

Policy for Removing or Permitting Physical or Functional Encroachments, Structures or Uses of State Highway Right-of-Way



NEBRASKA

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DEPARTMENT OF TRANSPORTATION

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Purpose

To prescribe policy and procedures for removing or permitting encroachments, structures, or uses of State Highway right-of-way.

Authority

Neb. Rev. Stat. § 39-1359 provides the Department general authority to control the use or occupancy of State Highway rights-of-way: Section 39-1359 states as follows:

The rights-of-way acquired by the department shall be held inviolate for state highway and departmental purposes and no physical or functional encroachments, structures, or uses shall be permitted within such right-of-way limits, except by written consent of the department.

Additionally, Section 39-1360 prohibits the use of highway drainage facilities for private purposes without obtaining a permit from the department. (See appendix.) Sections 1361 and 1362 require permits from the department and set forth conditions for the use of State highway right-of-way for pipelines, sewers, pole lines, conduits, cables and other related uses. Various utilities have the right by statute to occupy State highway right-of-way. Department personnel should contact the Department's legal office if a question arises concerning a utilities right to occupy State highway right-of-way.

The Department is granted authority in Section 39-102 to promulgate rules and regulations regulating the placement of pole lines, pipelines, or other utility facilities and private driveways, commercial approach roads, facilities, things or appurtenances upon State highway rights-of-way.

Finally, pursuant to Neb. Rev. Stat. § 39-1404, a person cannot obtain any title or interest in State property by use, adverse possession, or prescription. Please refer to the text of this section in the appendix.

In instances in which the State owns only an easement for highway purposes, an adjoining property owner has the right to make some non-competing uses of the land on which the easement is located. Department personnel should contact the Department's legal office if a question arises as to an adjoining owner's right to use the land on which the State has only an easement for highway purposes.

Definitions

For purposes of this policy, an encroachment shall have its commonly understood meaning and includes: any non-Department of Transportation use or occupancy of the area above, below, or on the surface of State highway right-of-way, that has not been permitted in writing by the Department, by any object or structure including but not limited to real property, fixtures or personal property.

Policy

It is the policy of the Nebraska Department of Transportation (NDOT) to keep State highway right-of-way clear of private uses and encroachments. The Department's policy recognizes that there are non-highway uses of State highway right-of-way allowed by State statute. The Department's policy also acknowledges that there are private encroachments and uses which pose no threat to the public use, construction and maintenance of the highway, the removal of which would impose an unreasonable hardship on the owner.

These encroachments may be allowed to remain in place by permit. Encroachments not allowed by statute or issued a permit by the Department must be removed from State right-of-way by orderly process.

Jurisdiction

No town, city, village or municipality shall have authority, right or power to allow encroachments, structures, or uses by any person, corporation, or entity upon state highways in and through such city, village, town or municipality without written agreement from the State of Nebraska, Department of Transportation, authorizing such control, power or authority.

For encroachments found along highways within municipalities, the Department should confirm that the municipality has been delegated the responsibility for removing encroachments by agreement, and if so, request that the municipality take action to remove any encroachments within its jurisdiction.

Procedures

The following procedures will apply whenever an encroachment is present upon, under, or overhanging the highway right-of-way.

1. Immediate Hazard. The encroachment may be removed immediately upon a determination of the Maintenance Superintendent, their designee, another Maintenance Superintendent from that same district, the District Maintenance Superintendent, the District Construction Engineer or the District Engineer that the encroachment creates an immediate hazard to the traveling public, the Department's employees, or others.
 - a. The Maintenance Superintendent shall personally meet with the owner of the encroachment, if reasonably possible, prior to removing the encroachment.
 - b. Photographs of the encroachment shall be taken before and after it is moved.
 - c. The Maintenance Superintendent shall remove the encroachment by moving it to a location that alleviates the immediate hazard.
 - d. The Maintenance Superintendent should complete a full report of the events related to the discovery and removal of the encroachment including:
 - (i) a description of the encroachment, including when it was discovered and where it was located in relation to the highway;
 - (ii) any pertinent weather or highway conditions;
 - (iii) the reason for, and the methods used to remove the encroachment;
 - (iv) names, addresses, and phone numbers of witnesses;
 - (v) the equipment and employees used to remove the encroachment;
 - (vi) an explanation of the attempts made to contact the owner of the encroachment;
 - (vii) to where the encroachment was moved.

- e. The Maintenance Superintendent shall follow up the personal contact with the owner with a letter sent by First Class Mail to the owner, setting forth the reasons why the encroachment was moved, how it was moved, to where it was moved, and a statement listing the State's costs in moving the encroachment with a request that the owner reimburse the State for its costs in moving the encroachment.
2. If it is determined, that the encroachment does not constitute an immediate hazard to the traveling public, State employees or others, the Maintenance Superintendent shall take appropriate steps to have the owner remove the encroachment. If it is anticipated that legal assistance might ultimately be necessary to remove the encroachment, the following procedure shall apply:
- a. The Maintenance Superintendent shall determine whether the encroachment is actually located on State highway right-of-way. In making this determination, the Maintenance Superintendent may use Department right-of-way plans, city plat maps, surveys or right-of-way markers, and other similar information. Without additional corroborating information, fence lines should not be used to make this determination.
 - b. If the encroachment is found to be on State highway right-of-way, the Maintenance Superintendent shall make all reasonable efforts to identify and locate the owner of the encroachment.
 - c. The Maintenance Superintendent shall make a personal contact, if at all possible, with the owner of the encroachment, and attempt to confirm the following information:
 - (i) Ownership of the encroachment;
 - (ii) The encroachment is located, at least in part, on State highway right-of-way;
 - (iii) The owner does not have permission, in writing, from the State for the location of the encroachment on State right-of-way.
 - d. If sections c(i), (ii) and (iii) are confirmed by the owner, the Maintenance Superintendent shall request that the owner remove the encroachment except in those instances when it appears that a permit could be granted to leave the encroachment in place.
 - e. When it is determined that the encroachment must be removed, the Maintenance Superintendent shall meet with the owner in person, if at all possible, and inform the owner that the encroachment must be removed by a certain date (within a reasonable time), inform the owner the encroachment will be considered abandoned, if not removed by that date, and will be removed by the State and the owner charged for the State's cost in removing the encroachment.
 - f. The Maintenance Superintendent shall follow up this personal contact with a letter sent by First Class Mail to the owner, setting forth the items described above in paragraph e.
 - g. The encroachment or structure should only be removed by the Department when the owner refuses to remove the encroachment and when it can be removed without going on the adjoining property to remove it and when it can be removed without damaging the adjoining property.
3. Legal Assistance. The Department's legal office should be consulted when the owner refuses to remove or seek a permit for the encroachment, and when it is determined for whatever reason that the encroachment cannot be removed without legal assistance. The District Engineer should contact the Chief Counsel of the Transportation Section of the Attorney General's Office and provide the Chief Counsel with the following information:

- a. All information, including photographs, plan sheets, surveys, and drawings, establishing that the encroachment is actually located on State right-of-way.
- b. A detailed description of the encroachment.
- c. The name and address of the owner of the encroachment.
- d. The deed(s) showing who is the present owner(s) of the property adjoining the encroachment.
- e. All documents regarding any tenants on the property adjoining the encroachment.
- f. All reports, letters, notes, and other correspondence related to the encroachment.

Permitting Encroachments

The District Engineer may grant a permit if it is determined that leaving the encroachment in place will not create a danger to the traveling public, to the State employees or to others, and that requiring the removal of the encroachment would place an unjust burden on the owner. A permit may be denied in any instance when requiring the removal of the encroachment is in the State's best interest.

Permits shall not be granted for the following uses of highway right-of-way:

1. The storage of personal property, including but not limited to vehicles, signs, equipment, hay or other farm products, and fence.
2. Any business use of the right-of-way, except those allowed by this policy or those instances where the Department has leased the highway right-of-way for business purposes.
3. Any use which adversely affects threatened or endangered species of wildlife or wild plants.
4. Any use of Interstate or Freeway highways, except for those uses allowed by our Policy for Accommodating Utilities on State Highway Right Way.

Permits for Use of Highway Right-of-Way

General Requirements for All Permissible Encroachments

1. **Application.** The applicant must complete the appropriate application form.
2. **Plans.** **Two** sets of plans, no larger than 12 inches by 18 inches, detailing the proposed work that is to take place in the right-of-way must accompany the application form.
3. **Performance Guarantee.** The District may require a performance guarantee from individuals and contractors. The District shall determine the amount of the performance guarantee. Major Utility companies, utility districts and governmental subdivisions will generally not be required to post a performance guarantee unless special circumstances prevail. If the work is not completed to the District Engineer's satisfaction, the District Engineer may withhold future permit issuance to the Major Utility companies, utility districts and governmental subdivisions, until the work is completed satisfactorily.
4. **Restrictions and Specific Instructions.** The NDOT may prescribe and define any terms and conditions deemed necessary and/or in the best interest of the public.

5. **Approved Permit.** The applicant must have an approved permit before commencing any work on the right-of-way. The applicant shall notify the District at least 48 hours in advance of the time the applicant expects to begin any work within the limits of the State's right-of-way. All construction under the permit shall be under the supervision of the NDOT and at the expense of the applicant.
6. **Completion of Work.** The applicant shall immediately notify the District when the work has been completed. The District will inspect the work and if satisfactorily completed, the performance guarantee, if any, will be returned to the applicant.

Accommodation of Utilities

The Nebraska Department of Transportation (NDOT) has the authority and responsibility to regulate utility occupancy on all state highways. Utilities are permitted to occupy highway right-of-way in accordance with state statutes and the department's current Policy for Accommodating Utilities on State Highway Right-of-way. Also refer to Nebraska Department of Transportation Rules and Regulations, Title 410, Chapter 1 – Utility Permits.

Approach Roads

The NDOT has the authority and responsibility to regulate the location and placement of driveways and approach roads on all state highways. Driveways and approach roads are permitted to occupy highway right-of-way in accordance with state statutes and the Department's Rules and Regulations, Title 410, Chapter 2 – Driveway and Approach Road Permits.

Identifying Marker

1. The department may consider requests for a sign or monument identifying a city, village, town or municipality within the boundaries of the highway right-of-way when:
 - a. The sign or monument is within the corporate limits of the city, village or town;
 - b. It is determined to be in the public interest;
 - c. Where the Identifying Marker cannot feasibly be located off the highway right-of-way.
 - d. The Identifying Marker is not within the interstate or freeway right-of-way; and
 - e. The sign can be placed in a safe location.
2. The following requirements and procedures will be used to evaluate and approve the location for the Identifying Marker. For locations on the National Highway System, approval must also be given by the Federal Highway Administration.
 - a. The applicant shall furnish documentation to the Nebraska Department of Transportation to support the following:
 - (1) The installation of the Identifying Marker is being erected within the corporate limits of the applicant.
 - (2) The installation of the Identifying Marker is pursuant to direction or authorization contained in local law or ordinance of the applicant.
 - (3) The Identifying Marker shall not advertise any products or services.
 - (4) The applicant shall furnish site plans of said intended Identifying Marker showing, distance from travel lanes, distance from right-of-way lines, the appropriate clear zone, elevations of the site location.
 - (5) The applicant shall furnish construction plans of said intended Identifying Marker showing its location, size, lighting, construction materials, height, message content.

- b. The district will forward application along with the district's comments and recommendations to the Right-of-way Division.
- c. The applicant shall install, own, and maintain the sign or monument and shall be solely responsible and liable for the sign or monument as if it were located on applicant's property.
- d. If the Identifying Marker, after installation and erection, is determined by the Department to endanger the health, safety or welfare of the traveling public or if the installation obstructs the view of oncoming traffic or any traffic control devices, the applicant shall remove the installation within 30 days after receiving notice from the Nebraska Department of Transportation at the applicant's expense.
- e. In accordance with law, no privilege, franchise, right, title, right of user, or other interest in or to the highway right-of-way shall ever arise or be created, secured, acquired, extended or enlarged or amplified by the applicant because of the permit issued for the Identifying Marker.
- f. The department may cancel the permit for the Identifying Marker at any time after giving the owner 30 days written notice.

Signs, Awnings, Canopies, Marquees

Where a highway passes through an established business district, within the corporate limits, and the buildings are at, or near, the right-of-way line, overhanging encroachments in the nature of signs, awnings, canopies, marquees, etc. maybe permitted subject to the following conditions:

1. Awnings, canopies, marquees or signs advertising on premise activities, or which give public service messages, or similar installations may be permitted provided the encroachment meets the following conditions:
 - a. It must be supported wholly from the face of the building.
 - b. In a curbed area, it shall be at least three feet back of the face of the curb and eight feet above the elevation of the sidewalk or ground.
 - c. For a two-lane highway in an area without curbs, it can overhang the right-of-way provided it is not closer than 24 feet from the centerline of the highway and eight feet above the elevation of the sidewalk or ground.
2. That the owner of the business makes application for a permit and submits a sketch or drawing of the new or existing encroachment showing its use, size, lighting, construction, materials, advertisement and distance from curb and height from sidewalk or ground.
3. That where the permit is granted, no other uses can be made of the structure other than as displayed on the permit. When required, the permit number will appear on the structure as directed by the department.
4. All encroachments which contain, include or are illuminated by any flashing, intermittent or moving light or lights are prohibited except for signs which change their message at reasonable intervals by electronic process or by remote control giving public service information such as time, date, temperature, weather or on premise signs advertising goods or services available on the premises provided that such signs shall not contain or be illuminated by beacons, strobe lights or bright flashing lights.
5. In the event the encroachments referred to above, by reason of color, illumination, or placement, obscure or in any way detract from the effectiveness of highway signs or traffic signals, or so distract the driver of a motor vehicle, the city, or state shall cause the removal of such encroachments or take appropriate measures so that the effectiveness of the highway signs or traffic signals are not impaired.

6. In all cases of permits above, the owner by signing the application form gives the department a right-of-entry to the property permitting the department access, at any time to remove the encroachment, where the owner has been notified in writing to remove the encroachment and such encroachment hasn't been corrected or removed within 30 days after the notification date.
7. That all permits shall have upon their face that the right to encroach shall be automatically revoked where the use of the property changes, alterations as to size occur to the encroachment, the encroachment is moved or changed from the original plans, sketches, drawings or narrative submitted with the application and further where the property is needed for highway purposes the permit is revoked upon 30 days written notice.
8. An inventory of existing encroachments shall be made in all cases where highway right-of-way is needed for highway construction. Notices shall be sent to the owners of encroachments where the permits are to be revoked because the encroachment no longer conforms to this policy. Notices shall also be sent to the owners of those encroachments that need to be altered or removed as part of the project because the encroachment no longer conforms to this policy.

Landscaping

It is the policy of the NDOT to permit the beautification of the right-of-way by the adjacent landowner, local municipality or other interested party when it does not compromise the integrity and the safety of the highway. Landscaping, as used in this policy, means to alter the appearance of a piece of land by planting trees, shrubs, flowers, grasses, and the like. It does not mean changing the contour of the land. Any grading work would need to follow the policy criteria for grading. It also does not mean placing any other items in the right-of-way other than those noted.

1. Landscaping permits shall not be allowed when the NDOT determines the primary purpose of the landscaping is to enhance or benefit private property. Instead, the Department will consider leasing the right-of-way by following the procedures noted in the Right-of-Way Manual.
2. The surfacing of any portion of the right-of-way for use by a business for parking or display of merchandise is strictly prohibited.
3. Drainage shall not be altered through a landscaped area.
4. The variety and location of shrubbery or trees planted within the right-of-way must be approved by Roadway Design, Highway Landscape Section and must meet the minimum set back codes of the local jurisdictional government, if any.
5. Any party allowed to landscape as provided in this section shall indemnify and hold harmless the State for all injury sustained and property damage caused by the landscaping or the landscaping installation operations.
6. Landscaping permits may be granted for tree trimming or tree removal, in accordance with the Guidance Document For Vegetation Trimming And Removal On State Right-Of-Way For Outdoor Advertising Signs Adjacent to the State Highway System, and except for exceptional circumstances when approved by Roadway Design, Highway Landscape Section. Our policy for Tree Trimming and Tree Removal by Utility Districts should be followed for these type of request from utility companies.
7. Landscaping permits shall not be granted for plantings that will have the appearance of recognizable business logos or any other nationally or regionally know shapes or symbols.

Temporary Irrigation Pipe Crossings

The NDOT has the authority and responsibility to regulate temporary irrigation pipe crossings on all state highways. The temporary irrigation pipe may be allowed to occupy highway drainage structures by permit provided the district has determined the placement of a temporary irrigation pipe will not negatively impact the drainage structure.

Grading and Dirt Removal

The NDOT has the authority and responsibility to regulate grading and dirt removal from all state highway right-of-way. Grading and dirt removal to enhance the view of billboards will be strictly prohibited. For other grading and dirt removal work, the NDOT's application and permit process shall be followed. Consideration should be given to the following non-inclusive list of factors in deciding whether or not to issue a permit:

1. Does the grading and/or removal of dirt benefit the State?
2. Does the grading and/or removal of dirt primarily benefit only the applicant? If this is the case, consideration should be given to charging the applicant for the dirt.
3. What are NDOT's future right-of-way needs?
4. Are there any noise impacts as a result of removing an existing berm?
5. Are there any negative drainage and water quality impacts?
6. Will there be a negative visual impact from the highway?
7. Will there be any wetland impacts or effects on established wetlands?

Monitoring Wells

The request for a permit to drill and install monitoring wells in the right-of-way is generally the result of contamination of underground water. The wells allow the applicant to monitor the amount of contamination, direction of flow, etc. The applicant shall provide documents, from the governmental agency responsible for determining the extent of the contamination, which support the necessity of using the highway right-of-way. The use of the highway right-of-way may be considered only as a "last resort" when no other feasible monitoring well locations are available for use by the applicant. The District needs to determine that the requested use of the right-of-way will not interfere with the safety of the highway and the District's maintenance uses. Generally two specific instructions are needed:

1. The cover plate for the monitoring well shall be flush with the surrounding ground.
2. Upon completion of the testing, the holes shall be refilled per specifications set forth in Nebraska Revised Statutes, 1943, Chapters 46-1201 to 46-1241 and Rules and Regulations, Title 178, Chapter 12.

It is important to determine the proper name for the permit. This should be the person(s) who is legally responsible for the well.

Water Remediation or Water Discharge

These types of projects usually involve the applicant wishing to discharge water into our right-of-way or storm sewers for extended periods of time. Generally, underground water has been contaminated and the remediation efforts require the water to be pumped from the ground, airified, and discharged to drainage systems. The use of the highway right-of-way may be considered only as a "last resort" when no other feasible route can be followed by the applicant. The application should address the following:

1. Provide documentation to identify what other alternative routes were considered and why those routes were not feasible.
2. All documentation showing the reason for the discharge, plans for the discharge, contamination reports and copies of all federal, state and local jurisdictional permits.

3. The applicant should provide information that describes how the right-of-way will be used. The following as a minimum, should be included:
 - How long the system will operate.
 - The volume of discharge.
 - Assurances and explanation of proper operation, inspection and maintenance of the system.
 - Method of preserving the capacity of the ditch, culverts, or sewer systems that the applicant wishes to occupy. Examples would be to install a sensor or float system in the storm sewer to automatically shut off the system in the event of a storm. Consideration could also be given to giving a key to the appropriate city official.
 - Inspection of wintertime operations in regards to ice build up blocking outlets or causing other problems.
 - What method will be used to shut off the system in case of downstream maintenance or construction.
4. The applicant shall provide to the NDOT all reasonable assurances that the water discharged on the highway right-of-way is free of contamination.
5. The applicant shall agree to hold harmless and defend the NDOT against any and all claims arising out of the discharge of water on state property.

The District should make the final determination to approve or reject the request for a permit. The District must concur that no feasible alternate location is available before allowing this type of use or occupancy. In addition, the District needs to determine that the requested use of the right-of-way will not interfere with, or cause unreasonable hazards to, the use of the right-of-way for highway purposes. In addition, the District should consider the possibility of creation of wetlands and maintenance problems associated with the use of our right-of-way.

The NDOT reserves the right to reject any water remediation permit applications where the NDOT determines it to be in the States best interest to do so.

Appendix

The following is a non-exclusive list of statutes concerning the use of highway rights of way.

The Nebraska Department of Transportation is given statutory authority, in several instances, for the control of the use of State highway property.

39-102. Rules and regulations; promulgated by Department of Transportation to promote public safety. In order to promote public safety, to preserve and protect state highways, and to prevent immoderate and destructive use of state highways, the Department of Transportation may formulate, adopt, and promulgate rules and regulations in regard to the use of and travel upon the state highways consistent with Chapter 39 and the Nebraska Rules of the Road. Such rules and regulations may include specifications, standards, limitations, conditions, requirements, definitions, enumerations, descriptions, procedures, prohibitions, restrictions, instructions, controls, guidelines, and classifications relative to the following:

- (1) The issuance or denial of special permits for the travel of vehicles or objects exceeding statutory size and weight capacities upon the highways as authorized by section 60-6,298;
- (2) Qualification and prequalification of contractors, including, but not limited to, maximum and minimum qualifications, ratings, classifications, classes of contractors or classes of work, or both, and procedures to be followed;
- (3) The setting of special load restrictions as provided in Chapter 39 and the Nebraska Rules of the Road;
- (4) The placing, location, occupancy, erection, construction, or maintenance, upon any highway or area within the right-of-way, of any pole line, pipeline, or other utility located above, on, or under the level of the ground in such area;
- (5) Protection and preservation of trees, shrubbery, plantings, building, structures, and all other things located upon any highway or any portion of the right-of-way of any highway by the department.
- (6) Applications for the location of, and location of, private driveways, commercial approach roads, facilities, things, or appurtenances upon the right-of-way of state highways, including, but not limited to, procedures for applications for permits therefor and standards for the issuance or denial of such permits, based on highway traffic safety, and the foregoing may include reapplication for permits and applications for permits for existing facilities, and in any event, issuance of permits may also be conditioned upon approval of the design of such facilities;
- (7) Outdoor advertising signs, displays, and devices in areas where the department is authorized by law to exercise such controls; and
- (8) The Grade Crossing Protection Fund provided for in section 74-1317, including, but not limited to, authority for application, procedures on application, effect of application, procedures for and effect of granting such applications, and standards and specifications governing the type of control thereunder.

This section shall not amend or derogate any other grant of power or authority to the department to make or promulgate rules and regulations but shall be additional and supplementary thereto.

39-302. Roads; sprinkler irrigation system; restrictions; violations; penalty. A sprinkler irrigation system which due to location or design diverts, or is capable of diverting, water onto or across a public road so as to saturate, wash, or impair the maintenance, construction, or pass ability of such public road or allows water to accumulate on the roadway or traveled surface of the public road shall be equipped with a device which will automatically shut off the end gun of the irrigation system

causing such diversion or accumulation of water. Any person who fails to comply with this section shall, upon conviction thereof, be guilty of a Class IV misdemeanor, except that section 39-301 shall be controlling with respect to mechanical malfunctions and normal weather conditions.

39-805. Bridge over irrigation or drainage ditch; construction and maintenance; cost; how paid.

Whenever any public highway within this state shall cross or be crossed by any ditch or channel of any public drainage or irrigation district it shall be the duty of the governing board of the drainage or irrigation district and the governing board of the county or municipal corporation involved to negotiate and agree for the building and maintenance of bridges and approaches thereto on such terms as shall be equitable, all things considered, between such drainage or irrigation district and such county or municipality. If such boards for any reason shall fail to agree with reference to said matter, it shall be the duty of the drainage or irrigation district to build the necessary bridges and approaches, and restore the highway in question to its former state as nearly as may be as it was laid out prior to the construction of the ditch or channel in question, and it shall be the duty of the county or municipal corporation involved to maintain said bridges and approaches; PROVIDED, where more than seventy-five percent of the water passing through any such ditch or channel is used by any person, firm or corporation for purposes other than irrigation or drainage, it shall be the duty of such person, firm or corporation, so using such seventy-five percent or more of such water, to build and maintain solely at his, their or its expense, all such bridges and approaches thereto. Any bridge that may be built by any drainage or irrigation district or by any person, firm or corporation under the provisions of this section shall be constructed under the supervision of the Department of Transportation, if on a state highway, and under the supervision of the county board or governing body of a municipality, if under the jurisdiction of such board or governing body of such municipality.

39-8,119. Interstate bridges; regulation of transmission and pipelines. The department shall have the power and authority to enter into agreements with an adjoining state for the purpose of regulating the passage of transmission and pipelines upon and across interstate bridges. Such agreements may provide that the department and the adjoining state, jointly, may establish all reasonable rules and regulations necessary to prevent such lines from interfering with any interstate bridge or the safe flow of traffic upon such bridge; PROVIDED, that such rules and regulations shall not authorize the passage of any transmission or pipeline across or upon any interstate bridge in violation of the law of the State of Nebraska or of the adjoining state, or of any law, code, rule, or regulation of the United States. Nothing contained within this section shall be construed to limit, change, alter, or invalidate the provisions of any prior existing contract to which the department or the State of Nebraska is a party.

39-1304.02. State highways; federal aid; relocation of public utilities; cost; limitation. Whenever any utility facility which now is, or hereafter may be, located in, over, along, or under any highway or urban extension thereof which is a part of the National System of Interstate and Defense Highways as defined in the Federal Aid Highway Act of 1956, and qualifying for federal aid thereunder, or any highway which at any time was on or designated as a part of the National System of Interstate and Defense Highways but has been removed for any reason, is required to be altered, changed, moved, or relocated for the construction of any federal-aid highway project, the cost of such alteration, change, moving, or relocation, and the expense of acquiring lands or any rights and interests in land or any other rights acquired to accomplish such alteration, change, moving, or relocation, shall be paid by the state as a part of the expense of such federally aided projects except when such payment to the utility would violate a legal contract between the utility and the state, or between the utility and a county, city, or village of the state, under the express terms of which contract the utility specifically agrees to pay or assume such costs of alteration, change, moving, or relocation. The cost of the alteration, change, moving, or relocation, and the expense of acquiring lands or any rights and interests in land or any other rights required to accomplish such alteration, change, moving, or relocation of a utility facility located in, over, along, or under any highway which at any time was on or designated as a part of the National System of Interstate and Defense Highways but has been removed for any reason shall not be paid by the state on or after July 1, 1993, and the total amount paid from May 5, 1983, until July 1, 1993, including any federal-aid funds, shall not exceed five million dollars.

For the purpose of this section, the term cost of relocation shall include the entire amount paid by such utility properly attributable to such alteration, change, moving, or relocation after deducting therefrom any increase in value of the new facility and any salvage value derived from the old facility.

39-1332. State highways; construction and maintenance of access road; written permit required, when. No person shall construct, use, or permit to be used on property owned or occupied by such person any private entrance or exit, approach road, facility, thing, or appurtenance upon or connected to a highway right-of-way without first obtaining a written permit from the department; PROVIDED, the owner or occupier of property shall not be required to obtain a permit to use or permit to be used in its existing condition any such private entrance or exit, approach road, facility, thing, or appurtenance existing on September 18, 1955, unless the department determines that the safety and general welfare of the public will be better served by such owner or occupier being required to apply for a permit and the department gives written notice to such owner or occupier that application for a permit must be filed with the department within thirty days from receipt of such notice.

39-1333. State highways; access; Department of Transportation; adopt rules and regulations; issue permits. The department may adopt reasonable rules and regulations and issue permits for the construction or use of any private entrance or exit, approach road, facility, thing, or appurtenance upon or connected to highway rights-of-way. Such rules and regulations and such permits may include, but need not be limited to, provisions for construction of culverts, requirements as to depth of fills, and requirements for drainage facilities deemed necessary. Such a permit so issued may contain such terms and conditions as, in the judgment of the granting authority, may be in the best interest of the public. All construction under such permits shall be under the supervision of the granting authority and at the expense of the applicant. After completion of the construction of the particular private entrance or exit, approach road, facility, thing, or appurtenance, the same shall be maintained at the expense of the applicant and in accordance with the rules and regulations of the department. Nothing herein contained shall be determined or construed to grant any right for or authorize the construction of a private entrance or exit or approach road upon or connected to any facility, thing, or appurtenance on the right-of-way of any highway or section of highway for which the department has by gift, agreement, or eminent domain acquired the rights of access on a portion thereof.

39-1334. State highways; access; permit; violation; actions. The Director-State Engineer, for the department and in the name of the State of Nebraska, may prosecute to final determination any action, suit, or proceeding which in his judgment is necessary for the preservation of public safety, the promotion of the general welfare, and to carry out the provisions of sections 39-1327 to 39-1336. In addition to any other available remedies, the Director-State Engineer may secure an injunction or mandamus (1) to prevent any owner or occupier of property from constructing, using, or permitting to be used a private entrance or exit, approach road, facility, thing, or appurtenance upon or connected to a highway right-of-way without a written permit from the department when a permit is required, (2) to enforce compliance with the conditions of a permit issued by the department to a person for such construction, use, or right to permit such use, and (3) to enforce compliance with the rules and regulations regarding such construction and uses prescribed by the department.

39-1335. State highways; access; use of adjoining property; permit; rules and regulations; violation; penalty. Any person who shall construct, use, or permit to be used on property owned or occupied by such person any private entrance or exit, approach road, facility, thing, or appurtenance upon or connected to a highway right-of-way without a permit from the department, when a permit is required, or who shall construct, use, or permit to be used a private entrance or exit, approach road, facility, advertising, advertising signs, displays, or other advertising devices, thing, or appurtenance upon or connected to any highway right-of-way without complying with the rules and regulations prescribed by the department or with the conditions of a permit issued by the department to such person, shall be guilty of a Class III misdemeanor. Each and every day that such violation continues after the department issues written notification to the violator may constitute a separate offense.

39-1359. Rights-of-way; inviolate for state and Department of Transportation purposes. The rights-of-way acquired by the department shall be held inviolate for state highway and departmental purposes and no physical or functional encroachments, structures, or uses shall be permitted within such right-of-way limits, except by written consent of the department.

39-1361. Cross or dig up highway; permit by Department of Transportation; conditions. No person, firm, or corporation may dig up, cross, or otherwise use any portion of the state highway system for laying or relaying pipelines, ditches, flumes, pipes, sewers, railways, or any other similar purpose without obtaining a written permit from the department and agreeing to comply with such reasonable regulations as the department shall prescribe. Such regulations may include provisions relevant to an existing portion of the state highway system and also may contemplate future or contingent problems by providing protection to the department from expense or damage arising in the reconstruction or relocation of a portion of the state highway system when such expense or damage would not have existed but for the activity authorized by the permit. No person, firm, or corporation shall construct or install any new pole line, any underground conduit, or any buried cable or erect any new guy wires upon any portion of the state highway right-of-way without obtaining a written consent or permit from the department. The department shall grant such written consent or permits to do any of the things mentioned in this section if the installation of such thing does not interfere with, or cause unreasonable hazards to, the use of the right-of-way for highway purposes. The person, firm, or corporation to whom, or in whose behalf, the permit is given shall pay the cost of placing the highway in as good condition as it was prior to being dug up, crossed, or used and shall, upon the request of the department, furnish the state with a cash deposit or certified check upon a solvent bank, or a surety bond in a guaranty company qualified to do business in Nebraska. The deposit, check, or bond shall be in the amount required by the department and shall be furnished on condition that the sum be forfeited to the state in the event that the conditions of the permit or regulations of the department are breached. A written permit to do any of the things mentioned in this section shall not be required for emergency maintenance or emergency repair work on existing facilities, but in such cases oral consent shall be secured from the Director-State Engineer or his authorized representative as soon as the exigencies of the situation allow.

39-1362. Cross or dig up highway; violations; penalty. Any person, who shall dig up, cross, or otherwise use any portion of the state highway system or drainage facilities of the state highway system for laying or relaying pipelines, ditches, flumes, pipes, sewers, railways, for constructing, or installing any new pole line, underground conduit, buried cable, or new guy wires, or for any other similar purpose without obtaining a written permit from the department or without complying with the regulations of the department shall be guilty of a Class III misdemeanor. Each and every day that such a violation continues, after the department issues written notification to the violator, may constitute a separate offense.

39-1404. Public grounds, interests in; cannot arise by operation of law. No privilege, franchise, right, title, right of user, or other interest in or to any street, avenue, road, thoroughfare, alley or public grounds in any county, city, municipality, town, or village of this state, or in the space or region under, through or above any such street, avenue, road, thoroughfare, alley, or public grounds, shall ever arise or be created, secured, acquired, extended, enlarged or amplified by user, occupation, acquiescence, implication, or estoppel.

The legislature has, however, provided for specific statutory authority for various entities to occupy State and public highways for certain purposes. The following list provide specific authority for use of highways.

18-413. Waterworks; right-of-way outside corporate limits; purposes; conditions. Any city or village in this state erecting, constructing or maintaining a system of waterworks, or part of a system of waterworks, without its corporate limits, is hereby granted the right-of-way along any of the public roads of the state, the streets and alleys of any village or city within the state, and over and through any of the lands which are the property of the state, for the laying, constructing, and maintaining of water mains, conduits, and aqueducts for the purpose of transporting or conveying water from such system of waterworks, or part of such system of waterworks, to such city or village erecting the same.

Such city or village is hereby granted such right-of-way for the further purpose of erecting and maintaining all necessary poles and wires, or conduits, for the purpose of transporting, transmitting or conveying electric current from such city or village to such system of waterworks, or part of such system of waterworks, for power and light purposes; PROVIDED, HOWEVER, that such city in constructing such water mains, conduits, and aqueducts for transporting water, and such poles, wires, and conduits for transmitting electric current along the streets or alleys of any other village, as aforesaid, shall construct and locate the same in accordance with existing ordinances of such other village or city pertaining thereto, and shall be liable for any damage caused thereby; PROVIDED FURTHER, that poles and wires shall be constructed so as not to interfere with the use of the public roadway, and said wires shall be placed at a height not less than twenty feet above all road crossings.

31-353. Crossing of highways or railroads; mutual agreement; condemnation. The board shall have the power to construct the works across any street, avenue, highway, railway, canal, ditch or flume which the route of the ditches may intersect or cross, in such manner as to afford security for life and property, but the board shall restore the same, when so crossed or intersected, to its former state as nearly as may be, or in a manner not to impair its usefulness unnecessarily. Every company whose railroad shall be intersected or crossed by the works shall unite with the board in forming such intersections and crossings, and shall grant the privilege aforesaid. If such railroad company and the board, or the owners and controllers of such property, thing or franchise so to be crossed, cannot agree upon the amount to be paid therefor, or the points or the manner of such crossings, the same shall be ascertained and determined in all respects as is provided in respect to the taking of land.

31-354. Public lands; grant of right-of-way. The right-of-way is hereby given, dedicated and set apart, to locate, construct and maintain such works over and through any of the lands which are now or may be the property of the state.

31-430. Power to cross highways and railroads. The district may dig ditches and drains under and across railroads and public highways.

31-528. Enlarged district; power to maintain adequate sewerage facilities; damages; payment to municipalities. In addition to the powers of said district and of the trustees thereof as originally vested, such enlarged district and the trustees thereof shall have power and jurisdiction to provide and maintain adequate and suitable sewerage systems for the entire district; to provide and maintain sewage disposal or reduction plants; to enter upon any street, alley or public place in any municipality, city or village, within the limits of such enlarged district for the laying of sewers and the construction of sewerage systems. The district shall pay to such municipality, city or village, upon claim being filed therefor, the amount of any damage to any pavement or any public improvement.

Such municipality, city or village shall not be entitled to any compensation for the use of its streets, alleys or public places except for damage to such public improvements.

46-153. Construction across streams, highways, railroads, and ditches; right-of-way over state lands; state water and water rights. The board of directors shall have the power to construct such works across any stream of water, watercourse, street, avenue, highway, railway, canal, ditch or flume which the route of such canal or canals may intersect or cross, in such manner as to afford security for life and property; but the board shall restore the same, when so crossed or intersected, to its former state as nearly as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness. Every company whose railroad shall be intersected or crossed by such works shall unite with the board in forming such intersections and crossings, and grant the privilege aforesaid; and if such railroad company and such board, or the owners and controllers of the property, thing or franchise so to be crossed, cannot agree upon the amount to be paid therefor, or the points or the manner of the crossings, the same shall be ascertained and determined in all respects as is provided in respect to the taking of land. The right-of-way is hereby given, dedicated, and set apart, to locate, construct and maintain such works over and through any of the lands which are or may be the property of the state; and also there is given, dedicated, and set apart for the use and purposes aforesaid, all water and water rights belonging to this state within the district.

46-249. Irrigation works constructed by authority of United States; right-of-way over public lands; grant; school lands excepted. There is hereby granted, over all the lands now or hereafter belonging to the State of Nebraska, except school lands held in trust by the Board of Educational Lands and Funds, a right-of-way for ditches, tunnels and telephone and transmission lines necessary to the construction and operation of any irrigation works constructed by authority of the United States; and in all conveyances such right-of-way shall be reserved.

46-251. Irrigation works; use of state lands and highways; grant; right-of-way; condemnation. All persons desirous of constructing any of the works provided for in sections 46-244 to 46-250 shall have the right to occupy state lands and obtain right-of-way over and across any highway in this state for such purpose without compensation, except public school lands. All bridges or crossings over such ditches, laterals and canals shall be constructed under the supervision of the Department of Transportation, if on a state highway, and under the supervision of the county board or governing body of a municipality, if on a highway under the jurisdiction of such board or governing body. All such persons may obtain a right-of-way not to exceed sixteen feet in width, for a like purpose along, parallel to, and upon one side of any highway by condemnation proceedings where the same does not interfere with the proper drainage of such highway. In such cases the abutting landowner and the county may grant such right-of-way, or in case of their refusal notice shall be served upon them and proceedings had as in other cases. Not more than one such ditch or lateral shall be permitted along the side of the same highway.

46-266. Irrigation water; overflow on roads; duty of owner to prevent; violation; penalty. No owner of any water power or irrigation ditch, canal or lateral shall so construct, maintain or operate the same as to permit any water to escape therefrom upon any public road or highway. No person in the application of water in the irrigation of lands shall permit the same to escape from such lands and to flow upon any public road or highway. Any person violating any of the provisions of this section shall be guilty of a Class V misdemeanor. Each day water is permitted to flow or escape upon any public road or highway in violation of the foregoing prohibitions shall be deemed a separate and distinct offense. The overseer of highways or other officer in charge of road work in the area in which a violation occurs shall make complaint therefor, but no other person shall be precluded from making complaint.

46-313. Eminent domain; use of highways; construction and operation; general law applicable. All general provisions of law applicable to electric light and power corporations and irrigation districts which pertain to the exercise of the power of eminent domain, the use and occupation of public highways, and the manner or method of construction and physical operation of plants, systems, and transmission lines shall be applicable, as nearly as may be, to irrigation districts in their exercise of the powers and functions, and in their performance of the duties conferred or imposed upon them under the provisions of sections 46-301 to 46-315.

57-1102. Crossing public roads or highways; rights acquired; restrictions. Any such person, company, corporation or association, in the laying, relaying, operation and maintenance of any such pipeline within the State of Nebraska, shall have the right to enter upon and cross, with such pipeline, any public road or highway, under such reasonable regulations and restrictions as may be prescribed by the Department of Transportation, if it is a state or federal highway, or by the county board of each county, as to all other public roads and highways within such county, and shall also have the right to lay, relay, operate and maintain such pipeline in and along any public road or highway.

70-515. Applicability of laws. All provisions of law, now applicable to electric light and power corporations as regards the use and occupation of the public highways, and the manner or method of construction and physical operation of plants, systems, and transmission lines, shall be applicable, as nearly as may be, to municipalities and public electric light and power districts in their exercise of the powers and functions, and in their performance of the duties, conferred or imposed upon them under the provisions of sections 70-501 to 70-515.

70-667. Plants, systems; construction or operation; works of internal improvement; laws applicable; eminent domain; procedure; when available. All power plants and systems, all ethanol production or distribution systems, and all irrigation works constructed, acquired, used, or operated by any district organized under or subject to Chapter 70, article 6, or proposed by such district to be so constructed, acquired, owned, used, or operated are hereby declared to be works of internal improvement. All laws applicable to works of internal improvement and all provisions of law applicable to electric light and power corporations, irrigation districts, or privately owned irrigation corporations, the use and occupation of state and other public lands and highways, the appropriation, acquisition, or use of water, water power, water rights, or water diversion or storage rights, for any of the purposes contemplated in such statutory provisions, the manner or method of construction and physical operation of power plants, systems, transmission lines, and irrigation works, as herein contemplated, shall be applicable, as nearly as may be, to all districts organized under or subject to Chapter 70, article 6, and in the performance of the duties conferred or imposed upon them under such statutory provisions. Such laws, provisions of law, or statutory provisions are hereby made applicable to all irrigation works and facilities operated by irrigation divisions of public power and irrigation districts organized under Chapter 70, article 6, and shall include, but not be limited to, the right of such district to exercise the powers conferred upon districts by Chapters 31 and 46, relating to operation, maintenance, rehabilitation, construction, reconstruction, repairs, extension, recharge for ground water, and surface and subsurface drainage projects and the assessment of the cost thereof to the lands benefited thereby. The right to exercise the power of eminent domain is conferred, except that this power may not be exercised for the purpose of condemning property for use by a privately operated ethanol production or distribution facility. The procedure to condemn property shall be exercised in the manner set forth in Chapter 76, article 7.

74-307. Roads, streams, or canals; crossings; conditions. Any railroad may construct and carry its tracks across, over, or under any road, railroad, canal, stream, or watercourse when it may be necessary in the construction thereof. In such cases, the railroad shall construct its railroad crossings so as to not unnecessarily impede the travel, transportation, or navigation upon the road, railroad, canal, stream, or watercourse so crossed. The railroad may change the channel of any stream or watercourse whenever it may be necessary in the location, construction, or use of its road if it does not change the general course of the stream or watercourse or materially impair its usefulness.

86-301. Telecommunications companies; right-of-way; wires; municipalities; powers and duties.

- (1) Any telecommunications company, incorporated or qualified to do business in this state, is granted the right to construct, operate, and maintain telecommunications lines and related facilities along, upon, across, and under the public highways of this state, and upon and under lands in this state, whether state or privately owned, except that (a) such lines and related facilities shall be so constructed and maintained as not to interfere with the ordinary use of such lands or of such highways by the public and (b) all aerial wires and cables shall be placed at a height of not less than eighteen feet above all highway crossings. Nothing in sections 86-301 to 86-304 shall transfer the rights now vested in municipalities in relation to the regulation of the poles, wires, cables, and other appliances.
- (2) Sections 86-301 to 86-304 shall not authorize a telecommunications company to erect any poles or construct any conduit, cable, or other facilities along, upon, across, or under a public highway within a municipality without first obtaining the consent of the governing body of the municipality. The municipality shall not exercise any authority over any rights the telecommunications company may have to deliver telecommunications services as authorized by the Public Service Commission or the Federal Communications Commission.
- (3) Consent from a governing body for the use of a public highway within a municipality shall be based upon a lawful exercise of its statutory and constitutional authority and shall not be unreasonably withheld, nor shall any preference or disadvantage be created through the granting or withholding of such consent. A municipality shall not adopt an ordinance that prohibits or has the effect of prohibiting the ability of a telecommunications company to provide telecommunications service.

- (4) A municipality shall not levy a tax, fee, or charge for any right or privilege of engaging in a telecommunications business or for the use by a telecommunications company of a public highway other than:

An occupation tax authorized under section 14-109, 15-202, 15-203, 16-205, or 17-525; and

A public highway construction permit fee or charge to the extent that the fee or charge applies to all persons seeking use of the public highway in a substantially similar manner. All public highway construction permit fees or charges shall be directly related to the costs incurred by the municipality in providing services relating to the granting or administration of permits. Any highway construction permit fee or charge shall also be reasonably related in time to the occurrence of such costs.

Any tax, fee, or charge imposed by a municipality shall be competitively neutral.

- (5) The changes made by Laws 1999, LB 496, shall not be construed to affect the terms or conditions of any franchise, license, or permit issued by a municipality prior to August 28, 1999, or to release any party from any obligations thereunder. Such franchises, licenses, or permits shall remain fully enforceable in accordance with their terms. A municipality may lawfully enter into agreements with franchise holders, licensees, or permittees to modify or terminate an existing franchise, license, or agreement.
- (6) Taxes or fees shall not be collected by a municipality through the provision of in-kind services by a telecommunications company, and a municipality shall not require the provision of in-kind services as a condition of consent to the use of a public highway.
- (7) The terms of any agreement between a municipality and a telecommunications company regarding use of public highways shall be matters of public record and shall be made available to any member of the public upon request, except that information submitted to a municipality by a telecommunications company which such telecommunications company determines to be proprietary shall be deemed to be a trade secret pursuant to subdivision (3) of section 84-712.05 and shall be accorded full protection from disclosure to third parties in a manner consistent with state law.
- (8) For purposes of sections 86-301 to 86-304:

Highway shall have the same meaning as in section 60-624; and

(b) Telecommunications company shall have the same meaning as in section 86-802.

303.01. Right-of-way; state and federal highways; regulation by Department of Transportation. If the public highway, along, upon, across, or under which the right to construct, operate, and maintain the telecommunications lines and related facilities is granted, is a state or federal highway, then the location and installation of such lines and related facilities, insofar as they pertain to the present and future use of the right-of-way for highway purposes, shall be subject to such reasonable regulations and restrictions as are or may be prescribed by the Department of Transportation. If the future use of the state or federal highway requires the moving or relocating of the facilities, then such facilities shall be removed or relocated by the owner at the owner's cost and expense and as directed by the Department of Transportation except as provided by section 39-1304.02.

86-305. Electric service companies; highways; right-of-way; damage to private property; procedure. All persons, associations, and corporations engaged in the generating or transmitting of electric current for sale, use, or purchase in the state for power or other purposes, are hereby granted the right-of-way for all necessary poles and wires along, within, and across any of the public highways of this state. Such persons, associations, or corporations shall be liable for all damages to private property by reason of the use of the public highways for such purpose. Such damages shall be ascertained and determined in the manner set forth in sections 76-704 to 76-724.

86-308.01. Electrical transmission lines; state or federal highways; regulation by Department of Transportation. If the public road, along, upon, across, or under which the right to construct, operate, and maintain the electrical transmission line is granted, is a state or federal highway, then the location and installation of the electrical transmission facilities, insofar as they pertain to the present and future use of the rights-of-way for highway purposes, shall be subject to such reasonable regulations and restrictions as are or may be prescribed by the Department of Transportation. If the future use of said state or federal highway requires the moving or relocating of said facilities, then such facilities shall be removed or relocated by the owner, at the owner's cost and expense, and as directed by the Department of Transportation except as provided by the provisions of section 39-1304.02.

Please note that with one exception, occupation of State right-of-way has been granted to public or quasi-public entities, to promote a public activity. The one exception, for railroads, although not a public or quasi-public body, does promote a public purpose. Also the occupation of public or quasi-public entities may not interfere with the primary use of the right-of-way for highway purposes. In any event, 39-1359 requires the written consent of the department for any use of the highway right-of way.

Remember to check with the NDOT's Chief Counsel when questions arise to make sure that you have the current version of the applicable statute and to answer any questions of interpretation.