicit with Terry Nelson and KLA in a “legal fiction” to potentially increase concentration of hogs in a single location. A Shawnee County District Court judge in 2019 ruled for Sierra Club, but the Nelsons filed an appeal with the Kansas Court of Appeals.

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Exhibit B

§ 318.5. Negotiating Surface Damages - Appraisers - Report and Exceptions Thereto - Jury Trial

A. Prior to entering the site with heavy equipment, the operator shall negotiate with the surface owner for the payment of any damages which may be caused by the drilling operation. If the parties agree, and a written contract is signed, the operator may enter the site to drill. If agreement is not reached, or if the operator is not able to contact all parties, the operator shall petition the district court in the county in which the drilling site is located for appointment of appraisers to make recommendations to the parties and to the court concerning the amount of damages, if any. Once the operator has petitioned for appointment of appraisers, the operator may enter the site to drill.

B. Ten (10) days' notice of the petition to appoint appraisers shall be given to the opposite party, either by personal service or by leaving a copy thereof at the party's usual place of residence with some family member over fifteen (15) years of age, or, in the case of nonresidents, unknown heirs or other persons whose whereabouts cannot be ascertained, by publication in one issue of a newspaper qualified to publish legal notices in said county, as provided in Section 106 of Title 25 of the Oklahoma Statutes, said ten-day period to begin with the first publication.

C. The operator shall select one appraiser, the surface owner shall select one appraiser, and the two selected appraisers shall select a third appraiser for appointment by the court, which such third appraiser shall be a state-certified general real estate appraiser and be in good standing with the Oklahoma Real Estate Appraisal Board. Unless for good cause shown, additional time is allowed by the district court, the three (3) appraisers shall be selected within twenty (20) days of service of the notice of the petition to appoint appraisers or within twenty (20) days of the first date of publication of the notice as specified in subsection B of this section. If either of the parties fails to appoint an appraiser or if the two appraisers cannot agree on

the selection of the third appraiser within the required time period, the remaining required appraisers shall be selected by the district court upon application of either party of which at least one shall be a state-certified general real estate appraiser and be in good standing with the Oklahoma Real Estate Appraisal Board. Before entering upon their duties, such appraisers shall take and subscribe an oath, before a notary public or some other person authorized to administer oaths, that they will perform their duties faithfully and impartially to the best of their ability. They shall inspect the real property and consider the surface damages which the owner has sustained or will sustain by reason of entry upon the subject land and by reason of drilling or maintenance of oil or gas production on the subject tract of land. The appraisers shall then file a written report within thirty (30) days of the date of their appointment with the clerk of the court. The report shall set forth the quantity, boundaries and value of the property entered on or to be utilized in said oil or gas drilling, and the amount of surface damages done or to be done to the property. The appraisers shall make a valuation and determine the amount of compensation to be paid by the operator to the surface owner and the manner in which the amount shall be paid. Said appraisers shall then make a report of their proceedings to the court. The compensation of the appraisers shall be fixed and determined by the court. The operator and the surface owner shall share equally in the payment of the appraisers' fees and court costs.

D. Within ten (10) days after the report of the appraisers is filed, the clerk of the court shall forward to each attorney of record, each party, and interested party of record, a copy of the report of the appraisers and a notice stating the time limits for filing an exception or a demand for jury trial as provided for in this section. The operator shall provide the clerk of the court with the names and last-known addresses of the parties to whom the notice and report shall be mailed, sufficient copies of the notice and report to be mailed, and pre-addressed, postage-paid envelopes.

1. This notice shall be on a form prepared by the Administrative Director of the Courts, approved by the Oklahoma Supreme Court, and supplied to all district court clerks.

2. If a party has been served by publication, the clerk shall forward a copy of the report of the appraisers and the notice of time limits for filing either an exception or a demand for jury trial to the last-known mailing address of each party, if any, and shall cause a copy of the notice of time limits to be published in one issue of a newspaper qualified to publish legal notices as provided in Section 106 of Title 25 of the Oklahoma Statutes.

3. After issuing the notice provided herein, the clerk shall endorse on the notice form filed in the case the date that a copy of the report and the notice form was forwarded to each attorney of record, each party, and each interested party of record, or the date the notice was published.

E. The time for filing an exception to the report or a demand for jury trial shall be calculated as commencing from the date the report of the appraisers is filed with the court. Upon failure of the clerk to give notice within the time prescribed, the court, upon application by any interested party, may extend the time for filing an exception to the report or filing a demand for trial by jury for a reasonable period of time not less than twenty (20) days from the date the application is heard by the court. Appraisers' fees and court costs may be the subject of an exception, may be included in an action by the petitioner, and may be set and allowed by the court.

F. The report of the appraisers may be reviewed by the court, upon written exceptions filed with the court by either party within thirty (30) days after the filing of the report. After the hearing the court shall enter the appropriate order either by confirmation, rejection, modification, or order of a new appraisal for good cause shown. Provided, that in the event a new appraisal is ordered, the operator shall have continuing right of entry subject to the continuance of the bond required herein. Either party may, within sixty (60) days after the filing of such report, file with the clerk a

written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury. The trial shall be conducted and judgment entered in the same manner as railroad condemnation actions tried in the court. A copy of the final judgment shall be forwarded to the county assessor in the county or counties in which the property is located. If the party demanding the jury trial does not recover a more favorable verdict than the assessment award of the appraisers, all court costs including reasonable attorney fees shall be assessed against the party.

History:

Added by Laws 1982, HB 1460, c. 341, § 4, emerg. eff. July 1, 1982; Amended by Laws 1986, HB 1838, c. 227, § 8, eff. November 1, 1986; Amended by Laws 1987, HB 1261, c. 189, § 6, emerg. eff. June 29, 1987; Amended by Laws 2001, SB 632, c. 258, §9, emerg. eff. July 1, 2001 (repealed by Laws 2002, HB 2924, c. 22, §34, emerg. eff. March 8, 2002); Amended by Laws 2001, HB 1724, c. 265, §1, emerg. eff. July 1, 2001; Amended by Laws 2002, HB 2924, c. 22, §16, emerg. eff. March 8, 2002.