

**IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA**

**HOLT COUNTY, NEBRASKA,**  
Plaintiff,

Case No. CI98-9

vs.

**DECREE**

**CRB FARMS, a Nebraska partnership, et al.,**  
Defendants.

**DATE OF TRIAL:** June 1, 1999.

**DATE OF DECISION:** July 13, 1999.

**APPEARANCES:**

For plaintiff: Thomas P. Herzog, Holt County Attorney.

For defendants:

Ewing Township: James G. Kube.

Mlnarik(s): Boyd W. Strope, who was excused pursuant to motion at commencement of trial, without defendants.

CRB Farms: Noyes W. Rogers and Michelle S. Stirek.

**SUBJECT OF DECREE:** final decision on the merits following trial to the court in equity.

**FINDINGS:** The court finds and concludes that:

1. This case concerns a pipeline buried under a public road. The nature of the materials transported through the pipeline is irrelevant to the legal analysis. The issues would remain the same whether the pipeline carried water to livestock, drainage from a field sump, lagoon effluent to center pivot irrigation systems, slurry from a mining operation, or the supply for a decorative water fountain.

2. As a preliminary matter, the court considers the state of the pleadings upon which the case is to be decided.

a. Following a pretrial conference on February 25, 1999, the court entered a pretrial order regarding pleadings. The order allowed the plaintiff (“the county”) 14 days from the pretrial conference to file a second amended petition. The plaintiff timely filed that second amended petition on March 10.

b. The pretrial order further allowed all defendants 14 days after the filing of the second amended petition to file an answer, with or without cross-petition, and stated that in the event of

failure to do so, the respective defendants would be deemed to have elected to have such defendant's previous answer stand as the answer to the operative petition.

c. The 14 days expired on March 24, 1999. The defendant CRB Farms ("CRB") timely filed its answer on March 19. The defendants Mlnarik timely filed an answer and cross-petition (dismissed shortly before trial) on March 19. However, the answer and cross-claim of the defendant Ewing Township ("the township") was not filed until March 26, 1999. The township neither sought any extension of the time for filing nor requested any amendment to the pretrial order. Therefore, pursuant to the pretrial order, the township is deemed to have elected to stand upon the answer filed on July 27, 1998, which contains no cross-petition or cross-claim.

d. The county sought and was granted leave to file a third amended petition. At trial, CRB was granted leave to file its first amended answer to the third amended petition.

e. Because the township failed to timely file any cross-petition or cross-claim and because the cross-petition of the defendants Mlnarik was dismissed by said defendants before trial, the case was essentially tried upon the county's third amended petition and CRB's first amended answer thereto. The township's answer filed on July 27, 1998, essentially admits the allegations of the county's petition.

3. The county filed this action for declaratory judgment under NEB. REV. STAT. § 25-21,149 *et seq.* (Reissue 1995).

a. An action for declaratory judgment is sui generis, and whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *DeCoste v. City of Wahoo*, 255 Neb. 266, 583 N.W.2d 595 (1998).

b. The county's third amended petition states two causes of action. The first cause of action sets forth a cause of action to quiet title to an easement. A quiet title action sounds in equity. *Mueller v. Bohannon*, 256 Neb. 286 (1999).

c. The second cause of action essentially alleges a continuing trespass and seeks injunctive relief. An action for injunction sounds in equity, and equitable remedies are generally not available where there exists an adequate remedy at law. *Central States Found. v. Balka*, 256 Neb. 369 (1999). The owner of real estate has the legal right to use and operate his land free from repeated acts of trespass, and an injunction will issue to restrain such acts, especially where committed under a claim

which indicates that the trespass will be continued. *Van Donselaar v. Conkey*, 177 Neb. 169, 128 N.W.2d 390 (1964). Equity will afford relief by the process of injunction against repeated acts of trespass, especially where committed under a claim which indicates a continuance and constant repetition of it. *Id.*

4. Certain facts are admitted by the pleadings:

a. The county and the township are political subdivisions of this state.

b. CRB is a Nebraska partnership carrying on a trade or business in this state.

c. CRB owns the real estate underlying the pipe in question on both sides of the trail road and underlying the road itself where the pipe crosses under the road. Because the legal descriptions are not material to the findings, the court omits the specific legal descriptions at this point.

d. The real estate involved is located within the township's boundaries.

e. The county possesses an easement for a road right-of-way for a trail road existing along the east line of Section 15, Township 26 North, Range 10 West of the 6<sup>th</sup> P.M. in Holt County, Nebraska. The easement is a public prescriptive easement for the use and travel of the public. The user by the public of the trail road established the prescriptive right and, as the appropriate public authority, the county holds the easement for the benefit of the public. The easement was in existence and in effect on May 16, 1998.

f. On May 16, 1998, CRB caused a trench to be dug across said road and caused an eight-inch pipe to be installed in the trench as part of a pipe leading from CRB's hog waste lagoons located in the East Half of Section 15 across the road into Section 14.

5. In addition, the parties stipulated that neither CRB nor its agents applied to anyone for permission to lay the pipe below the road.

6. The pleadings essentially concede all elements necessary for the county's prayer for relief on its first cause of action. To the extent not specifically admitted in the pleadings, the evidence supplies the remainder of support necessary for such relief. The circumstances require no further discussion on this point. The court finds generally for the plaintiff and against the defendants on the plaintiff's first cause of action.

7. The real controversy surrounds the second cause of action. There is one matter in the record which requires preliminary discussion. (78:25-81:5.) CRB offered Exhibits 29 and 30. Neither the county nor the township objected to Exhibit 29, but the court failed to immediately rule upon Exhibit

29. Further discussion followed regarding Exhibit 30, which was subsequently re-offered and expressly received in evidence by the court. The parties did not re-offer, object to, insist upon a ruling, or otherwise discuss the admission of Exhibit 29 thereafter. Because there was no objection to Exhibit 29, the court should have immediately received it. The court intended to receive Exhibit 29, and the failure to do so on the record was a mere oversight. The court has considered Exhibit 29, to the extent that it deserves any weight, in making the decision in this case. As part of the decree in this case, the court will expressly receive Exhibit 29, which has been included in the trial record, to correct the erroneous failure to expressly rule upon the offer of the same.

8. As CRB's brief concedes, there has been, at a minimum, a trespass by CRB upon the road right-of-way when the trench was opened to lay in the pipe. Obviously, during the relatively brief time the trench was opened, CRB's action would have interfered with the trail road had anyone attempted to then use the road. CRB maintains that this constituted a single incident of trespass and denies any continuing trespass. CRB asserts the pleadings and evidence fail to support the county's claim for equitable relief. Essentially, the decision concerning the second cause of action depends on two basic issues: (1) was, and is, there any continuing interference with the trail road easement, either factually or legally, caused by the buried pipe, and, (2) depending upon the answer to the first question, what relief, if any, is appropriate.

9. The evidence shows, without dispute, that the road in question is a typical trail road in the Sandhills of Nebraska.

a. The road receives no regular maintenance. The road formed from the wearing of two tire tracks over the surface by repeated vehicular traffic. Neither the county nor the township ever graded the road. The county adduced no evidence of any maintenance ever having been performed by the county. The township adduced no direct evidence of any maintenance provided by the township. The evidence raises a slight inference that there may have been some "spot" maintenance on this road performed by the township, such as to "fill in a hole or [fix] some damage . . . ." (44:11-16.) However, there is no evidence of any repairs performed or contemplated at the location of the pipe crossing, either before or after the laying of the pipe. The witnesses characterized the road as a minimum maintenance road.

b. It lies upon a section line between Sections 14 and 15. Various people utilize the road to get to their pastures. No evidence suggests that the road leads to any homestead, housing

development, city, or village, or otherwise connects to any other significant roadway. The road lies in a rural portion of Holt County some distance from any significant population area. No evidence suggests any likelihood of future development in the area. There is no evidence indicating any possible future need to improve the road, to modify or improve the road surface, or otherwise to change the character of the existing road.

10. The county's road department construction supervisor testified that:

a. If the county did not have to work up or grade the trail road, a line buried five feet under the surface would not interfere with the traveled portion of the road. (12:22-13:4.)

b. A pipe buried five feet below the surface of the earth would not be considered an obstacle to grading the road and creating a barrow pit because of the pipe's depth. (13:17-23.)

c. He initially testified that the pipe, as currently located, would not affect the public safety. (17:24-18:2.) However, he admitted that, if the pipe should break and wash out a portion of the road, it would affect public safety. (18:3-6.)

d. The county road department needs to know when pipes are located under roads for future planning and to insure public safety. (19:12-20:15.) The road department would have to consider the pipe for future improvement. (20:24-21:3.) But he foresaw no problem if the county were required to go in and further develop the road. (20:1-5.)

e. Although he testified he had not designed the area for use by an open, public, heavily-traveled road, and that it was possible a future design plan could call for removing sufficient dirt to affect the pipe, there was absolutely no evidence to show any likelihood of such development in the future. (22:6-14.) Although he conceded that the necessity for altering the pipe would increase the cost of future construction, he lacked any knowledge of any standards requiring such alteration. (22:22-23:10.) Such testimony smacks of speculation and conjecture, and fails to constitute evidence worthy of reliance by this court. Counsel succeeded in prodding the witness to grudgingly concede the possibility of counsel's speculation regarding future events. But counsel failed to change the basic thrust of the witness' testimony that the pipe, as presently buried, does not interfere with the actual use and travel of the public upon the trail road.

11. CRB's consulting engineer, Ray Hajek, essentially testified that the underlying pipe would not interfere with the use and travel of the road. However, he admitted that the pipe could leak under the

road (114:24-115:1), the pipe could break under the road (115:2-4), and the pipe could require maintenance under the road (115:5-7).

12. Part of Hajek's testimony focused on the nature of the soil overlying the trench that was dug to bury the pipe.

a. He testified:

Q. Could you describe the soils that overlay this pipe?

A. Yes.

Q. Please do so.

A. I consider those as a fine sand, clean.

Q. Pure sand?

A. I said a fine sand, a fine sand, relatively clean.

Q. And when you say that, do you mean that there's no silt or clay or anything, just sand?

A. That's correct.

Q. Is it just basically kind of pure sand?

A. Yes.

Q. Well, isn't it true that sand of that type can be subject to erosion?

A. Yes.

Q. Wind erosion?

A. Yes.

Q. And water erosion?

A. Uh-huh.

Q. And that that overlay sand over that pipe – overlaying that pipe could wear down and erode?

A. Yes.

(115:14-116:10.)

b. Hajek later testified:

Q. Now, Mr. Hajek, earlier you talked about your experience with crossings of roads, pipe crossings of roads. One of those methods is to bore the pipe, is it not?

A. Yes.

Q. And that would be the most difficult and expensive method, normally, to bore, isn't that normally true?

A. May I answer without saying yes or no?

Q. It's alright with me.

A. Okay. It depends upon what the obstacles are in the way. If you have bare ground, an open trench is usually less expensive than a boring job. If you have tremendous amounts of overburden, a boring job may be less expensive than the open trench. Or, if you have utilities or if you have paving, or if you have a whole bunch of stuff on the surface

of the ground, and you just want to get underneath it, then the boring, more than likely, is going to be less expensive than a surface cut.

Q. Okay. Thank you.

A. Uh-huh.

Q. I understand what you mean. Now, if one bores it, then one doesn't have to repair the surface?

A. That's correct.

Q. But if one takes the backhoe to it, then one has to deal with the disruption at the surface, is that right?

A. Yes.

Q. And of course, if that's on an oil road, that could be patched, and maybe be nothing more than a minor speed bump, right?

A. Uh-huh.

Q. You do agree with me?

A. Correct.

Q. And if that's done on this trail road, and you disrupt the road, in this instance it's subject to starting a blowout, isn't that right?

A. Yes.

(127:7-128:20.)

13. Exhibit 11 shows the area of the pipeline crossing in 1998 shortly after construction. Exhibit 29 shows the same area in May of 1999 from a slightly different angle.

a. Exhibit 29 shows that, while there has been some grass cover reestablished in the disturbed area, there remain significant portions uncovered.

b. However, Exhibit 29 also shows wheel tracks reestablished across the disturbed area of the crossing.

c. Other than the remaining absence of some grass cover, the road surface remains essentially unchanged.

14. The trench under the road was open only for about 45 minutes during the construction process. There is no evidence of any vehicle obstructed or otherwise affected during the brief period the trench was opened. Lewis Vandersnick testified that, during the third week of June in 1998, his vehicle became stuck while attempting to cross the disturbed part of the ground. Except for the single incident involving Lewis Vandersnick, no party adduced evidence of any difficulties in travel upon the road from the time of construction to the date of trial. No party adduced evidence of any repairs undertaken by the

county or the township to the road as a result of the disturbance to the road surface nor any evidence that future repairs would be necessary.

15. Under somewhat different circumstances, in *Art-Kraft Signs, Inc. v. County of Hall*, 203 Neb. 523, 279 N.W.2d 159 (1979), the Nebraska Supreme Court stated some basic principles applicable in this case:

a. NEB. REV. STAT. § 39-1402 (Reissue 1998) assigns general supervision and control of the public roads in each county to the county board.

b. The “county board” means the board of county supervisors in township counties. NEB. REV. STAT. § 39-1401(1) (Reissue 1998).

c. Counties operating under a township organization are not deprived of jurisdiction over township roads and the county does possess the authority removal of an obstruction from a township road. The pipeline in this case was constructed on a township road and Holt County operates under a supervisor system whereby each township has a township board. NEB. REV. STAT. § 39-1520 (Reissue 1998) grants the township board a limited power of having general supervision of road and culvert work on township roads.

d. NEB. REV. STAT. § 39-1401(2) (Reissue 1998) provides: “Public roads shall mean all roads within this state which have been laid out in pursuance of any law of this state, and which have not been vacated in pursuance of law, and all roads located and opened by the county board . . . and traveled for more than ten years . . . .”

e. This statutory definition of public roads makes no distinction between county and township roads for the purposes of § 39-1402, which expressly grants control over public roads with the county board of the county wherein they are located.

16. There appears very little legal precedent in Nebraska to guide the court’s analysis.

a. In *State v. Merritt Bros. Sand & Gravel Co.*, 180 Neb. 660, 144 N.W.2d 180 (1966), the Supreme Court recognized that a landowner whose property abuts upon a highway right-of-way may have rights in such right-of-way different in kind from, and greater than, the rights of the public generally, and at least has the same rights. Nebraska case law does not expressly describe those rights in the context of a pipeline under a road.

b. General authority states:

The use which the abutting owner may make of the highway includes the right to maintain ditches or drains for the benefit of his lands, provided he does not interfere with the use as a highway, and to this end he must take proper precaution to cover them so as not to interfere with the safety and convenience of travelers, and thereafter to keep the covering in repair. This right of the owner is subject to such reasonable rules and regulations as may be imposed by the state or the local authorities.

*The owner of the fee has the right to lay a pipeline across and under the bed of the road, provided he does not thereby obstruct the road; and he may convey that right to another.*

39A C.J.S. *Highways* § 142 (1976) (emphasis supplied). See also *Thom v. Dodge County*, 64 Neb 845, 90 N.W. 763 (1902) (abutting landowner has right to use of road ditch for drainage of his land as is incidental to road's existence and does not inconvenience the public or individuals or injure the public work).

17. Before considering the nature of an “obstruction,” the court considers the meaning of the term “road.”

a. As early as the decision in *People v. Buffalo County Comm'rs*, 4 Neb. 150 (1875), the Nebraska Supreme Court recognized that the term “road” is generally applied to highways, and as a generic term, includes highway, street, and lane. In *Weaver v. Dawson County Mut. Tel. Co.*, 82 Neb. 696, 118 N.W. 650 (1908), the Court reiterated that the word “road” is a generic term, and when unqualified is sufficiently comprehensive to include highways, public roads, private roads, streets, and lanes.

b. NEB. REV. STAT. § 39-101(3) (Reissue 1998) defines “highway” as “the entire width between the boundary limits of any street, road, avenue, boulevard, or way which is publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel . . . .”

c. NEB. REV. STAT. § 39-101(11) (Reissue 1998) defines “roadway” as “that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm or shoulder. . . .”

d. The court concludes that, in the present context, the term “road” means the traveled road surface as actually constructed and maintained. Because there has been no construction and no evidence of the extent of any maintenance at the pipeline crossing site, the “road” at that point consists of the surface of the ground and the tracks thereon created by vehicular traffic.

18. The public has the right to unobstructed use of its highways. 40 C.J.S. *Highways* § 220 (1991). Any unauthorized obstruction thereof, or encroachment thereon, is unlawful. *Id.*

a. In general, an unlawful obstruction or encroachment may consist of anything which renders the highway less commodious or convenient for the use of the public. 40 C.J.S. *Highways* § 221 (1991). The test has been stated as being whether the structure in question unlawfully obstructs the free passage of the public in the customary manner. *Id.*

b. In *Shupe v. County of Antelope*, 157 Neb. 374, 59 N.W.2d 710 (1953), the Supreme Court stated that an obstruction includes anything which will interfere with the public's reasonable use of the highway easement. A fence constitutes such an obstruction. *Burkhardt v. Cihlar*, 149 Neb. 712, 32 N.W.2d 197 (1948). In *Yeng v. Hunt*, 201 Neb. 1, 265 N.W.2d 854 (1978), the Court inferentially considered an obstruction as something "unreasonably interfering with the passage of traffic over the road." *Id.* at 1, 265 N.W.2d at \_\_\_ (parking vehicles and other equipment in such a way as to interfere with use of easement). Similarly, the Court in *Barrett v. Hand*, 158 Neb. 273, 63 N.W.2d 185 (1954) treated an obstruction as something that actually hinders a traveler upon the highway. However, the obstruction considered in *Barrett* was a fence, and the Court did not directly consider the definition of obstruction. See also *Workman v. Lincoln Telephone & Telegraph Co.*, 102 Neb. 191, 166 N.W. 550 (1918) (heavily charged electric wire dangling from overhead pole with part of wire lying on street surface).

c. The pipeline, as presently situated, is not an obstruction within the meaning defined above. The only evidence that any travel has ever been hindered was the single incident involving Lewis Vandernick in June of 1998. The evidence simply fails to persuade this court that the condition of the road surface, or anything else pertaining to the pipeline crossing under the road, interferes with traffic passing over the surface. The court finds the testimony of the county road department construction supervisor and the testimony of the defendant's consulting engineer, each denying any present impact upon travel over the road, persuasive. The court determines that, as a matter of fact, the present existence of the buried pipeline does not obstruct the road or interfere with the prescriptive easement obtained for use as a trail road on a section line. Generally, an injunction will not issue on the mere apprehension of the possibility of an invasion of rights. *Neff v. Boomer*, 149 Neb. 36, 31 N.W.2d 222 (1948).

19. The township’s brief concedes that “the pipe may not presently constitute a physical interference or obstacle in the use of the road . . . .” Brief for Defendant Ewing Township at 2. However, the township argues that future impacts may constitute “interference.” The court previously noted those matters in paragraph 10e above. The parties presented no evidence that any such development was underway, planned, or reasonably contemplated in the foreseeable future. Any inference of such development is purely speculative. The rural character of the property renders such speculation highly unlikely. The court declines to enter the realm of unreasonable speculation.

20. The township submitted a trial brief and supplemental trial brief in support of its interest in the case, which is aligned with the interest of the county. In the absence of any present physical obstruction or interference, the township seeks relief on the county’s petition based upon a theory of “legal” interference. Arguing that § 39-1410 declares all section lines to be public roads and that § 39-1402 vests general supervision and control of public roads in the county board, it essentially argues that the installation without permission in and of itself constitutes continuing interference. It relies solely upon the plain language of the statutes. The court assumes that the county agrees with the legal position urged by the township.

a. The township correctly cites the general rule of statutory interpretation. A court must give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense and, if possible, discover the Legislature’s intent from the language of the statute itself. *In re Adoption of Cassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995).

b. NEB. REV. STAT. § 39-1402 (Reissue 1998) provides:

General supervision and control of the public roads of each county is vested in the county board. The board shall have the power and authority of establishment, improvement, maintenance and abandonment of public roads of the county and of enforcement of the laws in relation thereto as provided by the provisions of Chapter 39, articles 14 to 20, except sections 39-1520.01 and 39-1908.

(1) The Nebraska Supreme Court has held that §39-1402 constitutes a statute of general application. *State ex rel. Scherer v. Madison County Comm’rs*, 247 Neb. 384, 527 N.W.2d 615 (1995); *Sanitary and Improvement Dist. No. 1 v. County of Adams*, 209 Neb. 108, 306 N.W.2d 584 (1981). However, the higher Nebraska courts have not addressed the meaning of the word “general” as used in the phrase “general supervision and control.”

(2) The court concludes that the term “general supervision and control” means the “overall” or “principal” supervision and control. BLACK’S LAW DICTIONARY 614 (5th ed. 1979) The term does not, by its plain language, preclude the existence of rights or duties in another person or entity.

(3) The township reads the word “general” as the equivalent of “absolute” or “plenary.” That reading conflicts with the remainder of the section, by rendering the second sentence, which specifies the “power” and “authority” of the county board, superfluous. In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *Omaha World-Herald v. Dernier*, 253 Neb. 215, 570 N.W.2d 508 (1997). It is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Id.*

c. NEB. REV. STAT. § 39-1410 (Reissue 1998) provides:

The section lines are hereby declared to be public roads in each county in the state, and the county board may whenever the public good requires it open such roads without any preliminary survey and cause them to be worked in the same manner as other public roads; *Provided*, any damages claimed by reason of any such road shall be appraised and allowed in the manner provided by law. . . .

(1) The Nebraska Supreme Court, in *Olson v. Bonham*, 212 Neb. 548, 324 N.W.2d 260 (1982), stated that this section does not authorize a county to open a section line road without giving notice to the landowners, hearing the landowners’ claims for damages, or appointing appraisers and making provisions for the payment of landowners’ damages, and that if the county attempts to do so, it is trespassing. See also *Breiner v. Holt County*, 7 Neb. App. 132, 581 N.W.2d 89 (1998).

(2) Contrary to the township’s argument, this statute adds nothing to the analysis. The county board acquires no power or authority regarding the area along a section line for a road until the road is opened. In this instance, the opening occurred by public prescriptive use for the statutory period, as CRB admitted. The only consequence of such determination arising from this statute is that the board may thereafter “cause [section lines roads] to be worked in the same manner as other public roads . . . .” NEB. REV. STAT. § 39-1410 (Reissue 1998). This language provides no additional power or authority to that already provided by other statutes, including section 39-1402.

d. The court concludes that the township's reliance upon §§ 39-1410 and 39-1402 fails to support its contention that the pipeline "legally" interferes with the road. The court's conclusion is bolstered by consideration of the showing normally required for injunctive relief for obstruction of a road.

21. In a suit by the proper public authority, injunction will commonly lie to compel the removal of an unauthorized obstruction from a legally existing public highway on showing of special damage, an irreparable injury, and the nonexistence of an adequate remedy at law. 40 C.J.S. *Highways* §226(a) (1991).

a. The county is the proper public authority. NEB. REV. STAT. § 39-1401 *et seq.* (Reissue 1998); *Art-Kraft Signs, Inc. v. County of Hall, supra*.

b. The court agrees that, if the other elements were satisfied, there would be no adequate remedy at law.

c. However, the evidence fails to show any special damage. The court has already discussed the evidence showing no impediment to travel upon the trail road, and the speculative and unlikely nature of the claims of future interference.

d. Similarly, the county and township have totally failed to establish any irreparable injury.

22. In *State v. Merritt Bros. Sand & Gravel Co., supra*, the Supreme Court stated that an injunction will not lie if the right thereto is unclear, or the damage complained of nonexistent. This court concludes that this rule applies in this case.

23. Further, injunctive relief is preventative, prohibitory, or protective, and equity usually will not issue an injunction when the action of which the plaintiff complains has been committed and injury has been done. *Rawson v. Harlan County*, 247 Neb. 944, 530 N.W.2d 923 (1995).

a. This rule would ordinarily not apply in the instance of a continuing trespass. However, in this case, the court concludes that the trespass is not continuing, because of CRB's right to the use of its fee simple property interest underlying the county's public prescriptive easement for a road where such use does not interfere with the use of the road.

b. The only wrong, the initial installation without permission, was completed and no injury, other than the vindication of a technical right of the county, remains. Compelling removal of the

pipeline is not appropriate under these circumstances. An injunction cannot be employed as a punishment for acts already committed. *Vogel v. Rawley*, 85 Neb. 600, 123 N.W. 1037 (1909).

24. Moreover, an injunction to remove the pipeline under the road would cause as much or more damage to the road's capacity for travel than the original installation. In view of CRB's right to use the underlying soil, so long as such use does not interfere with the public's right to use and travel the road, the remedy sought by the county and the township would not be equitable.

25. In many ways, the decision is limited to the peculiar facts of the case. The nature of the road, a mere trail road with no construction or maintenance, dictates a different result than an installation through the surface of a constructed, graded road surface.

26. The county brought this action for declaratory relief. Although the ultimate sanction of a mandatory injunction for removal of the pipeline is not appropriate, the respective parties are entitled to certain declaratory relief as set forth below.

27. In view of CRB's initial denial of the existence of the prescriptive easement and its admission thereof only on the figurative eve of trial, the plaintiff obtained almost total relief upon its first cause of action. The plaintiff also achieved some relief upon the second cause of action. The court concludes that the costs of the action of \$502.50, all of which have been previously paid by or ordered paid by the plaintiff, should be taxed equally to the plaintiff, to the defendant Ewing Township, and to the defendant CRB Farms. Judgment for costs of \$167.50 should be entered in favor of plaintiff and against defendant Ewing Township. Judgment for costs of \$167.50 should be entered in favor of plaintiff and against defendant CRB Farms.

28. Any requests for attorneys' fees, express or implied, should be denied.

**DECREE:** IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

1. Exhibit 29 is received in evidence and considered by the court.  
2. The court declares the respective rights, status, and other legal relations of the parties with regard to the matter in controversy as follows:

a. The plaintiff, the County of Holt, Nebraska, possesses an easement for a road right-of-way for a trail road existing along the east line of Section 15, Township 26 North, Range 10 West of the 6<sup>th</sup> P.M. in Holt County, Nebraska.

(1) The easement is a public prescriptive easement for the use and travel of the public.

(2) The user by the public of the trail road established the prescriptive right and, as the appropriate public authority, the plaintiff holds the easement for the benefit of the public.

(3) The easement was in existence and in effect on May 16, 1998, and now remains in full force and effect.

b. The title of the plaintiff, the County of Holt, Nebraska, for and on behalf of the public, in and to the public prescriptive easement above described is hereby quieted and confirmed in the plaintiff as against each of the said defendants, and each and all of them are permanently restrained and enjoined from asserting any claim or interest inconsistent therewith.

c. Subject to the public prescriptive easement of the plaintiff as set forth above, as between the parties to this action, the defendant CRB Farms is the owner in fee simple of certain real estate, including the East Half (E $\frac{1}{2}$ ) of Section 15, Township 26 North, Range 10, West of the 6<sup>th</sup> P.M. in Holt County, Nebraska.

d. On May 16, 1998, the defendant CRB Farms caused a trench to be dug across said road and caused an eight-inch pipe to be installed in the trench as part of a pipeline leading from CRB's hog waste lagoons located in the East Half of Section 15 across the road into Section 14. Neither the defendant CRB Farms nor any of its agents applied to anyone for permission to lay the pipe below the road.

e. The action of the defendant CRB Farms in causing the trench to be dug through the surface of the trail road constituted a temporary trespass upon the property right (the public prescriptive easement) of the plaintiff from the time of the opening of the trench and until the trench was properly closed and compacted.

f. The location of the pipeline, as presently buried and after the restoration of the surface, does not interfere with the plaintiff's public prescriptive easement above described.

g. The right of the defendant CRB Farms to use the soil underlying the trail road imposes a duty upon said defendant to keep the covering over the pipeline in repair, subject to the control and direction of the county board of the plaintiff.

3. The costs of the action of \$502.50, all of which have been previously paid by or ordered paid by the plaintiff, are taxed equally (a each) to the plaintiff, to the defendant Ewing Township, and to the defendant CRB Farms.

a. Judgment for costs of \$167.50 is entered in favor of plaintiff and against defendant Ewing Township.

b. Judgment for costs of \$167.50 is entered in favor of plaintiff and against defendant CRB Farms.

c. The judgment shall bear interest at the rate of 6.163% per annum from date of entry of decree until paid.

4. All other requested relief is denied.

5. All requests for attorneys' fees, express or implied, are denied.

Entered: July 13, 1999.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.
- : Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.
- : Mail postcard/notice required by § 25-1301.01 within 3 days.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.
- : Note the decision on the trial docket as: 7/13/99 Signed "Decree" entered; judgment entered accordingly.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.

Mailed to:

BY THE COURT:

\_\_\_\_\_  
William B. Cassel  
District Judge