



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2017-16

The Honorable Roger Thompson
Oklahoma State Senator, District 8
2300 N. Lincoln Blvd.
Oklahoma City, Oklahoma 73105

December 20, 2017

Dear Senator Thompson:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

1. Does 69 O.S.2011, § 1722 exempt a rural water district from paying the costs associated with removing or relocating the district's existing water lines or other facilities that are located in a turnpike right-of-way when removal or relocation is necessary for improvement, construction, or reconstruction of the turnpike?
2. If the answer to Question # 1 is yes, may the Oklahoma Turnpike Authority nevertheless require a rural water district, as a condition of granting a license or permit to locate the district's water lines in a turnpike right-of-way, to agree to pay such costs?
3. If the answer to Question # 1 is yes, may a rural water district, by agreement with the Oklahoma Turnpike Authority, waive its exemption from paying the costs of removing or relocating its water lines or other facilities, as provided in Title 69, Section 1722?

I.
BACKGROUND

The Oklahoma Highway Code of 1968 (the "Highway Code") governs Oklahoma's road and highway system. *See* 69 O.S.2011 & Supp.2017, §§ 101—1964. The Highway Code delegates to various public officials¹ the duty to "to plan, develop, operate, maintain and protect the highway

¹ The governing body of a particular road or highway is "[t]he legislative authority of any city or town for all streets and highways within the corporate limits of such city or town; and the board of county commissioners of each

facilities of this state, for present as well as for future use.” 69 O.S.2011, § 101(d). With regard to the turnpike system, the Oklahoma Turnpike Authority (“OTA”) is authorized and empowered “to construct, maintain, repair, and operate turnpike projects.” *Id.* § 1701.

While the principal object of a road or highway system is public passage, public utilities are often permitted to place their facilities within the right-of-way of a road. 39A C.J.S. *Highways* § 208. However, this right is not unfettered. A utility’s use of a roadway right-of-way² is governed by the Highway Code, which specifies that OTA has authority over the location and removal of all “telephone, telegraph, fiber optic, electric light and power transmission lines, poles, cables, wires and conduits, sewers and all pipelines” placed upon, across, or under a turnpike. 69 O.S.2011, § 1722(A).³

Separately, the Rural Water, Sewer, Gas and Solid Waste Management Districts Act (the “Act”) permits county commissioners to establish public nonprofit rural water, sewer, natural gas, or solid waste districts to serve the needs of rural residents, and specifies that such districts may use public roads and highways. *See* 82 O.S.2011, §§ 1324.1—1324.50. Under Section 1324.10 of the Act, a rural water district may, “in connection with the acquisition, construction, improvement, operation or maintenance of its...system, equipment, facilities or apparatus, use any street, road, alley or highway which is owned or held by the state, or any political subdivision.” *Id.* § 1324.10(A)(8). The location of the district’s water lines or other facilities in “streets, roads, alleys or highways” must be “concurred in” by the entity having “jurisdiction over said property.” *Id.* Moreover, “the relocation or rearrangement of any public utility's or common carrier's facilities of service required to be made to permit or accommodate installation or maintenance of a district's facilities on, across or under any such publicly owned or held real property or interest therein shall be performed at the sole cost of the district[.]” *Id.*

II. DISCUSSION

We begin with the recognition that “[s]tatutory interpretation is governed by legislative intent, and legislative intent is ascertained from a statute's plain language.” *Brisco v. State ex rel. Bd. of Regents of Agric. & Mech. Colleges*, 2017 OK 35, ¶ 10, 394 P.3d 1251, 1254. “If a statute is plain and unambiguous, it will not be subjected to judicial construction, but will receive the effect its language dictates. Only when the intent cannot be ascertained from a statute’s text, as when ambiguity or conflict (with other statutes) is shown to exist, may rules of statutory construction be invoked for use.” *Jobe v. State ex rel. Dep't of Pub. Safety*, 2010 OK 50, ¶ 13, 243 P.3d 1171, 1175. *See also Dean v. Multiple Injury Tr. Fund*, 2006 OK 78, ¶ 9, 145 P.3d 1097, 1101 (“If the [statutory] language is plain and clearly expresses legislative will, further inquiry is unnecessary.”).

county as to all county highways; and the State Highway Commission of the State of Oklahoma as to all state highways.” 69 O.S.2011, § 219.

² In this context, a right-of-way is “[a] general term denoting land, property, or interest therein, usually a strip acquired for or devoted to a highway use.” 69 O.S.2011, § 236.

³ The Department of Transportation and boards of county commissioners exercise similar authority over utility facilities located upon, across, or under roadways subject to their jurisdiction. *See* 69 O.S.2011, § 1403(A).

A. Title 69, Section 1722 exempts a rural water district from paying the costs to move a water line when necessary for a turnpike construction project and requires such costs to be borne by the Oklahoma Turnpike Authority.

As noted above, when a rural water district's water line is placed in a roadway right-of-way, any relocation or rearrangement of existing public utility or common carrier facilities that is necessary "to permit or accommodate installation or maintenance" of the district's water line is at the sole cost of the district. 82 O.S.2011, § 1324.10(A)(8). Once a rural water district's pipelines are located in a turnpike right-of-way, the Highway Code provides that removal and relocation of pipelines affected by "turnpike project[s] or improvement or construction or reconstruction thereof...*shall be made at the cost and expense of the owners thereof, unless otherwise provided by law or [OTA.]*" 69 O.S.2011, § 1722(A) (emphasis added).

The requirement in Section 1722(A) is a codification of the common law rule imposing such costs on utility owners. *See* 39A C.J.S. *Highways* § 210 ("Public utilities ordinarily may be required to remove or relocate their facilities at their own expense from public highways and streets where it becomes necessary for improvement for public use and convenience. This is the rule at common law, and it applies in the absence of express statutory provisions to the contrary."). Nevertheless, Section 1722(A) also specifies that, where otherwise provided by statute or agency order, this requirement may not apply. To that end, Section 1722(C) provides as follows:

Rural water districts...shall be exempt from the payment of the costs and expenses for the removal and relocation of water and sewer pipelines and all such facilities constructed or in place in the public right-of-way when the removal and relocation of such facilities is necessary for the improvement, construction or reconstruction of any turnpike. ***Such costs and expenses, including any unpaid on the effective date of this act, shall be paid by the public authority having jurisdiction over the particular turnpike.***

69 O.S.2011, § 1722(C) (emphasis added).⁴

The language of the statute is plain and unambiguous. The default rule under Section 1722 is that when removal or relocation of utility facilities placed in a turnpike right-of-way is necessary for turnpike improvements, construction, or reconstruction, the utility owner is responsible for the costs of removal or relocation. However, the Legislature specifically exempted rural water districts, among other entities, from this rule.⁵ Moreover, the Legislature went further by explicitly identifying the entity responsible for removal/relocation costs: "such costs and expenses...*shall be paid by the public authority having jurisdiction over the particular turnpike.*" *See* 69 O.S.2011, § 1701; *see also Vasquez v. Dillard's, Inc.*, 2016 OK 89, n.11, 381 P.3d 768, 771 (acknowledging that shall is generally considered a command).

⁴ Similar language appears in Title 69, Section 1403 regarding the relocation of rural water district pipelines located in rights-of-way of "any road or highway which is part of the state highway system or turnpike project." *See* 69 O.S.2011, § 1403(D), (F).

⁵ As the Court of Civil Appeals has recognized, "[r]ural water districts are created by statute and are thus controlled by the protection given to them by these statutes." *Bd. of Cty. Comm'rs of Creek Cty. v. Creek Cty. Rural Water Dist. No. 2*, 1994 OK CIV APP 166, ¶ 14, 888 P.2d 540, 543.

Accordingly, a rural water district is exempt from paying the cost of relocating or removing its water lines located within a turnpike right-of-way when removal or relocation is necessary for the improvement, construction or reconstruction of a turnpike.

B. The Oklahoma Turnpike Authority may not require a rural water district, as a condition of granting a license or permit to locate the district's water lines in a turnpike right-of-way, to agree to pay costs for which the district is exempt under Title 69, Section 1722.

OTA has broad authority over the location and removal of utility facilities placed upon, across, or under a turnpike. *See* 69 O.S.2011, § 1722(A). Similarly, the location of a rural water district's water lines or other facilities in "streets, roads, alleys or highways" must be "concurring in" by the entity having "jurisdiction over said property." 82 O.S.2011, § 1324.10(A)(8). In the case of turnpikes, that entity is OTA. Thus, under each statute OTA has express authority to regulate the placement and removal of utility facilities in turnpike rights-of-way. In addition to this express authority, OTA "has, by implication...such powers as are necessary for the due and efficient exercise of the powers expressly granted, or such as may be fairly implied from the statute granting the express powers." *Marley v. Cannon*, 1980 OK 147, ¶ 10, 618 P.2d 401, 405. OTA may not, however, "expand [its statutory] powers by its own authority." *Id.*

While the placement or removal of utility facilities on turnpike rights-of-way is subject to OTA jurisdiction, OTA does not have express or implied authority to require a rural water district to pay costs that the district would otherwise be exempt from paying under Section 1722(C). To the contrary, Section 1722(C) not only exempts rural water districts from paying these costs; it *requires* OTA to pay them. This is a clear and unambiguous duty. *Samman v. Multiple Injury Tr. Fund*, 2001 OK 71, ¶ 13, 33 P.3d 302, 307 ("When the Legislature has clearly expressed its intent, the use of additional rules of construction are almost always unnecessary and a statute will be applied as written."). If OTA were able to shift the burden back to a rural water district as a condition of OTA granting a license or permit, it would run counter to an explicit statutory directive and frustrate the public policy underlying Section 1722(C). In short, OTA "cannot do indirectly what cannot be done directly." *Wall v. Marouk*, 2013 OK 36, ¶ 13, 302 P.3d 775, 782.

C. A rural water district and the Oklahoma Turnpike Authority cannot agree to waive the statutory requirements of Title 69, Section 1722.

In general, a "waiver is the voluntary and intentional relinquishment of a known right." *Barringer v. Baptist Healthcare of Okla.*, 2001 OK 29, ¶ 22, 22 P.3d 695, 700–01. These rights "may be waived whether conferred by law or contract." *Perry v. Perry*, 1976 OK 57, ¶ 5, 551 P.2d 256, 257. You ask whether a rural water district may agree to waive the statutory exemption under Title 69, Section 1722(C) and assume responsibility for costs that Section 1722(C) requires OTA to pay. For the reasons that follow, such a waiver is not permissible.

A rural water district's agreement to waive its rights under the exemption, and thereby assume OTA's statutory obligation, would be a contract. *See* 15 O.S.2011, § 1 ("A contract is an agreement to do or not to do a certain thing."). Under Oklahoma law, a contract that is "[c]ontrary to an express provision of law" is unlawful. *Id.* § 211; *see also Dycus v. Belco Indus., Inc.*, 1977 OK

CIV APP 39, ¶ 16, 569 P.2d 553, 556 (“Any contracts or portions thereof in derogation of our statutes will not be enforced by courts of this state.”); *Great Am. Reserve Ins. Co. of Dallas v. Strain*, 1962 OK 241, ¶ 5, 377 P.2d 583, 587 (“A contract may be void in the sense of being illegal; if so, the obligation, being prohibited by law, is a nullity in its contemplation; hence incapable of affirmance, ratification and enforcement.”).⁶ Because Section 1722(C) explicitly exempts a rural water district from bearing the costs of relocating or removing its water lines in certain circumstances, and likewise requires OTA to assume those costs, a contract that would shift costs back to the district is contrary to the plain terms of the statute and therefore void and unenforceable.

It is, therefore, the official Opinion of the Attorney General that:

- 1. A rural water district is exempt from paying the costs associated with removing or relocating the district’s existing water lines or other facilities that are located in a turnpike right-of-way when removal or relocation is necessary for improvement, construction, or reconstruction of the turnpike. 69 O.S.2011, § 1722(C).**
- 2. The Oklahoma Turnpike Authority does not have the express or implied authority to require a rural water district, as a condition of granting a license or permit to locate the district’s water lines or other facilities in turnpike right-of-way, to agree to pay costs that the district is exempt from paying under 69 O.S.2011, § 1722(C). Such costs are the express responsibility of the Oklahoma Turnpike Authority. *Id.***
- 3. Any agreement between a rural water district and the Oklahoma Turnpike Authority to waive the district’s exemption under 69 O.S.2011, § 1722(C)—and thereby assume responsibility for costs that are the statutory obligation of the Turnpike Authority—is “[c]ontrary to an express provision of law” and therefore void and unenforceable. 15 O.S.2011, § 211; *Great Am. Reserve Ins. Co. of Dallas v. Strain*, 1962 OK 241, ¶ 5, 377 P.2d 583, 587.**



MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA



MATTHEW LAFON
ASSISTANT ATTORNEY GENERAL



⁶ Similarly, “contracts of public officials entered without constitutional, statutory or other authority are void.” *Nichols v. Jackson*, 2002 OK 65, ¶ 1, 55 P.3d 1044, 1045–46.