

**Road Use Agreements**

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1. Road Use Agreements: An Overview
2. Road Use Agreements (“RUAs”) are contractual arrangements a governmental body might enter into with an entity engaged in a large construction project to remediate damage to roadways under the local unit of government’s supervision/ownership and limit the unit of government’s potential liability exposure attributable to the project.
	1. Such large construction projects generally involve the transportation of machinery and materials exceeding normal weight limits applicable to county/road district roadways, placing a strain on local infrastructure and increasing the risks to the general motoring public.
	2. Given the wear and tear caused by moving such oversized loads over roadways for which road districts maintain legal responsibility, an RUA might be drafted so as to place the responsibility on those accountable for the construction project to: minimize the damage to such roads, to make any necessary repairs to roadways damaged during the pendency of the project, and to ultimately restore road district roadways to their original, pre-construction condition in the event such damage does result.
3. As the party generally liable for damages of the motoring public attributable to the roads under its supervision, road districts are well advised to ensure those responsible for large construction projects leave road district roadways in good condition and free from undue risks.
4. The specific provisions that might be adopted in an RUA will vary based on the particulars of the project and negotiations of the parties.
5. A well-drafted agreement will permit the movement of heavy traffic crucial to the completion of such projects over road district roads but will provide a means for recovering the costs attributable to such operations and will attempt to direct the overweight loads to more suitable roadways.
6. All the while, an RUA should assist in minimizing the disruption to the traveling public attributable to the project.
7. Examples
8. The Dakota Access Pipeline was built to transport petroleum from the Bakken oil shale fields to a major oil terminal at Patoka, Illinois. This major infrastructural project traversed several counties in West-Central Illinois, and to deal with and anticipate the heavy trucks and significant footprint occasioned by the pipeline company and its contractors’ activities, Morgan and Greene Counties entered into RUAs with Dakota Access covering liability between the parties, responsibility for repairs and/or the cost of repairs, and a host of other direct and incidental issues occasioned by the project.
9. RUAs might be drafted to cover not only massive interstate petroleum or natural gas pipelines, but also for more routine projects like the replacement of worn and damaged electricity transmission lines. Greene County, Illinois recently entered into such an agreement with Ameren Illinois to cover the utility’s replacement of various poles throughout the county. Demonstrating that such agreements might be negotiated on behalf of multiple units of local government, in addition to Ameren the RUA included Greene County, Kane Township, Carrollton Township, White Hall Township, and Roodhouse Township as signatories. By involving several impacted jurisdictions in negotiations, townships and road districts might cut down on costs and gain bargaining power with the party responsible for the project relative to what they would exercise on their own.
10. Relevant Legal Authorities
11. The basic legal authority for the enforcement of an RUA’s main provisions is the Illinois Highway Code, 605 ILCS 5/5, *et seq.*, which vests broad power in counties, townships, and road districts to open, construct, maintain, relocate, access, or repair roadways falling under their respective jurisdiction and supervision.
	1. Furthermore, 605 ILCS 5/9-113 permits county units of government (and, by extension, townships and road districts as units of government under county supervision) to impose reasonable rules, regulations, and specifications for the use of highways under its supervision on both private and public utility companies.
	2. 605 ILCS 5/9-113.01 then goes on to impose primary responsibility/liability on utilities for repair of any damage caused by their actions to a roadway under the jurisdiction of a local unit of government.
12. However, against this very general backdrop, it is important to consider the different legal treatment afforded to different major utility projects- as utilities are the parties often engaged in the large, intensive construction projects likely to justify a road district’s use of an RUA. Whereas oil pipelines, wind farms, and solar farms are primarily subject to grants of authority from their respective state, interstate natural gas pipelines are subjected to comprehensive federal regulation under the Natural Gas Act (“NGA”), 15 U.S.C. §§ 717, *et. seq.*, which vests exclusive regulatory jurisdiction in the Federal Energy Regulatory Commission (“FERC”) over the transportation and sale of natural gas in interstate commerce. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988).
13. FERC’s regulatory scheme for interstate natural gas carriers is all-embracing and detailed, a centerpiece of which is the issuance of a “certificate of public convenience and necessity” before any natural gas facility involved in interstate commerce is constructed, extended, acquired, or operated. 15 U.S.C. § 717f(c)(1)(A).
14. The United States Supreme Court has held that when a state regulation affects FERC’s ability to comprehensively regulate the transportation and sale of natural gas, to achieve the uniformity of regulation which was the NGA’s objective, or presents the possibility of interference with federal authorities’ regulatory power, then the state law at issue will be preempted. *Schneidewind*, 485 U.S. at 310.
15. The “exclusive and plenary” authority of FERC in this field has also been recognized by the Illinois Supreme Court in *General Motors Corp. v. Illinois Commerce Com’n*, 143 Ill.2d 407, 416 (1991).
16. Despite the strong preemptive effect of the NGA, FERC’s so-called “rule of reason” directs that certificate holders engaged in interstate natural gas transmission are to attempt to cooperate with state and local legal requirements. *Mountain Valley Pipeline, LLC v. Wender*, 2018 WL 4169098, ¶ 8 (S.D. W.V. D.C., 2018).
17. Thus, state and local laws having only an indirect or incidental effect on interstate natural gas facilities will not be preempted. *Rockies Exp. Pipeline LLC v. Indiana Natural Resources Com’n*, 2010 WL 3882513, ¶ 3 (S.D. Ind. D.C., 2010).
18. While this principle would invalidate state or local permitting related to the placement of a facility approved under a FERC-issued certificate, the material covered by an RUA would presumably be just the type of local regulations to which the rule of reason would sanction gas company adherence. In line with this principle, FERC permits often contain language along the lines of that involved in *Rockies Exp. Pipeline*:

Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. We encourage cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission. *Id*. at 2.

1. In contrast, oil pipelines receive relatively light-handed regulatory treatment, with state and local government having primary authority in this area. This state of affairs was sanctioned by the United States Supreme Court in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), a decision in which the Court declined to rule on the merits of an order of the Railroad Commission of Texas. The Court reasoned that the state court had greater expertise in this complex area and also noted the unique significance of the oil industry to the state of Texas in reaching this conclusion.
	1. Therefore, while interstate natural gas pipelines receive their certificate of public necessity from FERC, even oil pipelines which cross state lines must receive their certificate from the Illinois Commerce Commission for operations in this state (*See Pliura Intervenors v. Illinois Commerce Com’n*, 405 Ill.App.3d 199 (4th Dist. 2010), in which a common carrier oil pipeline applied for a Certificate in Good Standing under 220 ILCS 5/15-401 to construct a pipeline extension).
2. Finally, wind and solar farms are likely to face regulatory supervision primarily at the level of the local zoning board.
3. Thus, to the extent federal regulation of gas projects by FERC is unlikely to inhibit a local government body’s attempt to incidentally regulate the transportation of heavy machinery and equipment over roads it owns and maintains, the barriers to recognition and enforcement of an RUA’s main provisions are even less significant with oil pipelines and renewable energy projects.
4. Model Road Use Agreement Provisions

 Aside from general provisions common to all commercial contracts, some particular sections a road district implementing an RUA might consider include the following:

1. A description of the project’s general nature and a statement broadly defining the parties subject to the RUA’s provisions.
2. The party responsible for the construction project should be defined expansively so its direct employees, contractors, sub-contractors, vendors, etc. are all covered under the terms of the agreement. It is likely that a wide variety of different parties will participate in some aspect of the construction process and have some involvement in the transportation of heavy machinery and/or oversized loads.
3. As the road district would bear responsibility for costs and face potential liability in the absence of an agreement allocating expenses and risk otherwise, the RUA should make clear that the parties involved in moving oversized loads over public roadways are accountable for any liability and damages attributable to the strain their activities place on the road district roads.
4. Additionally, the agreement should state as a general rule that the party responsible for the construction project bears legal responsibility for costs associated with implementation of the RUA, whether they be legal fees, engineering expenses, labor costs, etc.
5. Whether prepared by the project leader or an outside consultant, maps should be provided by the project manager and approved by the road district which show:
6. The route or affected area of the project within the road district’s jurisdictional borders; and
7. The particular route/roadways/crossings over which heavy equipment and/or materials are to be transported to and from the project site.
8. Additionally, the roadways and crossings identified and mapped out as the route for transportation of equipment and materials should be inspected by a third-party consultant prior to the commencement of work on the project. Such a road inventory/survey will provide a pre-construction baseline on the condition of the roads against which an inspection using the same methodology following project completion is to be compared against. Such pre and post-construction inspections/surveys are to form the basis for the road district’s negotiations with the other parties concerning recovery of damages to the road district’s roadways.
9. If any additional roadways are to be used/crossed as part of the project, a similar inspection process is to be employed at the expense of those responsible for the construction and the movement of oversized loads over the road district’s roads.

1. In the likely event that an oversized associated with the project inadvertently uses an unpermitted roadway or crossing, the RUA might spell out how that party is to be held responsible for any resulting damage. This possibility may call for a more thorough pre-construction evaluation of all the roadways maintained by the road district to establish a baseline for the status of all roads that could be traversed, not just those the parties plan on utilizing.
2. Representatives for the project should provide the consultant with drawings depicting the axle numbers, spacing, and loading for those trucks hauling oversized loads so that the consultant might more accurately calculate the trucks’ likely impact on the roads.
3. The RUA should detail the procedure for how payments are to be remitted from the parties responsible for the construction project and the transportation of equipment/materials to the road district as well. The agreement might also explain the basis for charging those affiliated with the project for any labor, materials, etc supplied by the road district.
	1. The road district should document and the other parties to the contract should make payments to the road district consistent with any bookkeeping or accounting procedures generally used for road district receipts. For instance, the agreement might require the construction participant send payment to the road district within so many days of receiving a proper invoice.
	2. To the extent the project might use road district employees to direct/signal traffic or to make any repairs for which the project’s operators are responsible, they should pay for the value of the road district’s employees’ wages and for the prevailing market price for any road district property used.
4. The party responsible for the project might agree to hold a public meeting on the project prior to the commencement of construction to inform interested parties (including schools, fire protection districts, and affected landowners) of significant aspects of the project and acquire relevant contact information.
5. Facilitating such transparency before construction begins might minimize the potential for surprise, permit mutual understanding of project objectives and expectations, and clear up any logistical or safety issues prior to project commencement.
6. Such interested parties should be notified in advance of any anticipated road closures occasioned by the project or any other activities likely to cause hassle or delay.
7. Prior to beginning construction, a corporate guaranty or a surety bond should be executed by the project lead in favor of the road district to cover any failure to pay the costs of upgrading, repairing, and/or restoring road district roads and property. Such bond and/or guaranty should remain in place for some period of time following the project’s completion, at least until such time as all payments and/or restorative work has been completed.
	1. The road district could draw against such surety bond in the event the party responsible for the construction project failed to make or pay for upgrades, repairs, or restoration of road district roads damaged in the construction process and falling within the scope of the parties’ agreement.
	2. Such a bond gives the road district further assurance that the funds will be available to restore roadways to their pre-commencement state even if those responsible for the construction project later run into financial difficulties.
	3. Before the road district may draw on such bond, formal, written notice must be made of the responsible project participant specifying the failure to repair or other default under the parties’ agreement. Such project participant should then be permitted an opportunity to cure any claimed breach.
	4. Upon the project participants’ payment of any funds owed to the road district or completion of all repair and restoration work revealed to be necessary by the post-project inspection, the road district should execute a release or deliver any certification required for the surrender of the surety bond.
8. The road district might include a mutual indemnification provision as well, holding that each side is to release, indemnify, and hold harmless the other side to the extent any liabilities, obligations, etc. arise out of the indemnifying/holding harmless party’s actions.
	1. The RUA provides a mechanism for the construction project participants to conduct repairs and/or reimburse the road district for any damage done to road district roadways. However, if there is an event causing liability exposure to one of the project participants, it is possible they could bring a legal action against the road district- either seeking to pass off liability or seeking contribution for any resulting judgment.
	2. A mutual indemnification provision would help limit the road district’s liability exposure for the actions attributable to the participants in the construction project. Granted, such a provision would also limit the road district’s potential recourse against the other parties to the Agreement and the road district would still maintain financial exposure for its own actions as the party generally responsible to the motoring public for the condition of its roads.
	3. However, given the bargaining power of the respective parties and the fact that the project participants’ actions are much more likely to result in significant liability events than the actions of the road district in generally maintaining the roads, agreeing to mutually indemnify and hold one another harmless could spare the road district from exposure to the most significant judgments.
9. The RUA should also specify minimum levels of insurance coverage applicable to the construction project participants, including workers compensation coverage, commercial automobile liability insurance, and commercial general liability coverage, among potentially others. Evidence of such insurance should be submitted prior to the initiation of any work or the transportation of any materials to the project site.
	1. The use of heavy, oversized loads on public roadways for which the road district maintains responsibility presents the possibility of a major liability event occurring for which the road district’s own insurance coverage might be insufficient.
	2. As this increased liability exposure is directly attributable to the increased traffic and active operations of the major project, the road district should seek to have themselves added by the project participants as an additional insured party on the required policies.
10. Provision for issuance of vehicle permits for any overweight or oversized vehicle should be included in the RUA, and any such permit is to be kept in the subject vehicle and made available upon request. Additional restrictions on the scope of any permit might be issued for certain parts of the year, particularly winter and early spring, or for particular weather or road conditions.
	1. Oversized loads put a particular strain on roadways, especially if weight is not appropriately distributed between axles and spaced. The project participants should identify prior to commencement the specifications for the oversized loads they plan on utilizing, but a permitting system should be in place to regulate the movement of such vehicles over road district roads.
	2. IDOT is authorized by the Illinois Vehicle Code (625 ILCS 5/15, *et. seq.*) as well as 92 Illinois Administrative Code 554, Subchapter F to issue special permits for those vehicles exceeding otherwise applicable weight, height, length, and width requirements to operate on public roads under IDOT’s jurisdiction. For those roads not under IDOT jurisdiction (i.e. under the jurisdiction of local units of government such as road districts), the oversized load operator must obtain the permission of the local authorities.
	3. Thus, a road district might issue individual “super load permits” consistent with IDOT regulations to those involved in the transportation of equipment and materials.
		1. At a minimum, a load is designated by IDOT as a “super load” (and hence requiring a special permit) if any of the following is true: 1) load width is greater than 14’06”; 2) length of truck and trailer together is greater than 14’06”; 3) height is greater than 15’0”; or 4) gross weight is greater than 80,000 pounds.
11. The RUA might also state that, to the extent possible, the utility is to limit the disruption to local traffic resulting from its project. Not only does the road district have liability exposure for injuries arising of its failure to maintain the condition of the roads under its control, but it also bears some responsibility for maintaining the free and largely unimpeded flow of traffic over its roads.
	1. The Agreement might be a good place to impress upon those involved in the construction project and the transportation of materials and equipment that they are to strive to minimize their disruption to the motoring public.
	2. Additionally, the project lead and its various contractors should be directed to minimize their use of the road district’s roadways for the parking of trucks and other machinery as well as their staging of work in general. Parking vehicles in the roadway is not only inconvenient to the general motoring public, but also dangerous when they attempt to pass through stretches of roadway impeded by vehicles and machinery.
12. The road district should spell out the utility’s responsibility to make temporary repairs during the pendency of the project.
	1. The road district remains generally liable to the motoring public for property damage and personal injuries attributable to the conditions of the road under its jurisdiction. Thus, if roadways are damaged in a way that increase the danger to motorists, the road district might incur liability even if a construction project participant is responsible for the defect. Hence, it is important that the RUA requires the responsible party to make provisional, interim repairs to road district infrastructure before a more permanent restoration can be made.
	2. Should the other parties fail to make such repairs within the designated time period, the road district should reserve the right to retain a contractor at the other parties’ expense to make such repairs.
13. Notice and road district approval should be required before the construction project participants engage in any temporary or permanent modifications to the road district’s roadways or other property. If such modifications or improvements can be anticipated prior to commencement of the project, they should be specifically dealt with in the RUA.
	1. Widening of intersections/corners to permit sufficient turning radius for trucks is one particular improvement that might need to be undertaken prior to commencement of a project.
	2. A provision on temporary and permanent modifications should not affect the road district’s daily routine maintenance duties or the duty of those responsible for the construction project to make temporary repairs to road district infrastructure damaged by their activities.
	3. The road district may insert a provision in its RUA that allows it either: 1) to allow any improvements made to remain after the project’s completion; or 2) which would force the project participants to remove it following the completion of the project such that the property is returned to its pre-construction state.
14. Notwithstanding any other provisions in the RUA covering repair work, the road district should reserve the right to conduct any emergency repairs to roadways which it believes are necessary for the safety of the motoring public. Such damage and repair work should be well documented and photographed and a subject of the final negotiations of the parties on costs owed to the road district.
	1. Even if the damage to the road district’s roads is attributable to the parties involved in the construction project, the road district’s remains potentially liable for injuries or damage to property of the motoring public which result from the conditions of the roads under the road district’s control. Thus, a dispute between the road district and the project participants should not serve as an excuse for a damaged piece of roadway to remain unrepaired.
	2. Rather, the road district should make any necessary repairs and negotiate for reimbursement at a later date. The cost of the repairs, even if never paid for by the responsible parties, would likely pale in comparison to the cost of a major liability event attributable to conditions on a road district roadway.
15. Any traffic control measures conducted by the construction project participants must be in conformity with applicable IDOT standards, and project or work zone-related signage should also be the responsibility of those responsible for the construction project.
	1. The Manual on Uniform Traffic Control Devices and IDOT’s Supplement to the Manual on Uniform Traffic Control Devices supply the standard for work zone signage and road closures. 625 ILCS 5/11-301 and 5/11-304.
16. The project participants should bear responsibility for clearing any mud, garbage, or other obstructions attributable to the project from public roadways. The RUA might also include a section dealing with dust control if likely to become an issue.
	1. Mud, garbage, and other roadway obstructions increase the potential danger to the motoring public of traveling on road district roads, and hence increase road districts’ potential liability attributable to unsafe roadway conditions. Especially in wet conditions, large construction projects can generate significant debris which might make it onto roadways. It is only fair and eminently reasonable that those responsible for the projects generating such obstructions remove any such hazards.
17. As referenced above, following completion of the project, a final inspection of the roadways, crossings, etc. used by the project participants should be conducted by an independent, third-party contractor using the same methodology as that used in the pre-construction survey, and a final report issued concerning the extent of damage/ necessary repairs attributable to the project.
	1. To the extent this independent contractor identifies damages attributable to the project (i.e., departing from the baseline road status established by the pre-construction inspection), road district officials or the County Engineer will need to notify those responsible for the project in writing of the repair work that needs to be done and prepare estimates of the costs to repair these roads to their pre-project condition.
	2. Upon completion of the final restoration/repair work or the release of the funds needed to complete such work, the road district should execute a release of claims in the project participants’ favor.
18. Should there be a disagreement between the road district and the other signatories to the RUA regarding the extent of damage or the cost of remediating any damage which cannot be resolved by the good faith negotiation of the parties, a neutral party selected by both sides (and paid for by the construction project participants) might be retained to review all pertinent documents and determine the final cost of any roadway repairs covered by the RUA.
	1. Other dispute resolution procedures agreed upon by the parties, such as mediation or arbitration, might also be adopted.