

Surveying the Road

I have been in this job for over 10 years and it seems like every year I get a call about moving a road. The basic facts of the situation are usually the same: the requestor had his property surveyed and according to the surveyor, the road is in the “wrong” location. The road always needs to be moved farther away from the person requesting the work. Your first impression might be that a road should be in the right place, and putting the road in the right place is just the right thing to do. Wrong! The road has been in that location for over 100 years. The road location was established with the land owners’ knowledge and agreement. If location was an issue, it was settled when the road was opened.

It is helpful to understand the process of opening a rural road. Roads were opened by the county commission as an area was settled and roads became necessary. In eastern Kansas that was any time after the civil war, and in western Kansas usually prior to 1910.

The standard procedure was initiated by an interested land owner who would get a petition signed by a certain number of people and then submit the petition to the county commission. The county commission appointed road viewers. The road viewers set a date and time to view the road, and notice was published in the paper and sent to adjacent land owners. At the designated time the road viewers and the county surveyor would view the area where the road was requested. The viewers made an opinion whether the road would be of public utility, and would also determine the most practical route of the road and the width of the road. The county surveyor would stake the

road location determined by the viewers.

Adjacent land owners would submit claims for damages based on the location of the road, and the viewers would recommend the amount they thought was justified. The county surveyor made field notes of the road location and would later draw the location of the road in a road record book and perhaps place a copy in the road opening packet. The county commission would receive the report of the road viewers and order the road to be opened, or reject the petition.

If the road was to be opened, the county would pay damages to the adjacent owners. During the 100 years some of the records have been lost, and I suppose it is fair to assume that not every road opening was done as thoroughly and carefully as possible. But I think it is fair to say that the current



FIGURE 1. Fence being constructed along the edge of the road.

land owners knew where the road was located when they bought the land.

Now back to the issue of this article: moving the road. You might first think that this is just an issue between the requesting land owner and the county. This would be a good time to study Figure 1. Note the new fence being constructed along the shoulder of the road. The electric lines are located at the old fence line. Figure 1 doesn't show the other side of the road, but it is fair to assume that land owner will lose ground and will need to move his fence to accommodate the relocated right-of-way. Any change in road location negatively affects the land owner on the other side of the road who will lose land as well as any utilities in the right-of-way that will likely need to be relocated. So there are a lot of players in a road move, and only one of them will be happy.

I am not an attorney and so don't consider this legal advice, but I have been through this a number of times and learned a lot of things the hard way. Be careful when these situations arise and think things through, or you can follow a path that will be costly and time consuming.

I suggest the following three rules when dealing with requests to move the road or handling encroachments onto the right-of-way. These are really suggestions, but I feel so strongly about them that I call them rules for emphasis.

Rule 1: When asked by a land owner, we state that the road location was established when the road was originally opened and we have no right or obligation to now change that location.

Rule 2: Do not agree to a survey to find the "correct" location of the road.

Rule 3: Treat any encroachment of the existing right-of-way as an obstruction and remove it promptly.

Explanation of Rule 1 - *When asked by a land owner, we state that the road location was established when the road was originally opened and we have no right or obligation to now change that location.* In 1886 the Kansas Supreme Court in *Shaffer v Weech*, 34 KAN. 595 considered road location. A township was doing road work and wanted to move the road to the theoretical correct location as shown on the county surveyor's field notes and plat. The court ruled the road location

was established by the original survey and opening, and the county surveyor's field notes and plat must yield to the actual location where the road was opened. The court did not allow the township to move the road. So it has been settled that the "right" location for the road is the location where it was originally opened probably over 100 years ago. A survey now just reveals where the road theoretically would have been located.

Explanation of Rule 2- *Do not agree to a survey to find the "correct" location of the road.*

Agreeing to a survey is outside the scope of the county's authority as the survey could affect other parties such as the opposite land owner and utilities. A survey is just a professional opinion of where the boundary is located. A survey does not determine ownership; it just shows where the surveyor thinks the boundary is located. A survey now just reveals where the road theoretically

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would have been located based on evidence now available. There are a lot of reasons that a modern surveyor may not come to the same location as the original surveyor. A monument may have been lost and reset in a slightly different location, modern equipment is much more accurate, and there may have been some errors in the original survey and notes. But the point is there is a difference in the original survey and the current survey: the road did not move.

Explanation of Rule 3 - *Treat any encroachment of the existing right-of-way as an obstruction and remove it promptly.* The right-of-way as it exists is presumed correct, and is under the care, custody and control of the county until a judge rules otherwise. State law requires us to remove obstructions which restrict the right-of-way. If a new fence encroaches on the right-of-way, remove it and set back the materials on the adjacent property. If the land owner wants to enforce a new right-of-way line, he has the option of filing an ejectment action in district court.

My opinions stated above are based on lessons learned from mistakes I made over a period of 35 years. Remember that right-of-way issues are really title issues, and are very fact specific; it is always a good idea to consult with an attorney familiar with land law. ■

I send out a twice monthly email on current road issues and items of statewide interest. If you would like to receive these emails just send me an email request at bowers@kansascounties.org.



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