

Testimony before the House Agriculture Committee  
HB 2531 – County road ROW authority  
In-person testimony in support  
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Mr. Chairman & members of the House Agriculture Committee:

I am an attorney with the Adams Jones Law Firm. Our main office is in Wichita, but we also have offices in Ulysses and El Dorado. I have represented various agricultural interests over the years, and I have been asked by some of those clients to provide the legal background in support of HB 2531.

Others have addressed the importance of agricultural pipelines in road rights of way and the widespread history of their use. My testimony focuses on how the need for HB 2531 arose and came to light and why some of the concerns others have raised to the bill miss the mark.

Some people think of county and township roads as being county or township property, but that's not true. The land on which a road right-of-way runs technically belongs to the adjoining landowner. The rights-of-way easement gives the public a right to use the land for transportation purposes. The public right to build and maintain roads in most rural areas is delegated to counties and townships. Counties also have the power to regulate how members of the public can use their rights to travel those roads. However, that delegation of power and authority came from the Legislature.

The rights of many private entities to use the road rights of way aren't granted by the county or by the township. They are granted by the Legislature.

The Legislature has granted many types of private entities various kinds of rights to use public road rights-of-way. For example, private developers are granted the right to place private water lines in a public right-of-way by virtue of K.S.A. 19-2618 and 2619. Private irrigation companies and milling enterprises are granted the right to use the rights-of-way in city streets for pipes, canals, and raceways by K.S.A. 17-618. Fully private telecommunications companies are expressly granted the power to use public road rights-of-way in K.S.A. 17-1902. However, in all the statutes authorizing private entities to use road rights-of-way we do not find one in which the Legislature expressly authorized right-of-way use for agricultural pipelines other than as to state highways (K.S.A. 68-413b.) For decades this is something no one really noticed. Counties have long given private entities permission to lay pipelines in and across road rights of way for agricultural purposes and farming entities have long used that permission to install and operate pipelines.

But then something happened. An owner of land adjacent to a dirt road in Phillips County had a dispute with a farmer about the smell of the fertilizer the farmer put on a field. That farmer happened to have an agricultural pipeline that was installed with the permission of the county in

the right of way next to the landowner's land. So, the landowner sued the farmer claiming that because he owned the land that was subject to the road right-of-way, when the farmer installed the pipeline and left it there, he was trespassing on the owner's land. The Court agreed with the owner and ruled against the farmer. The court noted, in essence, that the Legislature had never expressly authorized the use of public road rights of way for private agricultural pipelines and so that was not an authorized use of the right-of-way and, in fact, not a use of the public right of way easement at all. Instead, the farmer's pipeline and its use were trespasses on the owner of the underlying land. The court wrote an extensive decision pointing out that the Legislature has granted rights for other private entities to install pipelines or make other uses of road rights of way but has never done so for agricultural users.

That was a bad result for this farmer, but its impact snowballed. Because the pipeline was unauthorized the court found that the farming operation was not in compliance with the law. Because it was not in compliance with the law, the court determined that the pipeline was not entitled to the protections of the "right to farm" statute that would otherwise protect the farmer's use against nuisance claims arising from the smell of the fertilizer. See K.S.A. 2-3201 *et seq.* As a result, the jury was allowed to enter a judgment against the farmer for nuisance—something that could not have happened if the Legislature had given the counties authority to permit agricultural interests to place pipelines in the public road rights-of-way. The bigger ripple, though, is that other farmers, whom I represent, face the possibility of lawsuits over the exact same thing. As your rural constituents will tell you, the practice of counties permitting private agricultural pipelines in county and township roads is common, even though it is unauthorized.

One might think that the district court must simply be wrong and that of course counties can permit agricultural pipelines in road rights-of-way. I was not involved in the Phillips County lawsuit. I became aware of it only after it had been decided, so this is something I looked into. In fact, a Kansas Supreme Court decision generally supports the judge's ruling. *State v. Weber*, 88 Kan. 175 (1912), suggests that purely private entities have no inherent right to use public road rights-of-way and possess only such rights as are granted by the Legislature. So, the solution to the problem is not to be found in the courts. The court's role ended in identifying the problem. The resolution is in the hands of the Legislature.

The solution contained in HB 2531 is the right one. The county commission is the right place to have the permitting process since it is the county that has the responsibility over county roads. Because the bill codifies what is already happening, it creates neither substantial new costs nor new risks for the counties. While the fiscal note theorizes that if the owner of the pipeline does not maintain the pipeline that could cause some cost to the county, we are not aware of any instance in which that has occurred. The bill empowers responsible county commissions with appropriate discretion to protect the public interest and expressly places the costs of installing, maintaining and moving the pipelines, if needed, on the pipeline owners. At the same time, it wisely limits county commissioners' discretion to keep them from being drawn into controversies they are not the appropriate body to decide—like whether a specific project that needs a pipeline should be built.

I urge the passage of HB 2531. A failure to do so would not only imperil agricultural producers but would also put Phillips County, and other similarly situated counties that rely heavily on those producers, in serious jeopardy.

Patrick Hughes