

Texas Supreme Court Narrows Jury Finding on Scope of Utility Company's Easement by Estoppel

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June 8, 2026

In a significant decision impacting the utility and energy industries, the Texas Supreme Court recently issued an opinion in [Boerschig v. Rio Grande Electric Cooperative, Inc.](#), making clear the limited scope of an easement by estoppel.

Private land in Texas, with one of the highest rates of private land ownership ([more than 96%](#)) and the second largest state by land size in the United States, is crisscrossed with utilities and energy extraction and delivery operations that date back more than a century. As a result, the recent opinion issued by the Texas Supreme Court, which concluded that easements by estoppel are to be narrowly construed in terms of scope, may have an impact on any utility or energy easement holders that are not properly recorded for historical reasons, significantly limiting what the easement holder can and cannot do within its easement rights.

In *Boerschig*, the Texas Supreme Court was tasked with determining

- Whether an electric cooperative held an easement by estoppel for its power distribution lines that were built pursuant to an agreed, albeit unrecorded, easement with the prior ranch owners and
- Whether the scope of that easement by estoppel allowed the electric cooperative to upgrade the power distribution lines that increased the number of power lines originally constructed.

Based on these questions, the Texas Supreme Court concluded that the electric cooperative **did have** an easement by estoppel; however, in a significant decision, the Court concluded that the power distribution line upgrades **exceeded the scope of the easement by estoppel** because the cooperative did not offer any evidence “that the upgrade was reasonably necessary to continue its existing use of the line.”

What Happened?

The [Rio Grande Electric Cooperative](#) was originally formed in 1945 to provide electricity to rural ranches and property owners in south, central, and west Texas. Since 1945, Rio Grande has expanded to cover 18 counties in Texas and two in New Mexico. In 1947, Rio Grande acquired a “Right of Way Easement”

over the property at issue, giving it “the right to place, construct, operate, repair, maintain, relocate and replace an electric transmission or distribution line or system on 5,684 acres” of the property at issue. However, the easement was never recorded in the real property records.

The distribution line was constructed after Rio Grande obtained the easement and crossed 1.6 miles of the property at issue. Subsequently, in 2002, John Boerschig purchased the U-Bar Ranch in Kinney County, Texas, which included the plot of land where Rio Grande’s utility easement ran. Mr. Boerschig was aware of the distribution line at the time of purchase, as he observed the distribution line in addition to the fact that it was marked on a survey that was prepared in connection with the purchase transaction.

In 2012, Rio Grande provided notice to Boerschig about its plan to bulldoze and upgrade the existing feeder along the utility line easement. Additionally, Rio Grande planned to move the distribution line approximately 15 feet and add to the line to serve new customers (specifically a gas compressor station and a new electric substation Rio Grande was planning to build to accommodate anticipated future demand and growth). While Boerschig contended that he never received the letter, after observing a bulldozer for Rio Grande starting to clear a route through his property, he demanded copies of the easements covering the route. Rio Grande did not provide the specific easement covering the area at issue, only providing other easements it held over the property.

Boerschig filed a suit against Rio Grande for trespass and obtained a temporary restraining order. Rio Grande filed a counterclaim seeking a declaratory judgment that it had a valid express easement or, in the alternative, that it had a prescriptive easement or one by estoppel. During the course of the litigation, the parties agreed Rio Grande would cease construction. Rio Grande also alleged that Boerschig had interfered with its easement rights and potential contracts to reroute the distribution line through the town of Brackettville, Texas.

Throughout the litigation, Boerschig offered to allow Rio Grande to build a new line in a different area of his property and alongside a different existing transmission line owned by another company. Rio Grande, however, refused. After Boerschig dropped his opposition to the continued construction, subject to his trespass claim that the upgrade was not authorized by a valid and enforceable easement, Rio Grande decided to keep the line on the original footprint, but upgraded it to include additional poles and lines as originally planned.

The dispute between the parties eventually went to trial, and the jury returned a verdict that Rio Grande did not have a written or prescriptive easement but concluded that it did have an easement by estoppel. The jury also concluded that Rio Grande’s upgrade to the distribution lines failed to exceed the scope of the easement, which included utilizing 60 poles carrying seven wires versus the original distribution line that was 20 poles carrying four wires.

On appeal, the Court of Appeals was presented with two questions:

1. Whether there was sufficient evidence for the jury to find that there was an easement by estoppel; and,

2. Whether there was sufficient evidence for the jury's failure to conclude that the transmission line upgrades by Rio Grande exceeded the scope of the easement by estoppel.

The Court of Appeals found that there was sufficient evidence for both jury findings.

Supreme Court's Fundamental Legal Analysis

Whether There Was Sufficient Evidence for Easement by Estoppel Jury Finding

The elements to prove a claim of easement by estoppel are relatively well-settled under Texas law.

1. "[T]he owner of the burdened estate represented that an easement would be conveyed,
2. The holder believed the representation, and
3. The holder relied on the representation to its detriment."

The question the Supreme Court focused on was whether the defective easement, because it was unrecorded, could be evidence to establish Rio Grande's easement by estoppel claim.

The Texas Supreme Court answered this in the affirmative and upheld the Court of Appeals, while declining to adopt the Restatement (Third) of Property. As the Supreme Court stated:

A writing that fails as an express easement can be some evidence supporting the representation element of an easement by estoppel. The function of such easement is to preserve reliance interests for uses of land intended by the parties but not supported by formal written documentation. Thus, easements by estoppel arise only in cases in which an express easement fails to cover the use at issue. An easement that the parties intended but failed to perfectly memorialize is no less relevant than an easement the parties intended to memorialize by a handshake.

Based on this, the Court concluded that there was legally sufficient evidence based on the unrecorded written easement from 1947 that the jury could rely on finding that Rio Grande had an easement by estoppel.

Did Rio Grande's Upgrade Exceed the Scope of its Easement by Estoppel

The second issue presented to the Supreme Court was on the scope of the easement by estoppel and whether the upgrades by Rio Grande exceeded its scope. This is where the Supreme Court reversed both the trial court and the court of appeals' conclusions, finding that as a matter of law Rio Grande exceeded the scope of its easement by estoppel under Texas law. Therefore, Boerschig, the property owner, is entitled to judgment as a matter of law on his trespass claim.

In coming to this conclusion, the Supreme Court specifically looked at the public policy surrounding easements by estoppel. As the Court noted, because easements by estoppel are not recorded like express easements, determining their scope is more difficult and is fraught with other considerations, like this situation where the easement would be extended to subsequent property owners such as Boerschig. Based on this, the Court stated "[T]he scope of such an easement [by estoppel] is limited to preventing injustice by protecting the holder's reliance interest—that is, the actual investment (or

other change of position) that the holder made to use the land in reasonable reliance on the owner's representations." Based on this, the Court made clear that easements by estoppel are limited in scope to that which "would be discovered by reasonable inspection or inquiry."

In support of this conclusion, the Court looked closely at separation of powers issues,

Courts and juries are not free to give away more of a landowner's property rights whenever they feel that the societal benefit of an expanded use outweighs its burden on the landowner. That judgment is for the other branches of government and entities on which they have conferred condemning authority, and our Constitution demands that the landowner be compensated when a greater easement is taken.

There are additional considerations that can be made in assessing whether an easement by estoppel holder exceeded the scope of its easement, such as whether the activity is "reasonably necessary to fairly enjoy the usage rights defined by the representations, reliance, and knowledge." This assessment of whether the use is reasonably necessary must be narrowly drawn, however, "[to burden the landowner as little as possible.](#)"

In undertaking this analysis, the Supreme Court concluded that Rio Grande's increasing the number of distribution line poles, increasing the height of those poles by seven feet, and increasing the number of lines on those poles was not an activity that was reasonably necessary for it to enjoy the usage of the easement based on the representations it received and relied upon as well as the knowledge of the easement.

In essence, the issue boiled down to whether Rio Grande could continue to use and maintain its line in its present form, which was not contested. However, the Rio Grande CEO testified that the changes made constituted an upgrade and would provide electric services to a new gas compressor station as well as connect a new electrical substation to accommodate anticipated future growth. The CEO also testified that the existing line served roughly 1,000 consumers. This testimony at the trial court showed that under the narrow construal of the easement by estoppel, Rio Grande had exceeded its scope because it was taking additional steps beyond simply using and maintaining the distribution line and easement that had been in place since the 1940s.

On this basis, the Court concluded as a matter of law that Rio Grande trespassed on Boerschig's property when it upgraded the distribution line and remanded the case to the trial court for further proceedings regarding the appropriate relief.

Key Takeaways

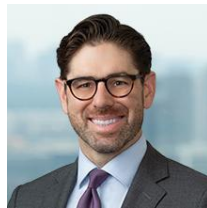
With Texas' historic amount of private property, utility and energy companies are often holders of easements that crisscross private landowners' land. The decision in this case is likely to have an impact on what easement holders can or cannot do within their easement where the easement is not properly recorded. This is likely to be a greater consideration when the land where the easement runs is transferred to a new property owner, as in *Boerschig*. Many of these easements may have been inherited from prior producers or utility companies or granted by prior landowners before the sale of

the property to the current landowner. It is fundamental, particularly with these historic property rights, to confirm both that any easements supporting the utility or infrastructure owned are appropriately recorded in the real property records and review the scope of those express easements to ensure that the activity complies with the use and scope of the express easement.

Additionally, it is necessary to understand the narrow limitations on what rights an easement holder may have under the *Boerschig* decision. Under the rule expressed in *Boerschig*, an easement by estoppel will be very narrowly construed in scope, limiting what actions the easement holder may take as reasonably necessary for the use and enjoyment of the limited property right they have.

The *Boerschig* decision underscores the critical importance of proper recording of easements in the property records for utility and energy companies operating across Texas and beyond. Additionally, it underscores the importance of confirming that historical easements, such as the one at issue in *Boerschig*, were recorded in the property records when obtained to avoid the risk of losing an easement or significant narrowing of an easement already negotiated and obtained years prior.

Attorneys at GableGotwals have experience advising energy clients on the full spectrum of easement and real property issues impacting operations — from auditing existing easement portfolios, ensuring proper recordation in county real property records, and defending real property disputes such as in the *Boerschig* case.



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