

JUL 10 2015

State of Minnesota
Yellow Medicine County

District Court
Eighth Judicial District

Court File Number: **87-CV-14-219**

Case Type: Civil Other/Misc.

Notice of Filing of Order

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MINNESOTA VALLEY REGIONAL RAIL AUTHORITY vs Hanson Communications, Inc; Clara City Telephone Company; and Sacred Heart Telephone Company

You are notified that on July 08, 2015, the following was filed:

Order on Motions for Summary Judgment

Dated: July 8, 2015

Cheryl Eckhardt
Court Administrator
Yellow Medicine County District Court
415 9th Avenue - 2nd Floor
Granite Falls MN 56241
320-564-3325

cc: DAVID E SCHAUER

A true and correct copy of this notice has been served pursuant to Minnesota Rules of Civil Procedure, Rule 77.04.

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF YELLOW MEDICINE

EIGHTH JUDICIAL DISTRICT
Court File: 87-CV-14-219

Minnesota Valley Regional Rail Authority,

Plaintiff,

v.

Hanson Communications, Inc.; Clara City
Telephone Company; and Sacred Heart
Telephone Company,

Defendants.

**ORDER ON MOTIONS
FOR SUMMARY
JUDGMENT**

The above entitled matter came before the court on April 16, 2015, at the Yellow Medicine County Courthouse, Granite Falls, Minnesota, on opposing motions for summary judgment. David Schauer appeared on behalf of Plaintiff Minnesota Valley Regional Rail Authority (MVRRA). Kirsten Schubert appeared on behalf of Defendants Hanson Communications, Inc., Clara City Telephone Company, and Sacred Heart Telephone Company.

Based on the exhibits, documents submitted, the arguments of counsel, and the entire court file herein, the Court makes the following:

FINDINGS OF FACT

- 1) Defendant Clara City Telephone Company (Clara City) and Sacred Heart Telephone Company are a state authorized telecommunications providers. Clara City and Sacred Heart Telephone are wholly owned or controlled by Hanson Communications, Inc.
- 2) In May and June of 2011, Clara City submitted applications to the Redwood County Highway Department and the Yellow Medicine County Highway Department for permits to install buried telecommunications cables along public highway and streets in Redwood

and Yellow Medicine Counties. Redwood County and Yellow Medicine County granted the permits, and cable was buried at the following locations:

- a. 5 feet from the roadway on the east side of County Highway 7, from County Highway 9 south to Elevator Street in Belview, Redwood County;
 - b. 40–46 feet from the centerline on the north and south sides of County Highway 1, from the Redwood County line west to the intersection with CSAH 6, in Yellow Medicine County;
 - c. 45 feet from the centerline on the east side of County Highway 6, from the intersection with CSAH 1 north to the intersection with State Highway 274, in Yellow Medicine County;
 - d. 45 feet from the centerline on the south side of County Highway 18, from the intersection with State Highway 274 west to the intersection with State Highway 23, in Yellow Medicine County; and
 - e. 70 feet from the centerline on the east and west sides of Truck Highway 274, from the intersection with Second Avenue north to the intersection with CSAH 18, in Yellow Medicine County.
- 3) All cables at issue were installed alongside or underneath a public highway, public roadway, or public street.
 - 4) The cables were fully installed in Autumn 2012, and placed into service in the fourth quarter of 2012.
 - 5) The cables provide telephone, cable television, and internet services to members of the public in Southwestern Minnesota. The cables also provide networking services to the Yellow Medicine East School District and the Lakeview School District.

- 6) Defendants installed the cables approximately 4 feet underground using directional drilling.
- 7) Minnesota Valley Regional Rail Authority (MVRRA) is a regional rail authority created pursuant to Chapter 398A of the Minnesota Statutes. It is organized as a political subdivision and local government unit of Minnesota to exercise thereunder part of the sovereign power of the state.
- 8) MVRRA was organized in 1982 by Carver, Redwood, and Sibley counties. The current membership includes Carver, Sibley, Renville, Redwood, and Yellow Medicine Counties. MVRRA is governed by commissioners from these counties.
- 9) MVRRA claims to own a railroad right-of-way and fee simple to the land occupied by the right-of-way, which intersects with the public highways at the five crossings listed above.
- 10) The Chicago and Northwestern Transportation Company transferred an interest in the railroad right-of-way to MVRRA by a deed from signed January 16, 1984. The deed states the conveyance is subject to the rights of the public in and to all streets and highways located on the right-of-way.
- 11) The public roads in question were in existence at the time MVRRA obtained the deed in December 1983.
- 12) Clara City did not obtain permission from MVRRA to cross the railroad right-of-way.
- 13) After Clara City was granted permits to install the cables, MVRRA demanded Clara City execute a license agreement wherein Clara City would pay for the license and privilege to use the railroad right-of-way for the placement of underground fiber optic cables alongside the public roadway at the five identified crossings. According to the terms of

the proposed license agreement, Clara City would pay a yearly rental fee of \$500 to be adjusted annually plus a one-time agreement preparation fee of \$300, and provide MVRRA with a certificate of insurance at Clara City's expense. Clara City refused to enter into the license agreement, and MVRRA initiated the instant litigation.

14) MVRRA served the Complaint on February 7, 2012. MVRRA filed the Complaint with the Court on June 13, 2014.


CONCLUSIONS OF LAW

- 1) Plaintiff's interest in the railroad right-of-way and any fee interest in the land must yield to the public right-of-way.
- 2) The installation and maintenance of telecommunications cables is a proper street use, regardless of whether the cables are suspended above or beside the roadway or buried under or alongside it.
- 3) Plaintiff has no authority to regulate or profit from Defendants' use of the public right-of-way.
- 4) Plaintiff cannot establish any damages, and is not entitled to any relief sought.

ORDER

- 1) Plaintiff's Motion for Summary Judgment is **DENIED**.
- 2) Defendant's Motion for Summary Judgment is **GRANTED**.
- 3) Plaintiff's claims against Defendants are **DISMISSED**.
- 4) Pursuant to Minnesota General Rule of Practice 125, entry of judgment shall be stayed for 30 days.

Dated: This 8th day of July, 2015.

Van Hon, Thomas
(Judge)
2015.07.08 11:16:20

Thomas W. Van Hon -05'00'
District Court Judge

MEMORANDUM

ISSUES

1. May the owners of a railroad right-of-way and a possible fee simple interest in the land subject to a highway right-of-way charge a fee for the use of that land by a telecommunications company when the telecommunications company installs and maintains buried telecommunications cables along and under the public highway right-of-way?
2. Do the buried telecommunications cables impose an additional servitude upon the land as to constitute a taking?
3. Is MVRRA barred from asserting its claim because it cannot allege any damages?
4. Should the complaint be dismissed by operation of the doctrines of laches and failure to prosecute because of the delay of more than two years between service of a complaint and filing the complaint?

RAILROAD LAND INTERESTS YIELD TO THE EASEMENT INCIDENT TO A PUBLIC HIGHWAY.

Plaintiff asks the Court for a declaratory judgment providing for a determination and declaration that Defendants cannot use Plaintiff's railroad right-of-way without permission, and for an order providing for a permanent injunction restraining Defendants from using Plaintiff's railroad right-of-way. Plaintiff is not entitled to either.

The highway right-of-way takes precedence over a railroad right-of-way by operation of law and by the express terms of the deed conveying the right-of-way to MVRRA. "Every railroad company takes its right-of-way subject to the right of the public to extend the public highway and streets across such right-of-way." *State ex rel. City of Minneapolis v. St. Paul M. & M. Ry. Co.*, 108 N.W. 261, 267 (Minn. 1906) (quoting *C. & N. W. Ry. Co. v. Chicago*, 29 N.E.

1109 (Ill. 1892). Railroad rights-of-way are subservient to the public highway right-of-way, even when those streets are constructed after the railroad acquires its right-of-way interest. *State ex rel. Village of Clara City v. Great Northern Railway Co.*, 130 Minn. 480, 482 (1915); *State ex rel. City of Minneapolis*, 108 N.W. at 263; *see also* Minn. Stat. §§ 219–222. Any railroad right-of-way is also subordinate to the use of the public right-of-way for proper highway uses. The right to use public streets and highways for proper highway uses exists even when the owner of the fee land through which the public street or highway passes does not consent to the use. *Cater v. Nw. Tel. Exch. Co.*, 63 N.W. 111, 114 (Minn. 1895).

USE OF THE PUBLIC HIGHWAY FOR TRANSMISSION OF COMMUNICATIONS VIA FIBER OPTIC CABLES IS A PROPER HIGHWAY USE.

It has long been established in Minnesota that public highway easements may be used for the transmission of communications. In *Cater v. Nw. Tel. Exch. Co.*, the Minnesota Supreme Court held that “[p]ermissible uses of a public highway include not only the transportation of people and property, but also the transmission of communications via technology.” *Cater*, 63 N.W. at 114. This is true even if new technology used to transmit those communications was not envisioned at the time the easement was acquired, and even if the owner of fee title to the land objects to the use. *Id.*

The [public] easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owner of the land when the easement was acquired, and are more onerous to him than those then in use.

Cater, 63 N.W. at 114. Public highways “are designed as avenues of communication” and new technologies facilitating communication are “within the general purpose for which highways are

designed.” *Id.* at 112. “[T]he mode of exercising this easement is expansive, developing and growing as civilization advances.” *Id.*

A fee owner is entitled to compensation only if the new use imposes an additional burden so as to constitute a taking.

Whether it be travel, the transportation of persons and property, or the transmission of intelligence, and whether accomplished by old methods or by new ones, they are all included within the public ‘highway easement,’ and impose no additional servitude on the land, provided they are not inconsistent with the reasonably safe and practical use of the highway in other and usual and necessary modes, and provided they do not unreasonably impair the special easements of abutting owners in the street for purposes of access, light, and air.

Id. at 113.

As telecommunications providers, Defendants are entitled to use the land above, alongside, and below public highways to construct and maintain cables which provide telephone and internet service to the public. Minnesota Statute § 237.163, subd. 2 authorizes telecommunications right-of-way users to “construct, maintain, and operate conduit, cable, switches, and related appurtenances and facilities along, across, upon, above, and under any public right-of-way. Minnesota Statute § 222.37 also recognizes the right of utility companies to use public roads “for the purpose of constructing, using, operating, and maintaining lines, subways, canals, conduits, hydrants, or dry hydrants, for their business.” Minn. Stat. § 222.37.

The installation of fiber optic cable is a recognized and statutorily approved part of highway use, and an easement acquired by the public to use property for a public road includes the right to install such cable and does not require the consent or, or compensation to, the fee owner so long as it does not impose an additional burden upon the land. Telecommunications companies are authorized by statute to use the land alongside, above, and below a public roadway to install facilities serving the public. Neither statute nor common law requires the

telecommunications company to obtain permission from the fee owner of the land before installing telecommunications facilities within the public easement.

MVRRRA DOES NOT HAVE THE RIGHT TO CHARGE A FEE EITHER AS A PRIVATE LAND OWNER OR AS A LOCAL GOVERNMENT UNIT.

There is a factual dispute in the present case as to whether MVRRRA owns the fee title to the land or merely owns the railroad right-of-way. The Court does not need to resolve this factual dispute because the installation of telecommunications cables is a proper street use and Plaintiff's claims are barred regardless of Plaintiff's interest in the land. Defendants have a right to use the public easement as set forth in Minn. Stat. §§ 237.132 and 237.163 without interference from or regulation by private land owners. It is well settled law that a fee owner of land abutting a public highway has no right to control or seek compensation for use of his land in the public right-of-way "so long as there is no application of the street to purposes other than those of a highway." *Willis v. City of Winona*, 60 N.W. 814, 815 (Minn. 1894).

Likewise, the Court does not need to decide whether or not MVRRRA is acting as a private or governmental actor, as it lacks authority to regulate a proper street use in either case. MVRRRA is a regional rail authority established as a local government unit under the laws of Minnesota. Minnesota Statute § 237.162, subd. 2 grants the right to manage the public right-of-way to "local government units," which are defined by that statute as counties, home rule charter or statutory cities, and towns. Minnesota Statute § 222.37 permits telecommunications companies to use public roads to install cables subject to reasonable regulation by "any county, town or city in which such public road may be." Plaintiff points out that these statutes do not include regional rail authorities, and argues that because they are not included regional rail authorities are not bound by the restrictions on regulation imposed by statute. It is true that

regional rail authorities are not bound by the restrictions on exercise of authority found in the statutes, but this is because regional rail authorities have no authority to regulate public rights-of-way to begin with. The statute grants that power to the specifically defined local government units. Regional rail authorities are not designated.

The Court will not add words to the statute that the Legislature did not supply. *See Graphic Commc'ns Local 1B Health & Welfare Fund A v. CVS Caremark Corp.*, 850 N.W.2d 682, 691 (Minn. 2014) (citing *Premier Bank v. Becker Dev., LLC*, 785 N.W.2d 753, 760 (Minn.2010)) (noting that the court may not add words or meaning to a statute). To do so would violate the rules of statutory construction. *See Genin v. 1996 Mercury Marquis*, 622 N.W.2d 114, 117 (Minn. 2001) (“The rules of construction forbid adding words or meaning to a statute that were intentionally or inadvertently left out.”) (citing *Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 274 (Minn.1995)). “When a question of statutory construction involves a failure of expression rather than an ambiguity of expression, ‘courts are not free to substitute amendment for construction and thereby supply the omissions of the legislature.’ *Id.* (quoting *State v. Moseng*, 254 Minn. 263, 269, 95 N.W.2d 6, 11–12 (1959)).

The plain language of the statute grants the authority to manage public rights-of-way to a select group of local government units and then limits this authority. Regional rail authorities are not included. The logical conclusion is that regional rail authorities do not have the authority to manage the public right-of-way. However, it is worth noting that were the Court to read regional rail authorities into the statute, they would logically be bound by the same restrictions as other local government units, namely they would be prohibited from requiring a telecommunications right-of-way user “to pay for the use of the right-of-way.” Minn. Stat. § 237.136, subd. 6. To allow a local government unit, especially one whose membership is comprised entirely of

counties, to avoid the restrictions on exercise of authority merely by organizing themselves differently would pervert the purpose of the statute and create a loophole allowing local government units to sidestep the restrictions imposed by the statute, thereby rendering them ineffective. The legislature could not have intended such a result, and the Court refuses to interpret the statute in such a way as to render part of it effectively meaningless.

The regional rail authority has no more right to regulate the use of a public right-of-way than a private land owner. As discussed above, a private land owner is not entitled to compensation for a proper street use unless that use imposes an additional servitude upon the land. MVRRA has no authority to regulate or charge Defendants for use of a public highway right-of-way.

THE FACT THE CABLES WERE INSTALLED BELOW GROUND IS IMMATERIAL.

Plaintiff argues that the public highways at issue create a public easement or right-of-way which is extremely limited in scope and which does not extend beyond the topsoil. However, Minnesota law clearly provides the public with an expansive interest in the land surrounding public roads. *See, e.g., Ober v. City of Minneapolis*, 229 N.W. 794, 796 (Minn. 1930); *Cater*, 63 N.W. at 112; Minn. Stat. § 237.13, subd. 3. Plaintiff has not provided any authority to support the argument that public highways have nothing more than a right to cross the very surface of a railroad right-of-way, and the exclusive right to regulate the space below the road belongs to the fee owner of the land. Such an argument is contrary to Minnesota law. The Minnesota Supreme Court stated in *Ober v. City of Minneapolis* that

the right of the public in the streets of cities, boroughs, and towns is far more extensive than the mere right to use the surface of the land for the purpose of passage. It may undoubtedly, either by itself, or by its delegated authority to others, dig up the soil to lay water pipes, gas pipes, sewers, drains, electric wires,

telegraph and telephone wires, cables, and doubtless subterranean railways, every one of which uses is in direct and exclusive hostility to the abutting owners' right in the fee.

Ober, 229 N.W. at 796. In *Cater v. Northwestern Telephone Exchange Co.*, the Court stated “it can make no difference in principle whether the immovable structure is on, under, or above the surface of the ground, for the rights of the owner of the fee are the same in either case.” *Cater*, 63 N.W. at 113. Minnesota Statute § 237.13, subdivision 3 defines a public right-of-way as “the area on, below or above” a public roadway or highway. Clearly, the public interest in a highway extends beyond the immediate surface of the road.

Minnesota Statute § 237.162, subdivision 3 defines a public right-of-way as the area “on, below, or above a public roadway, highway, street, cartway, bicycle lane, and public sidewalk in which the local government unit has an interest, including other dedicated rights-of-way for travel purposes and utility easements of local government units.” Minn. Stat. § 237.162, subd. 3. A telecommunications provider may “construct, maintain, and operate conduit, cable, switches, and related appurtenances and facilities along, across, upon, above, and under any public right-of-way.” Minn. Stat. § 237.163, subd. 2(a). The cables in this case are laid within an existing public easement for a roadway, highway, or street. The fact that the cables are buried as opposed to hung above or beside the roadway is immaterial.

Plaintiff argues that road authorities have a right to the use of the surface of right-of-way only, and the burying of cables interferes with subsurface rights. Even if the first part of this proposition is true, it does not follow that the burying of cables is not included within the right to use the surface of the railroad right-of-way. The surface of the land includes more than the topsoil. Black’s Law Dictionary defines a surface interest as “[e]very right in real property other than the mineral interest. . . . The surface-interest owner is entitled to all whatever nonmineral

substances are found in or under the soil.” SURFACE INTEREST, Black's Law Dictionary (10th ed. 2014). A subsurface interest, in contrast, is the right to whatever minerals and water are below the property. See SUBSURFACE INTEREST, Black's Law Dictionary (10th ed. 2014). Clara City has not interfered with the mineral estate of the land by drilling holes approximately 4 feet below the surface. Clara City’s use of the public easement is by definition a surface usage.

THE INSTALLATION AND MAINTENANCE OF THE CABLES DOES NOT CONSTITUTE A TAKING.

The installation and maintenance of cables in the present case does not constitute a taking because it does not impose an additional servitude upon the land. See *Cater*, 63 N.W. at 112. To prove a taking, a land owner must show a “(1) substantial invasion of a property right; (2) resulting in definite and measurable diminution in market value.” *Haeussler v. Braun*, 314 N.W.2d 4, 9 (Minn. 1981) (applying the test from *Alevizos v. Metropolitan Airports Commission*, 216 N.W.2d 651 (1974)). When a highway easement is involved, “[i]t is only when the light, air and view over a public street are obstructed by improper street uses that an additional servitude is deemed to be placed upon these implied easements and a taking can be found.” *Haeussler*, 314 N.W.2d at 8. The installation and maintenance of telecommunications cables is a proper street use.

MVRRRA cannot show that this proper street use imposes any burden on the land beyond that already imposed by the public easement. Laying fiber optic cable across a railroad right-of-way imposed no additional burden on the railroad right-of-way. The cable was laid 4 feet below the ground using directional drilling—a hole was drilled and the cable was pulled through. There was no disturbance to the ongoing use of the highway or railroad. The surface was not

substantially disturbed. The railroad did not incur any additional expenses from having to repair any damage. In short, laying the cable was unobtrusive and did not cause any harm to the railroad. This use of the public easement imposed no additional burden upon the land, and was therefore not a taking. Likewise the maintenance of the cables does not impose any additional burden upon the railroad beyond that which is already imposed by the public easement. The railroad is not entitled to any damages because no taking occurred.

PLAINTIFF CANNOT PROVE DAMAGES.

Summary judgment is also appropriate because Plaintiff cannot prove damages. Even if a taking had occurred, MVRRA would only be entitled to the diminution in value of the property. *See Hendrickson v. State*, 127 N.W.2d 165, 173 (where property is not actually taken, but only injured, the remedy is monetary damages for the diminution in value of the property). MVRRA has not offered any evidence tending to show that the property has lost any value due to Defendants' actions. Plaintiff claims it suffered damages because it was unable to collect a fee for the use of the railroad right-of-way. However, as discussed, MVRRA was not entitled to a fee for Defendants' use of the public right-of-way cross the railroad right-of-way. Therefore, Plaintiff is not entitled to any damages stemming from lost revenue. MVRRA is not entitled to any damages and has no right to an injunction of any kind prohibiting Defendants from using the public easement in a manner consistent with statute.


LACHES AND FAILURE TO PROSECUTE

The Court will not address the arguments related to the operation of the doctrines of laches and failure to prosecute. MVRRA's claims fail on the merits. The regional rail authority

cannot assert a basis upon which it is entitled to any damages or equitable relief, and all claims must be dismissed.

CONCLUSION

Defendants have not impeded the use of the land Plaintiff claims fee title to or imposed an additional servitude upon the land. Railroads are subject to proper street uses. The installation and maintenance of telecommunications cables is a proper street use. Plaintiff does not have the authority to regulate a proper street use of the public highway, and cannot control or profit from Defendants' use of the public roadway. Plaintiff has not suffered a loss in revenue to which it was entitled or suffered a taking; and is therefore is not entitled to any damages. The Defendants are entitled to summary judgment.

 Van Hon,
Thomas (Judge)
2015.07.08
11:17:30 -05'00'

TWVH