

State of New Hampshire
Site Evaluation Committee
Docket 2016-06

Prefiled testimony of Kris Pastoriza
11/15/16

If, as Eversource's lawyer, former DOT counsel Mark Hodgdon asserts, the public has the right to use the terrain under the roads, and if Hydro-Quebec and Eversource are permitted to site their Northern Pass HVDC lines under the roads, my rights as a member of the public to use the land under those roads will be encroached upon.

As stated in *State vs. Kean*

“The public, however, is entitled to the full and free use of all the territory embraced within the limits of a highway, not only for actual passage, but for all purposes that are legitimately incident thereto. Every actual encroachment upon a highway by the erection of a building or fence thereon, or any other permanent or habitual occupation thereof, is an invasion of the public right, even though it does not operate as an actual obstruction to public travel. *Wood Nuis.*, ss. 81,250. "Where there is a house erected, or an inclosure made upon any part of the king's demesnes, or of an highway, or common street, or public water, or such like public things, it is properly called a purpresture." 4 BI. Com. *167. "Pourpresture cometh of the French word `pourprise,' which signifieth a close or inclosure that is, where one encroacheth, or maketh several to himself that which ought to be common to many." Co. Lit. 277 b; Co. M.C. 38, 272. Any unauthorized erection over a highway is a purpresture. *Wood Nuis.*, s. 77; *Knox v. Mayor*, 55 Barb. 404; *Attorney-General v. Booming Co.*, 34 Mich. 462. Since the public right is coextensive with the limits of the highway, the fact that the traveled part is not thereby impeded is no defence to an indictment charging the erection or maintenance of a building or other construction within the highway. *Ros. Crim. Ev.* *619; *Commonwealth v. Wilkinson*, 16 Pick. 175; *Commonwealth v. King*, 13 Met. 115; *Commonwealth v. Blaisdell*, 107 Mass. 234; *Harrower v. Ritson*, 37 Barb. 301, 303; *Dickey v. Telegraph Co.*, 46 Me. 483; *Wright v. Saunders*, 65 Barb. 214; *Reg v. Telegraph Co.*, 8 Jur. N. S. 1153; *The King v. Wright*, 3 B. A. 681; *Reimer's Appeal*, 100 Pa. St. 182.

STATE v. KEAN, 69 N.H. 122, 125 (N.H. 1896)

Since the public right is coextensive with the limits of the highway, the public right includes the land under the highway. Applicant does not have the right to encumber this territory in a way that is an encroachment on the rights of the public by damaging it or unreasonably preventing public use of it.

“Thus the title furnishes evidence that the object of the statute was the preservation of the limits of the public right, not the prevention of obstruction to travel.”

Since so few utilities have been buried under N.H. roads, and no utilities of the size and scope of Northern Pass have been permitted, the rights of the public to the unencroached passage of water

through the soil under the roads, and the rights of the public to the subterranean matrix of soil, aquifers and groundwaters under the roads has never been considered.

“Any encroachment upon highway is unlawful.”

The applicant proposes boring and filling as yet unstated lengths of tunnel 36” in diameter under 60 miles of roads, in public and private lands. Where this Horizontal Direction Drilling does not take place, the applicant proposes creating impermeable and impenetrable 3' tall and 3' wide duct banks in which to encase their transmission cables. In Easton these underground walls would run for 7.6 miles, encroaching on the flow of groundwater across and beneath the road while funneling water that flows into them along and under the road. While fully asserting its rights to this public space under the roads, the applicant has in no way shown that their substantial installation will not encroach now, or in the future, on the rights of the public to this space and the services this space provides. Two cables at 33 lbs per foot, 5280' per mile, 9 miles of road makes 3,136,320. lbs of lead sheathed cable lying in the valley in Easton. Add to this the conduit, concrete duct banks and duct covers, and fluidized thermal backfill. This project is unprecedented in the State and the applicant desperately wishes to set a precedent for the absence of consideration of rights of the rest of the public.

Other projects of similar dimensions, though not distance, have been sited in short sections in heavily developed areas where the natural flow of waters and matrix of the soils was already compromised and where the public and abutters' ability to use the space was unlikely if not impossible. NHDOT has not ascertained the actual widths of the easement and has stated that it has no definition of disturbed ground and cannot say which portions of the proposed route are disturbed ground. This project proposes to occupy public land along predominantly rural terrain, where natural water flow is generally unconstrained and untainted.

In addition, there are long standing flowage rights, both public and private, and the applicant has not shown any documentation that their 7.6 miles of wall and 1.4 miles of 24” conduit under the ground in the Easton valley, or anywhere else, will not disrupt and impede these surface and subterranean flows.

The above ground portion of the road has been in use by the public for over 200 years. Its use has shifted from foot, oxen, and horse and cart to internal combustion engine propelled vehicles. It has been used by many groups of the public and no one group uses the space to the exclusion of others. Cars, cyclists, motorcycles, pedestrians, dogs and horses share the road. There has been a remarkable equality of use. Now the applicant proposes to significantly alter and exclusively possess a large part of the underground portion of the easement permanently. If the duct banks are 3' x 3' the project would occupy 7.5% of the 40' roadway easement width that exists in a large portion of Easton. A public resource should not be portioned out to those with the money to “make to themselves that which ought to be common to many.”